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
Hugo Bänziger
Rémy Best
Edouard Bugnion
Jacques Chapuis
Melchior de Muralt
Christoph Franz
Katja Gentinetta
Maya Hertig Randall

Alexis Keller
Jürg Kesselring
Laura Sadis
Doris Schopper
Beatrice Speiser
Bruno Staffelbach
Suba Umathevan
Barbara Wildhaber

Cover Photo: Mogadishu, Mustaqbal radio station. The ICRC and the Somali Red Crescent Society are working with a local radio station to encourage everyday habits that will help keep diseases, like acute watery diarrhea and cholera, away. An actress recording, Photographer: MOHAMED, Abdikarim. Credit: ICRC.
Emerging Voices

511 Editorial: Emerging Voices: Increasing the diversity of voices featured in the *International Review of the Red Cross*
*Bruno Demeyere*

515 Closer to home: How national implementation affects State conduct in partnered operations
*Alessandro Mario Amoroso*

539 Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural heritage under IHL and the Islamic law of armed conflict
*Victoria Arnal*

559 Armed escorts to humanitarian convoys: An unexplored framework under international humanitarian law
*Annabel Bassil*

579 Greener insurgencies? Engaging non-State armed groups for the protection of the natural environment during non-international armed conflicts
*Thibaud de La Bourdonnaye*

607 Collaborating with Organized Crime in the Search of Disappeared Persons? Formalizing a Humanitarian Alternative for Mexico
*Issa Hernandez Herrera*

629 For Whom the Bell of Proportionality Tolls – Three Proposals for Strengthening Proportionality Compliance
*Won Jang*

659 Liar’s war: Protecting civilians from disinformation during armed conflict
*Eian Katz*

683 Humanizing siege warfare: Applying the principle of proportionality to sieges
*Maxime Nijs*
The role of international humanitarian law in the search for peace: Lessons from Colombia
César Rojas-Orozco

Behind the legal curtain: Social, cultural and religious practices and their impact on missing persons and the dead in Colombia
Mayra Nuñez Pastor

The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?
Fernanda García Pinto

“Or any other similar criteria”: Towards advancing the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict
Vaughn Rossouw

Investigating the Jana Adalat of the 1996–2006 armed conflict in Nepal
Yugichha Sangroula

Whose perception of justice? Real and perceived challenges to military investigations in armed conflict
Claire Simmons

Automating occupation: International humanitarian and human rights law implications of the deployment of facial recognition technologies in the occupied Palestinian territory
Rohan Talbot

A legal obligation under international law to guarantee access to abortion services in contexts of armed conflict? An analysis of the case of Colombia
Juliana Laguna Trujillo

The redirection of attacks by defending forces
Tsvetelina van Benthem

Who is a civilian in Afghanistan?
Ioanna Voudouri

Jus ex bello and international humanitarian law: States’ obligations when withdrawing from armed conflict
Paul Strauch and Beatrice Walton

Indigenous Australian laws of war: Makarrata, milwerangel and junkarti
Samuel White and Ray Kerkhove
Since starting as the seventeenth Editor-in-Chief of the International Review of the Red Cross in July 2020, increasing the diversity of voices featured in the Review has ranked high among my strategic priorities. For far too long, conversations about international humanitarian law, policy and action have been dominated predominantly, if not exclusively, by elite academics, scholars and practitioners – predominantly male – based in the global North, often writing about conflicts and other situations of violence taking place in the global South.

It has been argued that:

[talent— for math, science, music, sports, finance, you name it— is evenly distributed around the world, even at its most rarefied levels. Opportunity, however, is not. This leaves a significant space to engage underutilized talent if we can make opportunity portable and match it with talent in ways that are less random.¹

Personally persuaded by this noted gap between talent and opportunity, under my leadership, the Review has taken active strides in pursuit of its unwavering commitment to achieve gender parity and genuine geographic representation. The Review also has been increasing its efforts to provide a platform to underrepresented groups – including persons affected by armed conflict and other situations of violence.²

But talk is cheap if it is not followed by action. So, as a first step to demonstrate the Review’s commitment to “walk the talk”, I invite you to have a look at the composition of its new Editorial Board for 2021–2026, whose members bring unique and complementary skills and perspectives, with a wide variety of qualifications and experiences. The new Board’s eleven women and eight men, with nineteen different nationalities, will guide the Review in the coming years to deliver on the promise of increasing the diversity of voices to which we offer a platform, while remaining uncompromising on the quality of the contributions we select for publication.³ The Editorial Board’s diversity of expertise will guide the Review, across all topics, to help this journal act as a bridge between theory and practice.

The Review is strategically positioned to not only shape, but also create high-level debates on topics of interest to the worldwide audience this journal
enjoys. It is exactly this unique position which may make it appear daunting—impossible?—in the eyes of younger and less established authors to try to get their publication accepted in this journal.

In December 2020, in an attempt to shift this perspective, the Review launched a global call for papers for “emerging voices” – a term deliberately left undefined. Addressed to “anyone aspiring to become a respected voice in the fields of international humanitarian law, humanitarian policy and action”, the opportunity was offered to “kick off your CV’s list of publications with an article … that contributes to shaping the debate in these fields in the years to come”. In particular, the call emphasized, the Review values “innovative and creative arguments that may have an impact on future legal and policy debates”.

What resulted? An avalanche of 152 abstracts – quite fitting since the Review celebrates its 152nd birthday this year! With the help of a jury of six experts – three International Committee of the Red Cross (ICRC) staff members and three individuals outside the organization, including two Editorial Board members⁴ – some forty abstracts were given the green light to proceed to drafting an article.

All articles subsequently received were submitted, after a detailed assessment by the Review team, to our regular process of “double-blind” peer review. For this particular edition, so as not to bias their assessment either way, peer reviewers were not told in advance that the papers they reviewed were part of this ongoing competition. Throughout the selection process, the Review team and the jury were led only by the quality of the article at hand, including the persuasiveness of its argumentation. Nobody’s paper was rejected or accepted on the basis of considerations to artificially seek to achieve the above-mentioned diversity of voices.

Today, the Review is proud to present the final result of this competition: exactly twenty papers have been selected, with – coincidentally – perfect gender parity among authors. Out of considerations of fairness, we publish them in alphabetical order by family name.

As a result of the open-ended nature of this call for papers in terms of topics that could be written on, there is no unifying substantive theme binding them

---


3 Editorial Board of the International Review of the Red Cross, available at: https://international-review.icrc.org/about/editorial-board.

4 Jury members were: (i) Monia Ammar, Magistrate Counselor at the Cassation Court of Tunisia; (ii) Bruno Demeyere, Editor-in-Chief of the International Review of the Red Cross; (iii) Cordula Droege, Chief Legal Officer and Head of the Legal Division of the ICRC; (iv) Juana Acosta López, Associate Professor, Director Public Interest/Human Rights Clinic, University of La Sabana, Colombia; (v) Robert McLaughlin, Professor at the Australian National Centre for Ocean Resources & Security; (vi) Mamadou Sow, ICRC, Head of Regional Delegation, Southern Africa.
together. Each paper stands on its own merit, with its noted potential to resonate and to shape debate in the years ahead. What these twenty papers do have in common, though, is that their selection for publication stands as a recognition of their quality—and that we can collectively look forward to hearing and reading more from these authors in the years to come.

At the end of this competitive process, I wish to thank all 152 authors who submitted abstracts, and all forty who submitted a paper. Non-selection for publication this time is not a negative assessment of any author’s potential, and simply reflects the intensely competitive nature of this process. Equally, I wish to thank all jury members for volunteering their time and efforts, as well as Mr Ash Stanley-Ryan, who served with rigour as this edition’s Thematic Editor.

Finally, an announcement! Both encouraged and humbled by the enthusiasm that this call for papers unleashed, and convinced of the clear benefits that “emerging voices” bring to the places where cutting-edge topics on international humanitarian law, humanitarian policy and action are debated, the Review has decided that this shall not be a “one-off”. Instead, as of now, this becomes a standing call for papers. Abstracts may be submitted, and will be reviewed, on a rolling basis. As of 2022, each edition of the Review intends to publish two articles as part of a new “emerging voices” subsection.5

For now, the Review invites you to discover the fascinating topics dealt with in each of the papers selected for publication!

---

5 For more information about the process going forward, see Standing call for papers: “Emerging Voices in International Humanitarian Law, Policy and Action” | International Review of the Red Cross (icrc.org).
Closer to home: How national implementation affects State conduct in partnered operations

Alessandro Mario Amoroso*

Alessandro Mario Amoroso is a PhD candidate in human rights and global politics at the Scuola Superiore Sant’Anna in Pisa, with a research project on the international obligations of States supporting armed groups in times of armed conflict. He has been a Legal Adviser with the ICRC’s regional delegation in Paris. He holds an LLM in international humanitarian law and human rights from the Geneva Academy (Graduate Institute – University of Geneva) and a law degree from the University of Naples Federico II.

Abstract

Domestic law, case law and policies play a decisive yet underestimated role in ensuring that partnered operations are carried out in compliance with international law. Research on the legal framework of partnered operations has so far focused on clarifying existing and emerging obligations at the international level. Less attention has been devoted to understanding whether and how domestic legal systems integrate international law into national decision-making which governs the planning, execution and assessment of partnered operations. This article tries to fill the gap by focusing on the practice of selected States (the United States, the United Kingdom, Denmark, Germany and Italy), chosen for their recent or current

* The author would like to thank Professor Andrea de Guttry and the anonymous reviewers of the Review for their insightful comments on earlier drafts of this article.
involvement in partnered operations. By using the International Committee of the Red Cross’s “support relationships” framework and based on a comparative analysis of practice, the study seeks to evaluate the effectiveness of national laws, case law and policies according to their ability to prevent or mitigate the risk of humanitarian consequences posed by partnered warfare.

Keywords: partnered operations, national implementation, humanitarian consequences, support relationships.

Introduction

Partnered operations pose a distinctive humanitarian problem. Insofar as they increase the military might of parties to armed conflict, they also increase the exposure to danger of all those not taking part in the hostilities. Such a risk might seem no different from that entailed by any conflict involving powerful actors, but circumstances which are peculiar to partnered operations can aggravate the humanitarian consequences of war.

Firstly, in strategic decision-making, the possibility of pooling resources, technology and intelligence represents an incentive for military engagement, because it enhances the chances of military success while reducing battlefield exposure. A similar incentive operates with regard to remote support to warring parties, which permits involvement on distant battlefields without incurring the economic and political costs of expensive military commitments opposed by reluctant domestic constituencies. The air, financial and logistical support provided by the US-led coalition to local forces against the so-called Islamic State group in Syria and Iraq, as well as the training provided by US troops to Ugandan forces to fight Al-Shabaab, are two examples of the increasing resort to techniques of remote warfare. By multiplying the number of parties to the conflict and the interests at stake, both these incentives—i.e., the possibility of joining forces and the advantages of remote support—can fuel enmities and contribute to stalling negotiations, ultimately prolonging hostilities. Although external support to one party may hasten the end of the conflict, empirical studies show that when both sides receive military assistance from third-party States competing for influence, hostilities are prolonged.

1 This has been empirically demonstrated in Daniel S. Morey, “Military Coalitions and the Outcome of Interstate Wars”, Foreign Policy Analysis, Vol. 12, No. 4, 2016.
Secondly, at the operational level, military partnerships may foster the proliferation of armed groups and weapons, especially in the case of remote support. This is what happened, for example, in the initial phase of the conflict in Syria, where the decision of some opposition groups to engage in a violent uprising was arguably influenced by the anticipated support of external actors.\textsuperscript{5} While the proliferation of armed actors makes humanitarian dialogue more complex, the proliferation of weapons increases the scale of violence both during and after conflict.\textsuperscript{6}

Thirdly, on the battlefield, interoperability is more difficult to achieve when the number of partners grows, as their operating procedures and military cultures may diverge. Poor interoperability, \textit{inter alia}, raises the likelihood of targeting mistakes and may hinder the accomplishment of missions.\textsuperscript{7} Beyond technical issues, aspects related to communication between coalition forces and political will are believed to be the cause of interoperability failures in Afghanistan and Iraq.\textsuperscript{8} Taken together, all these circumstances compound the humanitarian situation of civilians and others not engaged in the fighting.\textsuperscript{9}

In addition to all that, partnered operations present a specific legal challenge, which can in turn bring humanitarian consequences. The higher the number of partners and the more intricate the allocation of tasks, the harder it is to assess State and individual responsibility for violations of the applicable law.\textsuperscript{10} This may lead to a number of negative outcomes, ranging from a feeling of diffused responsibility which facilitates misconduct to actual accountability gaps. Even more worryingly, it may induce a preference for opaque arrangements by partners interested in blurring the consequences of their actions. Since these humanitarian and legal challenges are clearly intertwined, they have recently been made the object of a common response: prominent projects, including the Support Relationships in Armed Conflict Initiative (SRI) launched by the

---


\textsuperscript{8} Christopher G. Pernin \textit{et al.}, \textit{Targeted Interoperability: A New Imperative for Multinational Operations}, RAND Corporation, Santa Monica, CA, 2019, pp. 109–118.


International Committee of the Red Cross (ICRC),\(^{11}\) propose to leverage military partnerships in order to improve partners’ compliance with the law applicable in armed conflict.

While most of the research in this field has focused on the influence that States may have on partners’ behaviour, less attention has been paid to the measures that States adopt to ensure that their own conduct complies with international law when engaging in partnered warfare. The ICRC’s study on “support relationships”, entitled *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War*, partly fills this gap. It identifies ten areas in which practical measures can be adopted by actors in support relationships, with a view to maximizing compliance with international humanitarian law (IHL) and reducing negative humanitarian consequences. Among these practical measures, a key role is played by those intended to build “internal readiness” to engage in support relationships and “internal oversight” to ensure accountability for the State’s own forces. Both internal readiness and internal oversight depend on the adequacy of the supporting party’s own legal and policy framework. The ICRC’s study thus acknowledges the significance of domestic laws and policies as well as of case law for improving IHL compliance in support relationships.\(^{12}\) But how can the effectiveness of national legal and policy frameworks be evaluated?

This paper argues that the effectiveness of domestic law, case law and policies in maximizing compliance with the law applicable to partnered operations hinges greatly on the way domestic and international law interact—i.e., on the mechanisms used by States to implement international norms into their national legal systems. The paper therefore maps relevant practice in the national implementation of international law in this field, with the aim of assessing, based on a comparative analysis of different models, the benefits and shortcomings of distinct implementation mechanisms in addressing the humanitarian challenges raised by partnered warfare. In doing so, and in consideration of available national practice, the study refers to “partnered operations” as an umbrella concept that largely overlaps with that of support relationships.

After providing a definition of partnered operations, the following section introduces the research by outlining the international legal framework considered in the analysis. The third section constitutes the core of the inquiry: it reviews the national law, case law and policies of selected States, namely the United States, the United Kingdom, Denmark, Germany and Italy, chosen for their current or recent involvement in partnered operations and for the availability of relevant sources. The fourth section proposes to use the ICRC’s SRI framework to evaluate the effectiveness of implementation measures, based on their ability to

---


\(^{12}\) Ibid., pp. 85–86 (on the legal and policy framework for internal readiness), 115–116 (on the role of judicial authorities in internal oversight).
prevent or mitigate the risk of humanitarian consequences posed by partnered warfare. It submits that national laws and policies are the most effective implementation mechanisms for mitigating the humanitarian costs of partnered operations, while domestic case law does not provide a reliable basis for guiding State conduct. The final section offers some concluding remarks.

Setting the scene: The international legal framework of partnered operations and mechanisms for its national implementation

In recent years, legal and political scholars have used a variety of expressions such as “military assistance”,13 “remote warfare”,14 “proxy wars”15 and “surrogate warfare”,16 with slightly differing meanings but one element in common: the involvement of a multiplicity of actors with different roles in a military operation. As mentioned in the introduction to this paper, the ICRC has lately introduced the notion of “support relationships”.17 The present paper refers to “partnered operations” as an umbrella concept which, while largely overlapping with the notion of support relationships, better reflects existing practice in the national implementation of international norms in this field.

Partnered operations considered in this paper include all instances where States contribute to a partner’s military operation. This definition is general enough to include arrangements as diverse as joint combat operations, troop contribution and embedding, training, advice and assistance (including in force generation), detainee transfer, provision of weapons and equipment, intelligence-sharing, logistical support and financing.18 Yet, it incorporates one condition that delimits its scope: the contribution must be to a military operation. This excludes military cooperation which is not directed at realizing one (or a series of) specific military operation(s) (e.g., routine arms transfer, military exercises) as well as cooperation taking place outside of armed conflict (e.g., security sector assistance in law enforcement). Partnered operations thus defined include partnerships both between States and between States and non-State actors (i.e., armed groups and private military companies). Moreover, the definition does not require that all

---

13 See, for example, the two issues devoted to “military assistance on request” published by the Journal on the Use of Force and International Law, Vol. 7, Nos 1 and 2, 2020.
15 The American Bar Association has published a number of articles and blog posts as part of its Proxy Warfare Project, available at: www.americanbar.org/groups/human_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/.
17 ICRC, above note 11.
18 Financing is the lower end of the definition, being the most remote form of support. It is considered here because it can give rise to responsibility for aid or assistance if the conditions set out in Article 16 of the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts are met. See ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, United Nations Yearbook of the International Law Commission, Vol. 2, No. 2, 2001 (ARSIWA), p. 66, and below in this section.
members of a partnered operation be parties to the conflict: remote contribution may take place without meeting the thresholds of armed conflict under IHL, but in this case at least the recipient of the assistance must be a party. Finally, *jus ad bellum* considerations should not impinge on the qualification of an operation as a partnered operation: for example, peacekeeping missions and collective self-defence operations may both come under the purview of our definition, provided all other conditions are met.

The definition proposed is therefore very similar in scope to, although narrower than, the notion of support relationships adopted by the ICRC. The latter focuses on support which “increases the capacity of a party to conduct armed conflict” and includes (in addition to partnered military operations) political support, arms transfers (including outside of operations) and other forms of support such as institutional capacity-building. The present paper, instead, zooms in on State conduct which contributes to a partner’s military operation in order to reflect a relative homogeneity in national practice in this area, leaving aside forms of political support and institutional capacity-building that partly escape the complex legal framework of partnered operations.

Although not a recent phenomenon, partnered warfare has never been as common as it is today. The ICRC has observed that “as the number of actors and conflicts has grown, it has become the norm for actors to work towards their strategic objectives in partnership with other actors”. This makes it all the more important to understand the international legal framework applicable to partnered operations and to identify which implementation mechanisms are used by national institutions to comply with it.

In international law, partnered operations as defined in this paper are governed by a “network of rules on complicity” which reflect the complexity and variety of the phenomenon. These include both primary norms laying down “obligations connected to the conduct of others” and secondary rules on State responsibility deriving from “collaborative conduct”. The most relevant and far-reaching primary norm is the obligation to “ensure respect” for IHL, set out in Article 1 common to the four Geneva Conventions and customary law.

---

Although it applies to States in their relations with all parties to a conflict, the duty to ensure respect “is particularly strong in the case of a partner in a joint operation”, who is in a position to effectively influence the behaviour of others. Such a duty is composed of a negative obligation to refrain from encouraging or assisting violations and a positive obligation to take proactive steps to bring the parties to a conflict to an attitude of respect for IHL. It may be worth recalling that common Article 1 also applies to cooperation between States and non-State armed groups. Primary norms applicable to partnered operations are to be found also in international human rights law (IHRL). First, the customary principle of non-refoulement acts as a limitation on the transfer of detainees between partners, including when it takes place within the territory of one State. Second, according to the Human Rights Committee, States have a duty “not to aid or assist activities undertaken by other States and non-State actors that violate the right to life”. It can be added that the Arms Trade Treaty prohibits the transfer of conventional arms when a State Party has knowledge, at the time of authorization, that they would be used in the commission of international crimes, or when there is an overriding risk that the arms could be employed to commit serious violations of IHL and/or IHRL. These norms also apply to weapon transfers in the context of partnered operations. Finally, although the present survey focuses on the law applicable in armed conflict, it may be useful to mention that, under jus ad bellum, the definition of aggression includes two forms of partnered operations which violate the prohibition on the use of force: placing territory at the disposal of another State for perpetrating an act of aggression, and sending non-State armed forces which carry out acts of aggression against another State.

Primary norms are complemented by a series of secondary rules that provide for State responsibility arising from the conduct of another State or non-State actor. They are of immediate relevance to partnered operations and can be


Ibid., para. 158. According to the ICRC Commentary, this obligation can require States to opt out of a multinational operation if there is an expectation that it would violate the Geneva Conventions: ibid., para. 161.

Ibid., para. 164.


Human Rights Committee, General Comment No. 36, “Article 6 (Right to Life)”, UN Doc. CCPR/C/GC/36, 3 September 1992, para. 63.


To confirm the topicality of the subject, three monographs have been published recently on complicity in international law. See Vladyslav Lanovoy, Complicity and Its Limits in the Law of International Responsibility, Hart, Oxford and Portland, OR, 2016; Miles Jackson, Complicity in International Law, Oxford University Press, Oxford, 2015; H. P. Aust, above note 22.
identified by reference to the International Law Commission’s (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). In particular, Articles 16 and 17 introduce two forms of “derived” responsibility, respectively for “aid or assistance to” and for “direction and control over” the commission of a wrongful act by another State. Under Article 41(2), no State shall “render aid or assistance” to another State in maintaining a situation created by a serious breach of a peremptory norm. Finally, under Article 8, which is the only norm of the ARSIWA applicable to partnerships between States and non-State actors, the conduct of a group of persons “directed or controlled” by a State shall be considered an act of that State.

States have grown progressively more aware of the above-mentioned legal framework and of the risk of incurring responsibility for the wrongful conduct of their partners. This has prompted national legislatures, judiciaries and governments to act to ensure that relevant international norms are properly implemented in domestic legal systems.

**Existing practice in national implementation**

With a view to accounting for the variety of mechanisms available to States, this section examines, in turn, domestic legislation setting conditions for participation in partnered operations, national case law relying on international norms to settle domestic disputes, and official State policies adopted to orient the conduct of national institutions. It does not provide a comprehensive examination but rather focuses on the practice of selected States, chosen according to two criteria: their current or recent involvement in partnered operations relevant to our investigation, and the level of publicity of national implementation measures. Both information on States’ involvement in partnered operations and the level of publicity of national measures (especially in the case of policies) ultimately hinge on a crucial condition: the transparency of State conduct in a field that, if anything, stands out precisely for its frequent resort to elision and secrecy.

The following subsections bring into focus the national law, case law and policies of the United States, the United Kingdom, Denmark, Germany and Italy, carrying out, wherever possible, a comparative analysis between different models. The comparison will consider, in particular, the scope of military engagements covered and the international legal framework that each national measure seeks to implement. Norms of IHL, IHRL and State responsibility (as formulated in the ARSIWA) will be considered. Conversely, the analysis will not take into consideration implementation and monitoring mechanisms provided by international sources, since they fall outside the scope of the research.

34 ARSIWA, above note 18.
35 A factor further limiting the outcome of the investigation was of course the accessibility of sources in a language known to the author.
Domestic legislation providing conditions for participation in partnered operations

At the legislative level, States’ attitudes towards compliance with international law in partnered operations can generally be divided into three approaches. The first is the adoption of specific legislation making assistance in military operations contingent on the recipient’s respect for fundamental international norms. The second is the explicit inclusion of partnered operations among military commitments that national law subordinates to compliance with international law. The third is to leave the matter unaddressed.

The first case is exemplified by what is likely the best-known piece of domestic legislation on human rights compliance in military assistance: the US Leahy Law. Since US foreign military assistance comes from two sources, the Department of State (DoS) budget and the Department of Defense (DoD) budget, the Leahy Law consists of two statutory provisions. One was permanently incorporated into the US Foreign Assistance Act in 2008;\(^{36}\) the other is enclosed in the annual funding legislation of the DoD.\(^{37}\) The version amended in the Foreign Assistance Act reads as follows:

\[
\begin{align*}
(a) \text{ IN GENERAL – No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.} \\
(b) \text{ EXCEPTION – The prohibition in subsection (a) shall not apply if the Secretary determines … that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.}
\end{align*}
\]

Two crucial aspects explain the significance of the Leahy Law: (1) it applies at unit level, and (2) withholding of assistance is triggered by one single instance of gross violation of human rights (GVHR). These choices make it a (potentially) effective tool not only for avoiding complicity in human rights violations, but also for influencing partners and coaxing them into fighting impunity by addressing specific cases of human rights violations. Accordingly, the Leahy Law requires the secretary of State to assist recipient governments in bringing those responsible to justice\(^{38}\) and, if measures are taken, it allows assistance to be reinstated. Yet, two clarifications are needed to appreciate the real potential of the Leahy Law. As to the first aspect and on the positive side, the focus on individual units does not hinder consideration of the overall human rights situation in the recipient State, as another section of the Foreign Assistance Act prohibits assistance to “any

---

\(^{36}\) Foreign Assistance Act, US Public Law 87-195, Section 620M (US Code, Title 22, Section 2378d). Before 2008, the amendment had been included in all annual Foreign Operations Appropriations Acts since 1998.

\(^{37}\) US Code, Title 10, Section 362.

\(^{38}\) US Code, Title 22, Section 2378d(c).
country the government of which engages in a consistent pattern” of GVHRs.\(^{39}\) However, a severe limitation concerning the second aspect restricts the scope of application of the law. The US government considers GVHRs to include conduct such as torture, extrajudicial killing, enforced disappearance, rape under colour of law, and other flagrant denials of the right to the life, liberty or security of persons. This list is not exhaustive, and other types of incidents can be examined.\(^{40}\) As made explicit in the DoS implementation guidance,\(^{41}\) the law applies equally when the same violations are committed in the context of an armed conflict. Yet, and decisively, the DoS and DoD do not consider civilian harm that occurs during the conduct of hostilities in a conflict as a GVHR.\(^{42}\) This is a striking restraint which curtails the potential of the Leahy Law to effectively implement international norms applicable to partnered operations and makes it necessary to assess the role of national policies in complementing it.\(^{43}\)

Turning to enforcement, the Leahy Law seems to receive extensive application\(^{44}\) and is implemented through an elaborate procedure known as “Leahy vetting”, which is based on both the government’s information and independent reporting by non-governmental organizations.\(^{45}\) However, questions have been raised about the effectiveness of Leahy vetting, as since its enactment the United States has not discontinued assistance to armed and security forces whose human rights record is notoriously poor.\(^{46}\) This might be explained in part by differences in the DoD version of the Leahy Law, which is more permissive with respect to action needed for the recipient to regain assistance (“corrective steps” are sufficient) and provides an option for the secretary of defence to waive the prohibition if “required by extraordinary circumstances”. Most importantly, it has been disclosed that the DoS itself has in the past adopted a restrictive interpretation of the provision, limiting the types of assistance falling under the purview of the Law to training.\(^{47}\) This no longer appears to be the case, however, after it was clarified that the provision applies to “all forms of assistance, including training, equipment and other activities”.\(^{48}\)

\(^{39}\) Foreign Assistance Act, above note 36, Section 502B; however, and crucially, the US Government never enforced this provision.


\(^{41}\) Ibid., p. 20.


\(^{43}\) See the subsection on “State Policies Guiding the Conduct of National Institutions in Partnered Operations” below.


\(^{47}\) D. R. Mahanty, above note 42.

Conversely, doubts raised about the application of the Leahy Law in cases of assistance provided to armed groups remain unanswered. When in September 2014 the US Congress passed legislation authorizing the DoD to “provide assistance … to appropriately vetted elements of the Syrian opposition”, no definite assurance was given on its submission to Leahy vetting. Given the DoD’s understanding of the term “security force”, the Leahy Law has often been interpreted as applying only to State partners, although non-State recipients of assistance are subject to a “Leahy-like” process. Indeed, in the case of assistance to the vetted Syrian opposition, it was the authorizing provision itself that set the minimum requirements for vetting, thus assuming that the Leahy process would not be routinely applied.

An alternative to legislation listing precise criteria for the authorization of military assistance is the adoption of general clauses making participation in partnered operations conditional on compliance with international law. One example is the Italian Law 145/2016, which allows participation in international missions “provided it takes place in accordance with … general international law, international human rights law, international humanitarian law and international criminal law”. The enforcement of this condition is guaranteed by a mechanism of double parliamentary oversight. First, after the government decides on the participation of the Italian Armed Forces in an international mission, the Italian Parliament is called upon to pass a law that authorizes or denies authorization for the mission. The legal basis for the mission is one of the elements that the Parliament must take into account when deciding on the authorization. Second, all international missions of the Italian Armed Forces are reviewed once a year in a special session of Parliament, which is required to confirm the authorization.

Again, some clarifications are useful to correctly define the scope of application of the norm and appreciate its effectiveness. “International missions” as defined by Law 145/2016 include a fairly diverse type of military commitments outside situations of “declared war”. They range from missions established under the auspices of an international organization, such as the United Nations or the European Union, to the sending of troops and assets abroad in the context of defence alliances. Nonetheless, there is debate as to whether the law applies to

52 “The term ‘appropriately vetted’ means … at a minimum: (A) assessments of such elements, groups, and individuals for associations with terrorist groups …; and (B) a commitment from such elements, groups, and individuals to promoting the respect for human rights and the rule of law.” US Public Law 113-291, Section 1209.
54 Ibid., Art. 2(2).
55 Ibid., Art.3(1).
56 Ibid., Art. 1.
the deployment of special forces as part of intelligence operations abroad, which is governed by a separate provision.⁵⁷ In addition, the law refers to participation in “exceptional humanitarian interventions” but leaves the notion undefined: in this case, compliance with international law becomes a rather flexible condition, whose application depends on the definition of humanitarian intervention and the interpretation of the international legal framework on the use of force.⁵⁸

A third possibility is that national legislation remains silent on the participation of armed forces in partnered operations. This may particularly be the case in common law systems, where statutory law does not exercise the same function as in civil law systems and where case law and policies play a more prominent role. In the UK, for example, the War Powers Convention requires the government to seek parliamentary approval before deploying troops abroad. Yet the Convention, which has only been developed in the last few years, does not define which types of military engagements are subject to approval, and its scope has been interpreted as being limited to offensive operations.⁵⁹ Consequently, it fails to capture precisely those sorts of military commitments which contribute to a partner’s operation without being per se offensive in nature, such as the provision of training and logistical assistance⁶⁰ and the use of drones in intelligence, surveillance and reconnaissance missions.⁶¹ Moreover, two kinds of operations which usually involve offensive tasks are a priori considered to have a blanket exemption from parliamentary oversight: the deployment of special forces⁶² and the embedding of troops in the armed forces of another State.⁶³

Before moving on, it shall be remarked that the three pieces of legislation reviewed in this section are different in terms of the scope of engagements covered and the reference legal framework. Under both perspectives, the US Leahy Law seems to present a limited reach: its application is confined to military assistance to States, leaving out all instances of direct operational engagement, as well as (likely) any form of assistance to non-State actors. Moreover, violations considered for withholding assistance are only those amounting to GVHRs, to the exclusion of violations of IHL of the conduct of hostilities. At the other end of the spectrum, the Italian Law 145/2016 adopts a broader approach, as it applies to participation in any type of international mission (with narrow exceptions), ranging from direct operational engagement of Italian troops to the mere sending


⁶⁰ Ibid.


of assets. In this case, the reference legal framework includes all relevant sources (general international law, IHRL, IHL, international criminal law). Finally, the material scope and reference framework of the UK War Powers Convention is more difficult to define, given its nature as an unwritten source. As it stands, the Convention seems to be applicable to situations that are complementary to those addressed by the Leahy Law, since it covers only offensive engagements. Unfortunately, no legal parameter for parliamentary approval is explicitly defined, leaving it to each session of Parliament to independently assess the standards of legality of offensive missions.

**National case law on armed forces’ contribution to partnered operations**

Regardless of the existence of implementing legislation, disputes may be brought before domestic courts over the involvement of national institutions in partnered operations and their compliance with national and international norms. When this happens, depending on the specificities of the national legal system and the prior adoption of (general or specific) implementing legislation, national courts may be in a position to either apply international law directly or refer to international norms in their reasoning. In the field of partnered operations, this has occurred multiple times. Some examples are provided below.

German courts have dealt with partnered operations in at least two cases. In June 2005, the German Federal Administrative Court granted the appeal filed by a major of the Armed Forces who had disobeyed superior orders by refusing to work on military software. He motivated his refusal with concerns that his actions might contribute to Germany’s participation in attacks on Iraq, which he personally believed to be unlawful under international law. In deciding the case, the Court had to examine the plaintiff’s objection of conscience in light of international norms applicable to Germany’s assistance to UK and US forces. Assistance included “overflight rights for military aircraft” and “permission for the sending of troops and the transport of weapons and military supplies to the war zone from German soil”. The Court relied extensively on international law, *inter alia* Article 16 of the ARSIWA and Article 3(f) of the Definition of Aggression, and concluded that “grave concerns in international law exist about the conduct of the federal government”. In the judgment, as observed by one author, the Court referred to the ILC rule on complicity even though primary norms on the use of force would have been sufficient to reach a decision.

The opposite occurred in a recent case in which three German courts ruled on Germany’s involvement in US drone operations. The complaint was filed by

---

64 N. Ronzitti, above note 57, p. 478.
66 Ibid., para. 4.1.4.1.4.
67 UNGA Res. 3314 (XXIX), above note 32.
68 German Federal Administrative Court, *N*, above note 65, para. 4.1.4.1.4.
69 V. Lanovoy, above note 33, p. 183.
Yemeni citizens who claimed that their right to life was unlawfully threatened by US drone strikes relayed through the US airbase in Ramstein, Germany.\(^70\) After the Administrative Court of Cologne had dismissed the claim on the merits,\(^71\) in March 2019 the Higher Administrative Court for North Rhine-Westphalia overruled the decision by applying a stricter legal standard.\(^72\) It first held that whether Germany had a duty to protect the right to life of foreigners abroad\(^73\) was a question to be solved by reference to applicable international law.\(^74\) On that basis, it found that the German government had two positive obligations, which it had inadequately fulfilled: a duty to investigate whether US drone strikes in Yemen were conducted in accordance with international law (to the extent that they involved the use of German territory), and a duty, if necessary, to take the measures it deemed appropriate to work towards compliance with international norms.\(^75\) Interestingly, this time the Court expressly ruled out that Article 16 of the ARSIWA had any relevance to the case and relied exclusively on IHL primary norms to determine the scope of international obligations binding Germany.\(^76\) Eventually, in November 2020 the Federal Administrative Court overturned the ruling and restored the first-instance judgment.\(^77\) Lowering again the standard demanded by primary norms, the Court concluded that diplomatic efforts made by the German government and legal guarantees given by the US administration sufficed to ensure the compliance of drone operations with international law.\(^78\) The overruling was possible precisely because both courts ignored the possibility of State responsibility for complicity. Comparison between the two cases thus suggests that a comprehensive assessment of primary and secondary norms applicable to each case, albeit redundant, could help domestic courts to correctly identify the issues at stake and avoid accountability gaps.

An extreme alternative is the decision of the Danish High Court (Eastern Division) in the *Operation Green Desert* case, issued in June 2018.\(^79\) The dispute concerned a joint military operation conducted by British, Danish and Iraqi

\(^{70}\) The claimants were supported by the European Center for Constitutional and Human Rights (ECCHR). For additional information on the case, see ECCHR, “Ramstein at Court: Germany’s Role in US Drone Strikes in Yemen”, available at: www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/.


\(^{73}\) As recognized by the Basic Law (Grundgesetz), Art. 2(2).

\(^{74}\) Higher Administrative Court for North Rhine-Westphalia, *Jaber*, above note 72, para. III.2.a.

\(^{75}\) *Ibid.*, incipit.


\(^{77}\) German Federal Administrative Court, *Jaber v. Federal Government of Germany*, Case No. 6 C 7.19, Judgment, 25 November 2020. The plaintiff submitted a constitutional complaint, which is currently pending before the Federal Constitutional Court.


\(^{79}\) High Court of Eastern Denmark, *X v. Ministry of Defence*, Case No. B-3448-14, Judgment, 15 June 2018. The appeal is currently pending before the Danish Supreme Court.
forces in southern Iraq in 2004, during which thirty-seven Iraqi nationals were arrested, detained and ill-treated at the hands of Iraqi military and security forces. No Danish troops had taken part in the apprehension, detention and abuse of the plaintiffs, nor had they exercised control or command over the Iraqi forces; thus, the violations of Article 3 of the European Convention on Human Rights (ECHR) suffered by the plaintiffs could not be attributed to Denmark. Nevertheless, the Court affirmed Denmark’s responsibility because the Ministry of Defence and the Armed Forces should have known, when they decided to join the operation, that there was “a real risk that persons detained during the operation would be subject to inhuman treatment in Iraqi custody”. The decision stands in stark opposition to those of the German courts, not only for the very far-reaching stance on responsibility, but especially because the Danish High Court, although referring to Article 3 of the ECHR, decided the issue purely under domestic tort law, ignoring the international legal framework applicable to the operation.

Finally, it should be remarked (unsurprisingly) that not only lawmakers but also courts have sometimes tried to avoid dealing with government determinations regarding involvement in partnered operations. Avoidance strategies traditionally rely on the political nature of governments’ foreign policy decisions and are reflected in the “act of State” or “political question” doctrine. In the Noor Khan case, for example, the Court of Appeal of England and Wales rejected the claimant’s complaint concerning the killing of his father in a US drone strike in Pakistan, which had allegedly been planned on the basis of “locational intelligence” provided by British officers. Before UK courts, the claimant had sought a declaration that British citizens in similar cases would not be entitled to the international law defence of combatant immunity. The Court of Appeal declared the issue non-justiciable, upholding the government’s objection that any findings on the matters “would necessarily entail a condemnation of the activities of the United States”, precluded by the “foreign act of State” doctrine. Three years later, however, the UK Supreme Court took the exact opposite stance in the Belhaj and Rahmatullah (No. 1) joined cases. In both lawsuits, the claimants alleged that UK forces were complicit in their unlawful detention, torture and mistreatment at the hands of foreign authorities, to whom they had been transferred. Mr Belhaj and Mrs Boudchar were victims of an extraordinary

80 Ibid., pp. 810–811.
83 Court of Appeal of England and Wales (Civil Division), R (Noor Khan) v. Secretary of State for Foreign and Commonwealth Affairs, Citation No. [2014] EWCA Civ 24, Judgment, 20 January 2014.
84 Ibid., para. 8.
85 UK Supreme Court, Belhaj and Another v. Straw and Others; Rahmatullah (No. 1) v. Ministry of Defence, Citation No. [2017] UKSC 3, Judgment, 17 January 2017.
rendition to Libya “arranged, assisted and encouraged” by UK officers; Mr Rahmatullah was captured by British forces in Iraq and transferred to US custody, remaining in detention without charges for ten years. The Supreme Court ruled that no strand of the foreign act of State doctrine applied to the cases. Most importantly, it found that, even if engaged, the doctrine would be subject to a public policy exception for violations of peremptory norms of international law. Interestingly, the Court did not revert the Noor Khan judgment: it confirmed that the foreign act of State doctrine had been correctly applied in that case. Yet, as one author pointed out, what was missing in Noor Khan was precisely a thorough examination of the circumstances justifying the public policy exception.

Compared to the very diverse types of engagements covered by the national laws reviewed in the previous subsection, the case law examined here stands out for consistently referring to remote forms of assistance, ranging from logistical support to detainees’ transfer, to a general contribution to a partner’s mission. Conversely, the legal framework considered by national courts is very diverse. Courts in the same country seem to come to opposite conclusions as regards both the applicable international norms and the legal standards of review. German courts have alternatively used secondary rules on responsibility and primary norms of IHL; even when agreeing on the applicable law, courts at different stages of the proceedings have applied different standards of review. In addition, courts in different countries have disagreed on the general reference framework, resorting alternatively to IHL, IHRL and State responsibility norms. This wide range of options and, perhaps even more so, the reversals of lower court decisions by higher courts show a degree of uncertainty about the applicable legal framework, which may be motivated by the relatively new definition of a clear legal framework for partnered operations.

State policies guiding the conduct of national institutions in partnered operations

State policies are not commonly included in the analysis of national measures adopted by States to comply with international obligations. The reasons for this are, first, that policies are not binding, and second, where specific implementation obligations exist, they can only be fulfilled by enacting domestic legislation. This, however, does not rule out a role for State policies in ensuring that national institutions respect applicable international norms. Hence, this subsection considers administrative acts which, having been officially adopted by the executive branch, provide a reliable expectation of compliant behaviour. Consideration of State policies is not unusual in the practice of international

86 Ibid., paras 4, 6.
87 Ibid., para. 168.
88 Ibid., para. 93.
institutions and will prove useful for completing the overview of national implementation models.

One country that stands out in developing policy guidance for its armed and security forces engaged in partnered operations is the United Kingdom. This may be partly motivated by the prominent role of policy and executive documents in common law systems. Two documents are relevant to our inquiry. Their history is instructive, as both had been in operation for some time before being released to the public domain in response to growing demands for transparency about foreign assistance programs. The first document is the Overseas Security and Justice Assistance Guidance (OSJA Guidance), which was published in 2011 following allegations that the UK had been providing assistance to authoritarian regimes in the Middle East and North Africa before the outbreak of the Arab Spring. The OSJA Guidance, last updated in 2017, has a broad scope of application, as it concerns all kinds of justice and security sector assistance provided by the UK to other States. It also covers assistance to foreign armed and security forces in the framework of armed conflict and applies to both capacity-building and “case-specific assistance” (thus falling within the scope of our survey). A second document with a narrower focus had been available since 2010: the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (updated in 2019 and renamed the Principles). It was published following a lawsuit by the legal charity Reprieve, filed after reports of British involvement in the US rendition programme. Both documents serve a dual goal. Firstly, they seek to avoid complicity in the wrongful conduct of a partner—in particular, to ensure that assistance is consistent with international human rights obligations and that IHRL and IHL risks are mitigated, and to prevent participating in, soliciting, encouraging or condoning unlawful killing, torture or cruel, inhuman or degrading treatment, and extraordinary rendition. Secondly, they aim to influence partners by strengthening compliance with IHRL and IHL and promoting human rights in

90 A relevant example is the ICRC’s updated IHL implementation guidance, which takes into account “administrative and practical measures”, including the creation of relevant institutions, processes and procedures. see ICRC, Bringing IHL Home: Guidelines on the National Implementation of International Humanitarian Law, Geneva, May 2021, pp. 15–24.
95 OSJA Guidance, above note 91, p. 4.
96 The Principles, above note 93, pp. 3–4.
97 This is the aim of the “Assessment and Approvals Process” under the OSJA Guidance, above note 91, p. 9.
countries with which the UK deals. Unfortunately, despite such a positive general stance, the assessment and approval mechanism designed into both documents are obviously limited in scope: since these are policy (i.e., non-legally binding) documents, even when there is a serious risk of contributing to IHL or IHRL violations, they do not block assistance but only require that decision-making is referred to senior personnel or ministers, who can ultimately give authorization.

This certainly hampers the ability of both documents to strengthen compliance and casts serious doubt on the possible use of policies as a means to relax legal limitations. To further nuance the assessment of policy initiatives in the field of partnered operations, it should be added that to date the UK government has refused disclosing its Guidance to Intelligence Officers and Service Personnel Applicable to the Passing of Intelligence relating to Individuals Who Are at Risk of Targeted Lethal Strikes. Requests made under both the Freedom of Information Act and parliamentary oversight have so far been unsuccessful.

Another country which has made efforts to clarify its policies on involvement in partnered operations is the United States. As in the UK, US policy is also fragmented across multiple documents, but unlike the UK, in the case of the US national policies do not compensate for the absence of national legislation; rather, they complement it. Again, the centrality of policy documents, even on matters of armed conflict, should come as no surprise, given the role of policies in common law systems. This holds true both when national legislation remains silent on issues that are left to the appreciation of the courts and the regulation of the executive, and when the law regulates a matter only selectively. Indeed, one reason for resorting to policy-making is that the scope of the US Leahy Law is limited to military assistance which may foster GVHRs: it leaves out both instances of direct operational engagement and assistance which results in violations of IHL of the conduct of hostilities. These instances are thus addressed in national policies. At least two initiatives deserve to be mentioned in this regard. Since 2016, the US administration has released an unclassified portion of its Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force, whose complete version is submitted to Congress every year. The document includes a section on “Working with Others in an Armed Conflict”, covering activities such as “training, provision of materiel, intelligence sharing, and operational support”. It explicitly acknowledges that the US partners with non-State actors, if this furthers US interests. It states that

98 The Principles, above note 93, p. 4.
100 Information Commissioner’s Office, Decision No. FS50599866, 26 May 2016.
102 See the subsection on “Domestic Legislation Providing Conditions for Participation in Partnered Operations” above.
104 Ibid., p. 12 (emphasis added).
the administration can take measures “including diplomatic assurances, vetting, training, and monitoring” to ensure that the recipient of intelligence respects human rights and the law of armed conflict, but it then recalls the Leahy Law only by reference to partner countries. In any case, the framework reiterates the commitment to “promoting compliance by U.S. partners with the law of armed conflict”, in line with common Article 1. Indeed, although the United States rejects an “expansive interpretation” of common Article 1, it accepts that the obligation to “ensure respect” entails a commitment to verifying partners’ compliance with the law of armed conflict when assessing the lawfulness of military assistance and joint operations. A second example is provided by the Policy on Pre- and Post-Strike Measures to Address Civilian Casualties, adopted by the US administration in December 2016. The Policy comprises a commitment to “engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties, including through appropriate training and assistance”. Successive editions of the Annual Report on Civilian Casualties in Connection with United States Military Operations have also accounted for the measure of US reliance on local partners for offensive operations in several theatres.

It seems possible to draw a few conclusions from a comparison of the two sets of documents discussed above. On the one hand, when compared in terms of the scope of engagements covered, the UK and US policy documents appear to be complementary, in that the former concern remote support that does not involve direct operational engagements, while the latter apply precisely to operational support. On the other hand, and unlike both the law and case law reviewed in previous subsections, the policy documents examined here are notable for their reference to both IHL and IHRL as sources of international legal standards.

**Leveraging national implementation to address the humanitarian challenges of partnered operations**

As shown in the previous section, the international law of partnered operations is implemented in national legal systems through a variety of mechanisms, which can be combined to address separate aspects of military partnerships. The national practice examined above also suggests that different implementation mechanisms – law, case law and policies – have been used for distinct purposes, leading to varying results. This leaves room for an evaluation of their

---

105 See Brian Egan, “International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations”, International Law Studies, Vol. 92, 2016 p. 245. As explained by Egan, the United States instead denies that common Article 1 legally requires States to take steps to ensure respect for IHL by all State and non-State parties to a conflict, including non-partners.


107 See, for example, DoD, Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020, April 2021.
effectiveness, provided it is done according to one of several aims that States may pursue through national implementation. An assessment in general terms would be impractical for two reasons: first, there is insufficient data to assess how formal implementation translates into actual compliance, mainly due to lack of transparency on State conduct in this field; and second, the choice between legislative, judicial or policy measures (or no specific measure) will ultimately depend on the peculiarities of each national legal system. By way of example, judicial implementation of international law generally represents a positive development, but its effectiveness in incorporating international norms differs, depending on the different role that international law plays in common law and civil law systems—not to mention the possibility that national judiciaries are influenced, to varying degrees, by political considerations. Similarly, officially adopted policies, although not binding, can be so deeply embedded in the daily practices of political and military decision-makers that they alone can guarantee fully compliant behaviour. More radically, where international law is routinely incorporated in domestic legal systems and national institutions consistently comply with it and operationalize it, specific implementation measures may be unnecessary. For these reasons, this paper refrains from indicating one universal model, based on the conviction that there is no one-size-fits-all solution.

A concern highlighted at the outset of this investigation is that partnered operations raise a peculiar humanitarian problem, insofar as they may exacerbate the suffering and exposure to danger of civilians and others not engaged in the fighting. One option is thus to evaluate the effectiveness of implementation measures according to their potential to prevent or mitigate the risk of humanitarian consequences posed by partnered operations. This can be done by adopting the framework of analysis proposed by the ICRC in its recent study on how to manage support relationships in armed conflict to reduce the human costs of war (SRI framework). The difference in scope between the two notions of “partnered operations” and “support relationships”, as explained in the second section of this article, should not be an obstacle: since the former is entirely contained within the latter, all instances of partnered operations considered in the examination of national practice do amount at the same time to support relationships as defined by the ICRC, and the SRI framework is equally relevant to them. It should be additionally mentioned that the purpose of the SRI framework is to appraise practical measures that actors in support relationships can take to maximize compliance with IHL, whereas the legal framework considered in this paper is broader, also including national measures implementing IHRL norms and the secondary norms of State responsibility. Even this should not be an impediment to using the ICRC’s study as a framework for assessing the effectiveness of implementation measures, however—in fact, all legal

108 Elision and secrecy cover not only the existence of partnered operations, but also the impact of implementation measures where they exist. For a call to more transparency on the impact of the Leahy Law for example, see Michael J. McNerney et al., Improving Implementation of the Department of Defense Leahy Law, RAND Corporation, Santa Monica, CA, 2017, pp. 52–54.
109 ICRC, above note 11, Chaps 5, 6.
and policy measures reviewed above seek to prevent or mitigate the humanitarian consequences of partnered operations, thereby serving the ultimate purpose of the SRI framework.

Bearing that in mind, the ICRC’s study divides practical measures into ten functional groups arranged in three stages: preparation, implementation and transition. The framework, therefore, is particularly helpful for our analysis because it reflects the “operations process” adopted by many armed forces and defence alliances. Observations made here can thus be easily integrated into the planning, execution and assessment of military operations by State forces. When reviewed in light of the ICRC’s SRI framework, national law, case law and policies each play a distinctive role in maximizing compliance with the law applicable in armed conflict. Nevertheless, they intervene at different stages of partnered operations and have a different prospective impact on the humanitarian consequences of those operations.

Law and policies are relevant for the preparation phase: they affect what the SRI framework identifies as an actor’s “internal readiness” to engage in a partnered operation, as they set the rules under which the operation will be conducted. Consequently, they are crucial for two reasons: first, they represent minimum standards and thresholds against which States decide whether to engage in a partnered operation, and second, they are the benchmarks according to which the operation will be planned. Hence, they have a greater potential to prevent and mitigate the risk of humanitarian consequences entailed by the operation. This consideration should, however, be nuanced in light of some features revealed by the analysis of national legislation in the previous section of this article. Interestingly, both the US Leahy Law and the Italian Law 145/2016 include vaguely worded provisions, relying on constructive ambiguity. The Leahy Law lacks definitions for “assistance” and “security force of a foreign country”; these shortcomings have been used in the past to limit its scope of application to training, and are used today to exclude assistance to non-State armed groups from Leahy vetting. Law 145/2016, meanwhile, is noncommittal on its application to special forces operations and makes an unclear reference to “exceptional humanitarian interventions”, leaving the notion undefined. A comparison of these two statutes therefore shows that neither specialized legislation nor all-embracing clauses are exempt from loopholes, and both might be circumvented through selective interpretation. The same may be true, to an even greater extent, for national policies. As the British example shows, policies provide governments with a flexible tool for ensuring compliance with international norms while avoiding binding commitments. In common law


111 For both these interpretive issues, see the discussion on the Leahy Law in the subsection on “Domestic Legislation Providing Conditions for Participation in Partnered Operations” above.
systems, they are a standard means of replacing or complementing deficient national legislation. They can also be helpful in achieving legal interoperability. Yet, for precisely the same reasons, governments may use policies as a means of relaxing applicable legal standards, which end up being balanced by foreign policy considerations.

National case law performs an equally crucial but distinct function. It can come into play either when national implementing legislation has been breached, to restore proper implementation, or when national legislation has not been adopted at all, to replace it and sanction non-compliant institutions by direct reference to international norms. It intervenes at the implementation stage of the adopted framework, aiming to ensure “internal oversight” of government decisions and armed forces’ conduct in partnered operations. As pointed out in the ICRC’s study, internal oversight “is particularly important when it comes to actors or operations that are intentionally excluded from normal reporting procedures for security reasons, such as missions conducted by special forces or intelligence services”.112 In this way, the judiciary may be instrumental in closing interpretive loopholes intentionally left in national laws and policies. For this reason, case law has emerged in recent years as a promising development, marked by an increase in strategic litigations.113 Yet, judicial decisions may have less impact on the humanitarian challenges of partnered operations for three reasons. First, as noted above, they relate to the implementation phase, not the planning stage. They are essential for redressing the plight of victims, not for avoiding their suffering in the first place. Of course, their findings may be integrated into lessons learned and may help in the planning of future operations. However, and second, practice reviewed in this paper indicates that decisions on matters of military partnerships have been easily reversed, as is typical of a field which is still developing. Finally, it should be noted that frequent judicial reversals result in a condition of unpredictable State responsibility. While this does not call into question the contribution of national judiciaries to the implementation of international law, taken together these observations do explain why national authorities may consider domestic case law as a less reliable basis for planning partnered operations.

Conclusions

In his keynote speech at the 110th Annual Meeting of the American Society of International Law, Brian Egan, then legal adviser to the DoS, recognized that one of the reasons why the United States complies with the law of armed conflict is that “it is essential to building and maintaining our international coalition”.114 Indeed, when assessing the international legal framework of partnered operations,

112 ICRC, above note 11, p. 115.
113 See, for example, the freedom of information litigation filed by ECCHR over Italy’s involvement in the US drone programme, available at: www.ecchr.eu/en/case/sicily-air-base-freedom-of-information-litigation-on-italys-involvement-in-us-drone-program/?L=2.
114 B. Egan, above note 105, p. 236.
it should not be forgotten that States have recently paid attention to national implementation not only to avoid responsibility, but also because the capacity of coalitions to respect the law of armed conflict supports their legitimacy, strengthens the ties between partners, and ultimately increases their chances of success. These non-legal reasons contribute to explaining why compliance with international law in partnered warfare is gaining prominence and further prove the relevance of the topic that this paper has sought to address.

By reviewing the national law, case law and policies of selected States involved in partnered operations and chosen for the accessibility of relevant sources, this paper has explored the role that national implementation mechanisms can play to prevent or mitigate the risk of humanitarian consequences inherent in partnered operations. It has refrained from indicating a universal model for national implementation, mindful of the limitations proper to every mechanism, of the significant differences between national legal systems, and, above all, of the lack of sufficient data for assessing how formal implementation translates into actual compliance. Yet, the survey of relevant practice suggests at least that a strategy to alleviate the risk of humanitarian consequences in partnered operations should take into consideration the different effectiveness of law, case law and policies – i.e., the different impact they bear on distinct phases of partnered operations. If this is done, a general call for national implementation of international law in this field does not appear to be sufficient. Conversely, engagement with States should privilege advocacy of national implementation laws and policies as highly effective mechanisms for guiding the planning and preparation of partnered operations. This seems even more relevant when one considers that most of the efforts made so far towards fostering compliance with international law have been directed at initiating strategic litigations, often with little result. While this may be linked to a certain degree of uncertainty in the applicable legal standards, typical of a field that is still consolidating its premises, national legislation remains the preferred option for trying to prevent or mitigate the humanitarian consequences of partnered operations.
Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural heritage under IHL and the Islamic law of armed conflict

Victoria Arnal*

Victoria Arnal is a recent graduate of the LLM programme at the Geneva Academy of International Humanitarian Law and Human Rights Law. She holds an LLB (Honours) in Scots law, English law and European legal studies from the University of Aberdeen.

Abstract

The destruction of cultural heritage in armed conflicts has gained increasing political momentum and visibility over the last two decades. Syria, Iraq and Mali, among others, have witnessed the intentional destruction of their cultural heritage by non-State armed groups (NSAGs) that have invoked Islamic law and principles

* The author would like to thank Dr Ahmed Al-Dawoody for delivering the inspiring course “Introduction to the Islamic Law of Armed Conflict” and for his encouragement to produce this article.
to legitimize their actions. The response of the international community has predominantly focused on the material aspect, to the detriment of the significant impact on the associated intangible manifestation of cultural heritage in local communities. This article argues that several Islamic legal rules and principles may, more adequately than international humanitarian law, safeguard the intangible dimension of cultural heritage in certain contemporary armed conflicts in Muslim contexts. It aims to demonstrate the importance of drawing from multiple legal traditions in order to enhance the protection of intangible cultural heritage in armed conflicts and to strengthen engagement with the relevant NSAGs.

Keywords: deliberate destruction, protection of cultural heritage, intangible cultural heritage, international humanitarian law, non-international armed conflict, Islamic law.

Introduction

The destruction of cultural heritage in armed conflicts has gained increasing political momentum and visibility over the last two decades. The proliferation of this destructive trend is correlated with the changing nature of armed conflicts. The primary motive for resorting to the use of force has taken on a substantial ethnic, religious and cultural dimension. Identity has become the overarching theme. In parallel, combat dynamics have evolved towards the urbanization of warfare, thus incidentally placing more cultural sites at greater risk of collateral damage. Additionally, the looting and illicit trade of cultural heritage has become a lucrative enterprise for certain armed groups.1 Muslim-majority States have been particularly affected by the trend of deliberate attacks against cultural heritage as a policy or method of warfare. Syria, Iraq and Mali, among others, have witnessed the intentional destruction of many of their cultural sites by non-State armed groups (NSAGs).2 These armed groups have invoked Islamic law and principles to legitimize their actions.3 In the absence of a uniform definition of “cultural heritage” under international law, this term will be understood here as

encompassing both tangible and intangible property that reflects the cultural and spiritual identity of a certain community.

This article will provide a critical analysis of the protection of cultural heritage under international humanitarian law (IHL) and the Islamic law of armed conflict (ILAC), with a particular focus on the often overlooked aspect of intangible cultural heritage. The present author has relied on Islamic legal literature in English, and the chosen sources mainly address Sunni Islamic law since it represents the majority view in the three countries in focus. The article will first present a contextual assessment of the destructive trend and highlight the interconnectedness of tangible and intangible heritage. The following section will assess whether the relevant rules under IHL applicable to non-international armed conflicts (NIACs) sufficiently protect the intangible dimension of cultural heritage. The rules on the protection of cultural heritage under the ILAC will subsequently be comparatively analyzed. Finally, the article will reflect upon whether the ILAC and IHL can be approached as mutually reinforcing normative systems. The article will argue that several Islamic legal rules and principles may, more adequately than IHL, safeguard the intangible dimension of cultural heritage in certain contemporary armed conflicts in Muslim contexts. To this end, cross-cultural dialogue should be sought on the international scene with the aim of strengthening the protection of intangible cultural heritage and bolstering compliance with international norms through meaningful engagement with NSAGs.

The destructive trend in contemporary armed conflicts

Contextual assessment

In July 2012, fourteen historical and religious sites in the World Heritage town of Timbuktu in Mali were destroyed by Ansar Dine (“the Defenders of the Faith”) and Al-Qaeda in the Islamic Maghreb. Similarly, Syria, frequently referred to as an “open-air museum”, has been the theatre of destruction of numerous cultural and religious sites, with the attacks mainly being conducted by the self-proclaimed Islamic State (IS). Amongst those buildings, four were designated as

4 This paper acknowledges that there are numerous abuses in armed conflicts; the aim is not to compare the destruction of cultural heritage with the loss of human lives caused by armed conflicts. The author also notes that these were not the only cultural and religious buildings that have been targeted, and that the NSAGs mentioned throughout this paper are not the only perpetrators of such destruction. These NSAGs have been selected for their justifications of destruction grounded on Islamic principles. However, it cannot be stressed enough that violent extremism is not a phenomenon peculiar to Islam. The mentioned NSAGs’ actions and attitudes towards cultural heritage do not account for all NSAGs’ attitudes; for a different understanding of intangible cultural heritage by certain NSAGs, see M. Lostal, K. Hausler and P. Bongard, above note 2.

5 ICC, Al Mahdi, above note 3, para. 10.

World Heritage Sites. World Heritage Sites have also been the targets of deliberate attacks in Iraq. Furthermore, several sites and shrines pertaining to the Yezidi ethno-religious minority have been besieged by IS in the Sinjar region. Likewise, Christian, Shia and Sufi shrines in the Nineveh province have been intentionally destroyed.

An essential common feature shared by the belligerent parties conducting these attacks is that they are leading ideological wars in which the destruction of cultural heritage is seen as a requisite step towards annihilating the enemy. The aforementioned NSAGs frequently invoked Islamic principles to justify their actions. Al Mahdi, the head of Ansar Dine, expressed that the targeted monuments were considered idolatrous and thus contrary to the group’s radical understanding of Islam. Similarly, in Syria, the destruction formed part of the Islamic State of Iraq and Syria’s (ISIS) process of erasing the “the traces of ‘infidel’ cultural and religious heritage”. In Iraq, ethno-religious minorities were targeted for belonging to groups depicted as “devil worshipers” and “infidels”.

The misplaced emphasis on World Heritage Sites

In light of the global impact of the rise of violent extremism, the protection of cultural heritage in wartime has sparked considerable political and legal interest. The Al Mahdi case was the first occasion on which the International Criminal Court (ICC) brought an action against a member of an NSAG exclusively based on cultural destruction charges. In the same year, the prosecutor set the prosecution of destruction of cultural objects as a priority in case selection. In Al Mahdi, the ICC considered that directing attacks against World Heritage Sites constituted an aggravating factor. The 1972 Convention Concerning the

---

7 “Joint Statement of UN Secretary-General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi: The Destruction of Syria’s Cultural Heritage Must Stop”, New York, 12 March 2014.
14 ICC, Al Mahdi, above note 3.
Protection of the World Cultural and Natural Heritage established a system whereby cultural heritage considered to be of “outstanding universal value” is designated to be inscribed on the World Heritage List. Nonetheless, the selective discourse of the international community, encompassing a misplaced emphasis on the “World Heritage” nature of the targeted sites, is dangerous for the identity of the targeted communities. World Heritage Sites only represent a small proportion of cultural heritage in a given country. Syria, Iraq and Mali have a rich national and local heritage, which is not necessarily recognized in the eyes of the international community. Yet these sites are testimonials to the diversity of the populations living in the respective territories. Whilst Syria, for instance, takes pride in having a “universal heritage”, this should not obscure the fact that very often, national and local heritage contribute the most to one’s sense of identity.

Targeting the intangible?

Inevitably, the material destruction of these sites severely threatens the various expressions of intangible cultural heritage in the territories involved. For instance, Sufism, a branch of Islam widely practiced in the region of Timbuktu in Mali, involves sacred rituals such as recitation of prayers and poems, dances and chants. Similarly, one cannot ignore the prevalent intangible character of Yezidism. This religion is practiced by a minority primarily found in northern Iraq, and there are several contested theories over its origin; it is nonetheless accepted that Yezidism “places less emphasis on conforming to specific beliefs and more on participation in certain intangible religious rituals and adherence to specific behaviours”. The persecution and displacement of the Yezidis has strongly influenced, and strengthened, their links to various locations and buildings as places to freely manifest their spirituality. Unfortunately, the dominant discourse concentrates on the visible effects of conflict, but when attacks materialize on a tangible element of cultural heritage, a similar destructive force affects the intangible dimension. Cultural practices associated with heritage and identity, such as skills, practices and traditions, are severely impacted and even lost through destruction, forced displacement or conflict-related deprivation. This can, in turn, hinder the

17 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151, 16 November 1972 (entered into force 17 December 1975), Art. 11(2).
21 B. Isakhan and S. Shahab, above note 9, p. 10.
peace, reconciliation and reconstruction processes in post-conflict settings. The preservation of all forms of cultural heritage in armed conflict is thus essential for the preservation of the identity of the communities involved.

The protection of cultural heritage under IHL

The Hague regime

Given the prevalence of the destruction of cultural heritage in contemporary armed conflicts, there is a pressing need to explore the rules of IHL governing the matter. The destruction of the aforementioned sites occurred in the midst of non-international armed conflicts. To trigger the applicability of the IHL of NIACs, there must be “protracted armed violence” between a State and an organized armed group or between such groups. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict represents a key development, since it was the first instrument to be devoted exclusively to the protection of cultural property in armed conflicts. Not only does the Convention protect tangible cultural heritage from attacks, but it also prohibits the use of tangible cultural heritage in a way that would turn it into a military objective. Such a protection is unprecedented for civilian objects. However, the Convention’s adoption in the aftermath of the Second World War justifies its State-centric approach. The onus is on States to safeguard their own cultural property in the event of an armed conflict. Only one article provides that all warring parties, including non-State actors, shall be bound to apply, as a minimum, the provisions of the Convention which relate to respect for cultural property. Thus, the Convention’s applicability in NIACs is rather limited.

Subsequent events such as the shelling of Dubrovnik or the burning of Sarajevo’s historic Vijećnica library during the war in Yugoslavia shed light on


27 1954 Hague Convention, Art. 2.

28 Ibid., Art. 19(1).
the weaknesses of the legal regime in place.\textsuperscript{29} In addition to reiterating the threat to cultural heritage in armed conflict, these events also evidenced the paradigm shift away from traditional inter-State wars. They prompted the international community to rethink its protection system. The 1999 Second Protocol to the 1954 Hague Convention was specifically drafted to apply to armed conflicts of both international and non-international character.\textsuperscript{30} This instrument goes a step further than the parent Convention in enhancing protection since it no longer limits its application to respect for cultural property.\textsuperscript{31} Furthermore, it provides an attempt to circumscribe the principle of military necessity.\textsuperscript{32} The 1954 Convention did not contain a definition of what constituted a military objective, thereby leaving the application of the principle of military advantage largely to the armed group’s discretion. The Second Protocol defines “military objective” and further narrows the scope of the waiver through the requirement that “there is no feasible alternative available to obtain a similar military advantage”.\textsuperscript{33} Nonetheless, the benefit of its application to NIACs and the circumscribed waiver on imperative military necessity is to be weighed against an essential consideration – namely, that the major drawback of the Hague regime remains its definition of “cultural property”, which only refers to “movable or immoveable property”.\textsuperscript{34} This one-faceted understanding regrettably fails to capture, and grant protection to, the immaterial dimension of cultural heritage in armed conflict.

Additional Protocol II to the 1949 Geneva Conventions (AP II) applies to NIACs taking 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 this Protocol.\textsuperscript{35} AP II prohibits direct attacks against “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the people”.\textsuperscript{36} This broad phrasing and the addition of the notion of spirituality could be

\begin{flushleft}
\textsuperscript{29} Marc Balcells, “Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Deterring It and Cultural Heritage Prevention Policies in the Aftermath of the Balkan Wars”, European Journal on Criminal Policy and Research, Vol. 21, No. 1, 2015, p. 4.
\textsuperscript{31} Ibid., Art. 5.
\textsuperscript{32} Ibid., Art. 6. This article restates 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. 52(2).
\textsuperscript{33} 1999 Second Protocol, Arts 1(f), Art. 6(a).
\textsuperscript{34} 1954 Hague Convention, Art. 1.
\textsuperscript{35} 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 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(1).
\textsuperscript{36} Ibid., Art. 16.
\end{flushleft}
understood as safeguarding intangible cultural heritage. Nonetheless, the high threshold required for the Protocol’s application, coupled with the lack of ratifications, means that for the purposes of this article it is relevant in the Malian context only.

In the absence of a uniform definition of cultural heritage, each of the above-mentioned applicable instruments defines the components of cultural heritage that it protects. Varying scopes of protection are afforded to cultural heritage, mostly based on the classification of the conflict and the importance conferred to the various categories of cultural heritage. This piecemeal and sectoral development of the protective regime has introduced a somewhat hierarchical element. The distinction between “peoples”, “every people” and “humanity”, or between expressions such as “of great importance” and “of the greatest importance”, runs the risk of marginalizing a certain type of heritage and therefore certain communities.

Redressing the shortcomings of the IHL of NIACs

The past decade has witnessed the emergence of a discourse framing the protection of cultural heritage as a human rights law issue. Karima Bennoune, the UN Special Rapporteur in the Field of Cultural Rights, has set the issue of the intentional destruction of cultural heritage as a priority in her mandate. She recognizes that tangible and intangible heritage are interconnected, and asserts that “[a] human rights approach assists in making these connections”. To this end, the present article suggests that the shortcomings in the IHL of NIACs must be redressed by contemplating the protection of cultural heritage under international human rights law (IHRL). It should be noted that while it is largely uncontroversial that IHRL remains applicable in armed conflicts, the issue of whether IHRL addresses non-State armed groups remains contentious.

40 AP II, Art. 16.
42 1999 Second Protocol, Art. 10 (enhanced protection).
47 For academic debates on the matter, see Nigel Rodley, “Can Armed Opposition Groups Violate Human Rights Standards?”, in Kathleen E. Mahoney and Paul Mahoney (eds), Human Rights in the Twenty-First
In 2003, the United Nations Educational, Scientific and Cultural Organization (UNESCO) devised the Convention for the Safeguarding of the Intangible Cultural Heritage. Intangible cultural heritage is defined as “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognise as part of their cultural heritage”. The Convention marks a much-praised shift from the predominantly tangible focus of prior instruments. Furthermore, it distances itself from the “outstanding universal value” paradigm or any hierarchical approach to cultural heritage. Unlike the 1972 Convention, whereby States submit sites to be inscribed on the World Heritage List, the 2003 Convention ensures that the custodians of intangible cultural heritage are involved in the nomination process. Intangible cultural heritage is thus identified by reference to its significance for particular groups or communities, the rationale being that they are the ones “who can define what their intangible cultural heritage is and ensure its preservation into the future”. The relevance of the 2003 Convention for the purposes of this article is bolstered by the fact that Mali, Iraq and Syria are parties to it. However, while promising, this human rights law instrument was not specifically concluded for armed conflicts. It lacks specific obligations binding on parties to contemporary conflicts and its level of protection is unclear. For instance, the Operational Directives of the 2003 Convention only provide for international assistance in the form of financial support when the heritage or its bearers are in an emergency situation, such as an armed conflict.

Protecting the transmission of intangible cultural heritage

It has thus far been established that the international regime governing the protection of cultural heritage suffers from structural gaps which hamper its application in NIACs as well as any form of engagement with the relevant actors. Nonetheless, one could argue that although the specific rules of IHL predominantly protect tangible cultural heritage, this body of law as a whole confers sufficient protection to the multidimensional character of cultural heritage. Sassoli asserts that “[t]he general rules of IHL protect persons who realize, transmit and participate in the expression of intangible cultural heritage...
from violations of their physical as well as mental integrity and dignity”.54 Article 3
common to the 1949 Geneva Conventions is the only treaty provision applicable to
NIACs. This article guarantees protection to all persons not taking active part in the
hostilities, without any adverse distinction, from violations of their physical and
mental integrity as well as their personal dignity.55 The transmission argument is
relevant since the protection granted to persons not taking active part is
hostilities covers a broad category of individuals, naturally encompassing bearers
and transmitters of intangible cultural heritage. Nonetheless, this provision does
not guarantee an individual right to perform cultural functions. Under IHL, only
the ability of ministers of religion to continue their functions is inviolable.56 No
mention is made of any other actor of intangible cultural heritage; the role of
these actors is only protected under IHRL.57 Therefore, the protection of
intangible cultural heritage under IHL has not (yet) realized its full potential since
recourse must be made to other instruments that are not specifically drafted for
armed conflicts, and even less those of a non-international character.

Apart from the 2003 Convention, the IHL regime disproportionately
focuses on the material manifestations of culture to the detriment of its
indissociable intangible aspect. Overall, the protection of cultural heritage under
IHL has resulted in a piecemeal and sectoral approach, partially supplemented by
IHRL to address the intangible dimension. Furthermore, as the aforementioned
treaties are only binding upon States, the lack of satisfactory protection of
intangible cultural property in NIACs is manifest.

Although it is of the utmost importance to discuss international rules in
contemporary armed conflicts, the destructions on which this article focuses took
place in Muslim-majority States, with Islam invoked as a justification for the
alleged violations. The following section will therefore evaluate the protection of
cultural heritage under the Islamic legal tradition.

The protection of cultural heritage under Islamic law

The protection of property in Islamic law

As a starting point, it will suffice to look at the sources of Islamic law to demonstrate
the importance that it places on the safeguarding of intangible cultural heritage. The
sources themselves are testimonial to the sanctity of divine revelation. The primary
sources of Islamic law are the Qur’an (which literally means “recitation” or
“reading”), the Sunna (the traditions of the Prophet, the written account of which
is termed “hadith”) and ijma’ (consensus of the jurists). Secondary norms are

55 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), Art. 3.
56 Ibid., Art. 24; AP I, Art. 15(5); AP II, Art. 9; ICRC Customary Law Study, above note 26, Rule 27.
mainly obtained through the use of *usūl al-fiqh*, a method of extracting and codifying rules from primary sources.\(^{58}\) The codification of the traditions of the Prophet demonstrates a willingness and perseverance in preserving oral traditions. Moreover, Islamic scholars developed a number of sciences taught in schools to ensure the authenticity and reliability of the Prophet’s traditions. This documentation and authentication are extremely significant, since this tradition serves as a source both of law and of ethical guidance for Muslims up to the present day.\(^{59}\) Thus, *prima facie*, Islamic law seems to devote greater importance to the safeguarding of intangible cultural heritage.

Although no direct reference to the notion of “cultural heritage” as such is contained in any of the primary sources, the latter nonetheless contain several mentions of the notion of property. A Qur’anic verse states that “[w]hatever palm trees you have cut down, or have left them standing on their roots, it was with Allah’s permission”.\(^{60}\) This reference appears irreconcilable with one of the ten commands later ordered by Caliph Abu Bakr, asserting: “Do not cut down fruit-bearing trees; do not destroy buildings; do not slaughter a sheep or camel except for food; do not burn down or drown palm trees.”\(^{61}\) Despite these seemingly contradictory assertions, it can be derived that the principle which has guided the Islamic law of warfare since the seventh century AD has been the permissibility of attacks if required by military necessity. The principle of military necessity became evident in light of the Prophet’s prohibition against cutting down trees except those that would prevent Muslims from engaging in the fighting.\(^{62}\) An allusion to the principle of military necessity can also be implied from the Qur’anic verse holding: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.”\(^{63}\) Through this verse, one can infer that a Muslim’s action in cases of necessity must not be guided by impulse, but rather that “he is required to act without oppression and without deliberate transgression”.\(^{64}\) This requirement therefore excludes the wanton destruction of enemy property. According to the renowned Syrian jurist al-Awzā’ī (d. 774), such an act constitutes a crime of “*al-fasād in the land*”

---


(destruction) and is strictly prohibited by the Qur’an. The rationale behind the blanket prohibition of wanton destruction during the conduct of hostilities is that everything in the world belongs to God, and Muslims are entrusted with the responsibility of preserving His property and contributing to human civilization. The reference to “everything in the world” provides for an infinite category of protected heritage. This expression also avoids any adverse distinction relating to heritage that is only worthy of protection if it is “of great importance” or “of outstanding universal value”. If the notion that “everything in the world belongs to God” is accepted as corresponding to the “Islamic worldview,” one can therefore argue that all types of property are placed on an equal footing and are granted similar protection. Respect for property is thus cemented as an intrinsic part of religious commitment, essential to ensuring the continuity of civilization.

In addition to the absolute prohibition of wanton destruction during the conduct of hostilities, the Qur’an and the Sunna contain various references to the inviolability of religious sites. The first text in the Qur’an allowing Muslims recourse to armed force is in reference to defence against aggression. It reads that “had not God permitted people to defend themselves against [the aggression of] others, monasteries, churches, synagogues and mosques, wherein the name of God is oft-mentioned, would be pulled down”. This verse strongly supports religious freedom since the protection of monasteries, churches, synagogues and mosques is given as a justification for defensive war, and the defence of religion against persecution almost becomes a duty. Therefore, one of the early Islamic jus ad bellum rules is the protection of the practice of Christianity, Judaism and Islam. According to Bassiouni, “there is continuity among the Abrahamic religions, and, accordingly, Jewish, Christian, and Muslim religious and holy sites deserve recognition and respect by all three faiths”. This interpretation excludes religious sites belonging to non-Abrahamic faiths, but it must be weighed against alternative theories advanced by Islamic scholars supporting the conclusion that the Islamic legal tradition adopts a universalist stance.

---

67 A. Al-Dawoody, above note 65, p.1007.
71 Ibid.
According to Sharawi, the inclusion of non-Abrahamic religious groups, and thus the inviolability of their religious sites, has been accepted in classical fiqh.73

Similarly, in an exchange between the abbot of St Catherine’s Monastery in Sinai and the Prophet, the latter is reported to have said that “[n]o one is to destroy a house of [the Christian] religion, to damage it, or to carry anything from it to the Muslims’ houses”.74 This hadith seemingly confirms that Islamic law appreciates the value of religious and cultural objects of the adherents of other faiths. Moreover, the protection granted to cultural heritage is manifold: it concurrently encompasses destruction and damage as well as what could be considered looting or theft. The explicit mention by the Prophet of these three actions accentuates the multifaceted and “vital role that these objects play in shaping a community’s identity”.75 Therefore, one can infer from the primary sources of Islamic law and subsequent interpretations by Islamic scholars that all religious buildings cannot be the targets of attacks, that the prohibition extends to the objects contained therein, and that this holds true for all civilizations. This is further reinforced by several allusions to diversity in the Qur’an which can be interpreted as protecting the heritage of all people.76

Furthermore, the Prophet stated that “[w]hen you are in Syria, you will meet those who remember God in their houses of worship. You should have no dispute with them and give no trouble to them.”77 An additional layer of protection can be deduced from this statement: it is not only the religious buildings that must be protected, but also “those who remember God in their houses of worship”. These injunctions and obligations allude to the interdependence between tangible and intangible dimensions. Accordingly, the obligation to respect religious buildings is juxtaposed with the obligation to protect the bearers and transmitters of religious teachings.

Regulating the use of force in internal conflicts

The ILAC also draws a distinction between conflicts of an international and a non-international character. The equivalent of NIACs in Islamic law would be internal conflicts between Muslims. This classification is further subdivided into four categories involving as a party to the conflict either rebels (al-bughāh), bandits,
robbers, terrorists (al-muháribún), apostates (al-murtaddún) or violent religious extremists (al-khawárij).\textsuperscript{78}

The members of Ansar Dine or IS cannot be classified as murtaddún since this category has lost its relevance.\textsuperscript{79} However, the regulation of the fight against al-bugháh finds support in the Islamic scriptures.\textsuperscript{80} Most classical Muslim jurists conceded that there are three cumulative conditions to classify a group as al-bugháh.\textsuperscript{81} Firstly, the group must have military power and organization (shawkah). Secondly, the group’s fight must pursue a cause (ta’wil) generally, in the form of a complaint about an injustice inflicted by the government or a violation of the Sharia; in this regard, a subjective belief by the group is considered sufficient. Finally, the group must resort to armed force (khurūj). As per the rules of engagement, attacks must be directed at legitimate targets with the aim of achieving the objective of the rebellion. Additionally, the victim’s property cannot be seized, and fighters must not target civilians or cause any destruction that is not dictated by military necessity.\textsuperscript{82} If the rules are complied with, the jurists unanimously agreed that both rebels and government forces cannot be held liable for any destruction caused during the course of the rebellion.\textsuperscript{83} Applying these rules to ISIS and Ansar Dine, it appears that, while these groups demonstrated a relevant degree of organization, pursued a cause subjectively judged legitimate and resorted to force in furtherance of their cause, they did not respect the rules of engagement. Consequently, they cannot benefit from the absolution of liability for property destruction granted to al-bugháh.

Khawárij are usually described as pious worshippers with a very narrow understanding of Islam; the main difference between al-khawárij and al-bugháh is the deliberate targeting of innocent civilians.\textsuperscript{84} The khawárij definition corresponds to the aforementioned NSAGs. The rules of fighting against al-khawárij have not been amply developed by classical Muslim jurists, and this eventually led to disagreements among the various schools.\textsuperscript{85} For this reason, Al-Dawoody argues that “ISIS should be treated as muháribún as far as the rules of engagement and punishment are concerned”.\textsuperscript{86} Contrary to the previous categories, muháribún have no ta’wil; they willfully spread terror and intimidate the civilian population. The law of fighting against al-muháribún is also known as the law of hirábah (“terrorism”). It constitutes the most developed and least controversial form of internal conflicts.\textsuperscript{87} It is rooted in Islamic scriptures, and

\textsuperscript{78} A. Al-Dawoody, above note 60, pp. 140–193.
\textsuperscript{80} A.Y. Ali, above note 63, verse 49:9.
\textsuperscript{81} A. Al-Dawoody, above note 79, p. 124.
\textsuperscript{82} A. Al-Dawoody, above note 60, pp. 167–168.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid., p. 151.
\textsuperscript{85} A. Al-Dawoody, above note 79, p. 133.
\textsuperscript{86} Ibid.
the verses relating to *hirábah* prescribe four punishments, including the most severe ones foreseen in Islamic law.88 Perpetrators of terrorist acts are thus strictly liable for the damage they inflict on lives and property. The relevant Qur’ánic verses, strengthened by the classical Muslim jurists’ intransigent approach to indiscriminate attacks meant to spread terror, provided a great contribution towards humanizing internal conflicts and, as a consequence, alleviating the suffering of victims.89

Thus, Islamic law regulating the use of force in internal conflicts demonstrates a certain degree of flexibility and an ability to adapt to contemporary contexts and challenges. Yet, it is also specific enough to sufficiently tackle the issue of destruction of cultural heritage. From an early stage, by encapsulating a strong accountability dimension for transgressors, Islamic law has demonstrated a keen interest in protecting the community from those who threaten it with violence and terror.

**Protecting the bearers and interpreters of intangible cultural heritage**

The principle of distinction between combatants and non-combatants dates back to the Prophet’s lifetime.90 However, some disagreements persist over who can benefit from non-combatant immunity. According to the minority opinion shared by al-Shāfi’ī (767–820) and Ibn Hazm (d. 994), anyone can be a lawful target, except women and children. Shāfi’ī nonetheless adds that it is also impermissible to target the clergy who confines himself to worship and is not involved in acts of hostility.91 This view is not shared by Ibn Hazm, who does not accept the authenticity of the hadiths that extend non-combatant immunity beyond women and children. The majority opinion, however, provides a list of five categories of non-combatants, including, in addition to women and children, the aged, the clergy (*rāhib*) and the *usafâ* (those hired to perform non-combat services on the battlefield).92 Based on the extended list of categories of people immune from targeting in war, one can assert that, along the same lines as IHL, the transmission of cultural heritage is guaranteed by ensuring the protection of those who do not take part in hostilities.

Furthermore, one could even contend that the protection afforded under Islamic law is greater because the protection of *usafâ* has been extended by analogy to “craftsmen, wage earners, and farmers who do not do battle, or those who follow the army but do not participate in the hostilities, such as merchants”.93 The rationale behind this immunity is that these people are

89 A. Al-Dawoody, above note 88, p. 438.
90 A. Al-Dawoody, above note 60, p. 111.
91 *Ibid*.
92 *Ibid*.
93 A. Z. Yamani, above note 64, p. 207.
“builders of prosperity” and “Islamic war does not have for its object the destruction or undermining of civilization and prosperity”. While only religious ministers’ ability to perform their function is protected under IHL, such protection is conferred to a broader category of actors of intangible cultural heritage under the ILAC. Therefore, through the immunity of usafā, Islamic law ensures the preservation of creative expression, skills and traditions. Islam being one of the oldest legal traditions in practice, it is interesting to juxtapose the long-standing protection of craftsmen under Islamic law with the fact that the protection of traditional craftsmanship only came under the scope of international law through the 2003 Convention.

The above analysis has demonstrated that the protection of cultural heritage is built around Islamic teachings and principles which fully embrace the intangible dimension of cultural heritage. Islamic law crystallized around the notion of divinity, as opposed to international law, which emerged out of States’ interests. To this end, the absolute prohibition of wanton destruction associated with a strong accountability mechanism was crucial to ensuring the prosperity of the Islamic civilization. Similarly, the protection conferred upon those who produce, enact and perpetuate cultural heritage, as long as they do not engage in hostilities, supports this argument. Additionally, the principle of diversity enables the protection of all places of worship, including objects and persons located inside such places, thereby reasserting protection beyond the mere architectural aspect, and regardless of one’s faith.

Making room for cross-cultural dialogue?

The double-edged sword of religion

Following the above analysis, one can appreciate that the selected Islamic rules and principles display a notable congruence with international humanitarian norms and can even appear more progressive with regards to safeguarding cultural heritage in armed conflicts. Indeed, the fundamental protection of intangible cultural heritage has existed since early Islam, whereas it is only now emerging as an important protected category in contemporary international law. This view was shared by the prominent Syrian Islamic law professor Wahbeh Al-Zuhili (d. 2015), who stated that the prohibition of the destruction of cultural heritage is one of the fundamental principles prescribed since early Islam. Therefore, if one takes the 2003 Convention as a breakthrough in acknowledging the “deep-seated interdependence” between

94 Ibid.
95 2003 Convention, Art. 2(2)(e).
96 K. Bennoune, above note 61, p. 638.
98 2003 Convention, Preamble.
the tangible and intangible dimensions of cultural heritage, this shift had already happened centuries ago in Islamic law.

Nonetheless, there remains one outstanding concern: (mis)interpretation. The preceding section has pointed to the adaptability of the Islamic legal tradition; it should not be understood as a static or monolithic construct. As such, Islamic jurists constantly need to re-engage with the primary sources in order to keep Islam’s message alive and to be responsive to contemporary needs. The resulting multiple, and sometimes conflicting, views of Muslim jurists are an unavoidable corollary of the lack of systematic codification of Islamic law. The case studies referred to throughout this article illustrate this concern. NSAGs have justified their deliberate destruction of heritage on the basis of the alleged prohibition of “idolatry” in Islam, and have removed the content of the Islamic sources from their historical and political context in order to further their military agenda. Thus, while this article’s selection of Islamic texts depicts the Islamic tradition as congruent with international norms, the same sources are also being used to violate international norms. In the words of Evans, religion is a “double-edged sword” since it can both undermine and support humanitarian law. Upon reflecting on the accommodation of religious teachings to promote cross-cultural dialogue, the risk of (mis)interpretation raises the reasonable question of whether, once religion is used to support certain IHL rules, it may also be used to undermine others. Religion remains a “powerful weapon that should not be left to those who advocate violence in its name”. To this end, dialogue is possible – and even necessary – to the extent that the harm inflicted in the name of religion can be countered by a “pragmatic partnership between people of good will working together from both religious and legal perspectives”.

**Strengthening legitimacy and compliance**

The aforementioned risk of religious (mis)interpretation is inevitably diminished by codified treaties of international law with identifiable consenting States Parties. However, this clarity and legal certainty must be balanced against the lack of ratification of relevant treaties and protocols. States remain the primary actors of international law, and only States can become parties to international treaties. The very terminology of “non-State actors” or “non-State armed groups” reasserts the centrality of States. However, contemporary dynamics have blurred the contours of the international scene and prompt us to challenge this positivistic approach to international law. The only visible attempt to depart from the State-centric approach in relation to the protection of cultural heritage came through the 2003 Convention. Nonetheless, well-established institutions such as

---


101 Ibid., p. 32.

102 Ibid., pp. 28–29.
UNESCO—a focal point for the implementation of the protection of cultural heritage—are unable to engage directly with NSAGs because of entrenched restrictions within their mandate, or political limitations. Unfortunately, the change in narrative towards a community-centred approach has not been accompanied by effective structural changes.

On the other hand, one can appreciate that Islamic law has more potential to strengthen legitimacy and compliance than international conventions to which NSAGs cannot become party and which usually offer limited protection in contemporary armed conflicts in Muslim contexts. Indeed, the peculiarity of the Islamic legal tradition lies in its spiritual foundation, which includes rules on worship, belief and morality. Islamic law is a self-imposed system of law, meaning that compliance with its regulations is perceived as an act of worship for Muslims. Not only does this reinforce the fundamental aspect of intangibility as a core tenet of Islamic law, but this characteristic of Islamic law equally facilitates engagement with NSAGs.

Furthermore, echoing the pattern of World Heritage Site destructions, international law can be criticized for embodying Western values to the exclusion of Islamic traditions. According to Bennoune, “one of the greatest problems facing both IHRL and IHL is that they are considered to be Western concepts, descended from Western values and inspired by the Judeo-Christian tradition alone”. Incorporating Islamic law into the international discourse can provide a partial solution to this issue. For Muslims, it adds moral legitimacy to the norms by recognizing them as part of one’s tradition rather being perceived as an outside imposition.

Towards reconciliation and harmonious interpretation

The reaction to the deliberate destructions in Muslim-majority States has often portrayed Islam as a threat to Western cultural values. The aforementioned Al Mahdi case has even been referred to as a “clash of civilisations”. Yet this article contends that this case could have provided the international community with the opportunity to engage in cross-cultural dialogue. Engaging with Islamic concepts, which could have potentially been raised as a defence by Al Mahdi, would not imply that the Court had to agree with such concepts. However, an inclusive approach would have come at a time when the ICC faced a defining

104 A. Al-Dawoody, above note 66.
105 K. Bennoune, above note 61, p. 641.
106 C. Evans, above note 100, p. 13.
moment for its legitimacy. Incorporating Islamic norms and principles could have overcome criticisms of the ICC as a “Western colonial institution with an anti-African bias”.109 Furthermore, seeking “additional attention on why cultural property is targeted by Islamist extremist groups is required in order to offer it better protection”.110 Closer engagement with the Islamic legal tradition would thus have been beneficial for bolstering respect for IHL and, due to its well-developed principles on safeguarding intangible cultural heritage, could have potentially conferred greater protection. Finally, despite the international community’s reluctance to incorporate Islamic rules and principles, the case would have countered extremist views of Islamic law and provided alternative interpretations in line with international law.111

Unfortunately, the opportunity to seek clarification on the subject from Islamic law experts was not seized by the Trial Chamber.112 This article has demonstrated that it is entirely possible to interpret Islamic law without compromising the fundamental norms of IHL and IHRL. The two legal systems should be seen not as incompatible, but as mutually reinforcing synergies.113 Since it has been established that both legal traditions have a similar logic and common aspirations, and that Islamic law can be interpreted in conformity with the rules of international law, solutions to legal and structural gaps in one system should be sought in the other. International institutions such as the ICC should be able to become platforms for dialogue, but such dialogue should not be exclusively left in the hands of the ICC—it can, and should, take place at many levels.114 It remains to be seen in the upcoming trial of the second Mali case to what extent the Court will be willing to engage with the Islamic legal tradition.115

Conclusion

The selective discourse of the international community in response to the deliberate destruction of cultural heritage in contemporary armed conflicts has predominantly focused on the material dimension. However, the intangible cultural heritage of local communities is potentially as imperilled as its tangible counterpart in situations of armed conflict. Yet, safeguarding intangible cultural heritage in wartime is only now emerging as a pressing issue on the international scene. This article has established

110 M. E. Badar and N. Higgins, above note 11, pp. 515–516.
111 J. Fraser, above note 109, p. 393.
112 M. E. Badar and N. Higgins, above note 11, pp. 515–516.
114 J. Fraser, above note 109, p. 394.
that the current international legal framework remains ill-equipped to address the destruction of cultural heritage in NIACs. By contrast, although there is no direct reference to “cultural heritage”, well-founded Islamic principles uphold the interconnectedness between the tangible and intangible components of cultural heritage. The integrated approach in the Islamic tradition to the rules regulating property in armed conflicts, combined with Islamic law’s compatibility with fundamental human rights, confers substantial protection to intangible cultural heritage. In order to enhance respect for the rules, it is essential for the relevant actors to take global authorship of the norms; establishing the Islamic legal tradition as a common ground would inevitably enhance dialogue with NSAGs and can be an effective tool for increasing NSAGs’ respect for the protection of cultural heritage in armed conflicts in Islamic contexts. Moreover, as a self-imposed system of law, the regime would avoid being perceived as an imposition of Western values, which is what NSAGs seem to reject based on the pattern of destruction of World Heritage Sites. Nonetheless, as a very rich and complex legal tradition, Islamic law’s nature renders it vulnerable to abuse and misuse. The international community has demonstrated a certain reluctance to engage in cross-cultural dialogue incorporating the Islamic legal tradition, mainly because the justifications for the deliberate attacks are allegedly grounded in that legal tradition. This article contends that, in the face of such polarized discussions, it is essential to bridge the discourses between IHL and Islamic law in order to find mutual reinforcement. Only a thorough understanding of Islamic legal rules and principles will avoid misinterpretations and enable Islamic law to grant the special protection that it affords to all manifestations of cultural heritage.
Armed escorts to humanitarian convoys: An unexplored framework under international humanitarian law

Annabel Bassil*
Annabel Bassil is a Junior Legal Adviser at Diakonia International Humanitarian Law Centre, based in Lebanon.

Abstract
The use of armed escorts to humanitarian convoys delivering humanitarian assistance potentially increases the targeting of these convoys, yet so far this use has not been examined from the perspective of international humanitarian law (IHL). This article attempts to determine whether the resort to armed escorts is in line with the principle of passive precautions under IHL, how the principle of proportionality could apply in cases of attack against the escort, and whether the convoy turns into a military objective when escorted. Finally, the article tackles the limitations of such a framework in order to define the situations it covers.

Keywords: international humanitarian law, humanitarian aid, humanitarian access, armed escorts, relief convoys.

* The views expressed in this article are the author’s own and do not necessarily reflect those of the organization with which she is affiliated.
Introduction

The legal framework on humanitarian assistance and humanitarian access is clear under international humanitarian law (IHL). When referring to relief actions, Additional Protocol I to the Geneva Conventions (AP I) implicitly defines humanitarian assistance as food, medical supplies, clothing, bedding, means of shelter, other supplies essential to the survival of the population, and objects necessary for religious worship.\(^1\) In occupied territory, the Occupying Power must supply such goods if the territory is inadequately supplied.\(^2\) Further, it must consent to the free passage of the goods.\(^3\) In all other cases, the delivery of relief consignments is subject to the consent of the State in an international armed conflict (IAC)\(^4\) and that of the High Contracting Party concerned in a non-international armed conflict (NIAC),\(^5\) and such consent cannot be withheld arbitrarily.\(^6\) In a NIAC, the consent of an armed group controlling or operating in the territory where the relief action is carried out may also be necessary from a practical point of view.\(^7\) Moreover, parties to the conflict must allow and facilitate rapid and unimpeded passage of relief consignments.\(^8\)

In practice, however, the delivery of humanitarian assistance is increasingly difficult in light of current concerns on humanitarian security.\(^9\) Faced with insecure environments of opportunistic criminality or targeting by a party to the conflict, humanitarian organizations have resorted to armed escorts from the military,

---

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. 69(1) applicable in occupied territories and Art. 70(1) applicable in non-occupied territories, which refers to Art. 69(1) for an enumeration of the objects it covers. See also Marco Sassòli, International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare, 1st ed., Edward Elgar, Cheltenham, 2019, p. 575.
3. GC IV, Arts 59, 61; AP I, Art. 69.
4. GC IV, Art. 23; AP I, Art. 70.
7. Ibid., p. 578. Also note that such consent would not confer any the legal status to the armed group: see, for example, Art. 3(4) common to the four Geneva Conventions.
United Nations (UN) peacekeeping missions, private military and security companies (PMSCs) and non-State armed groups.11 Yet, IHL is largely silent on the resort to armed escorts in the specific case of relief convoys. Only the Commentaries refer to an authorization to use these escorts in “zones where the control is disputed by the parties [when the relief organization] does not have the benefit of the protective emblem”.12 The Geneva Conventions expressly refer to the practice of armed escorts only in the context of medical units and establishments.13 In this context, the Commentaries define an escort as “a person, vehicle, or group accompanying another to provide protection”14 and to defend the medical unit or establishment “against attacks by rioters or pillagers and unlawful attacks by enemy soldiers, … or ensure the maintenance of order”.15

In the case of armed escorts to humanitarian convoys, various international organizations have provided non-binding guidelines. For example, the UN Inter-Agency Standing Committee (IASC) has issued a non-binding framework regulating the resort to armed escorts.16 According to these guidelines, armed escorts may only be used as an exception, in last resort, if four cumulative criteria are met: firstly, “[t]he level of humanitarian need is such that the lack of humanitarian action would lead to unacceptable human suffering”;17 secondly, “State authorities or local non-State actors are unable or unwilling to permit the movement of humanitarian supplies or personnel without the use of armed escorts”;18 thirdly, “[t]he armed escorts utilised are capable of providing a credible deterrent necessary to enhance the safety of the humanitarian

13 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. 22(2).
15 Ibid., para. 1874.
17 IASC, above note 16, p. 6.
18 Ibid., p. 6.
personnel”; and lastly, “[t]he use of an armed escort will not irreversibly compromise the humanitarian operating environment or the longer-term capacity of the organisation(s) to safely and effectively operate in the future”.\textsuperscript{19} In 1995, the International Committee of the Red Cross (ICRC) provided guidelines\textsuperscript{20} stating that the use of armed escorts is generally strictly prohibited, and it has maintained this position over time.\textsuperscript{21} In the same guidelines, the ICRC also took the view that such use shall be permitted only on an exceptional basis where “the refusal of such an escort would lead to the paralysis of humanitarian activities”.\textsuperscript{22} The guidelines also indicated that when permitted, the use of armed escorts should also respect the principles of humanity, independence, impartiality and neutrality.\textsuperscript{23} The guidelines further stressed that this use should consider cumulatively and as a minimum the pressing nature of humanitarian needs, the ability of the ICRC to fulfil those needs to the exclusion of alternative organizations, the security of the beneficiaries, the function of deterrent of the armed escort, the consent of the party or authority through which the convoy will travel to the passage of the convoy, and the nature of the actor against whom the escort is defending the convoy.\textsuperscript{24}

In spite of the existence of this non-binding framework, “in insecure contexts, the use of one-size-fits-all armed escorts for humanitarian actors often becomes the rule, instead of the exception”.\textsuperscript{25} Despite the risks\textsuperscript{26} that this use may entail, the legal framework on the resort to armed escorts protecting humanitarian convoys against targeting by a party to the conflict or opportunistic criminality remain largely unexplored. Hence the question: what is the legal framework regulating armed escorts to humanitarian convoys under IHL?

This article analyzes the rules applying to the parties to the conflict regarding the use of, or attacks against, armed escorts to humanitarian convoys, and the status of escorted convoys under the existing rules of IHL. It does not examine armed escorts to medical units and establishments because this practice is specifically regulated under Article 22(2) of Geneva Convention I (GC I).\textsuperscript{27} Due to space constraints, the article focuses on relief supplies of the convoy rather than the entire convoy, which usually also contains relief personnel. More specifically, the article argues that although IHL does not tackle the practice of armed escorts to humanitarian convoys expressly and specifically, the principle

\textsuperscript{19} Ibid., p. 6.
\textsuperscript{22} ICRC, above note 20.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{27} GC I, Art. 22(2).
of passive precautions, the principle of proportionality and the principle of distinction provide a legal framework for this practice. In arguing so, the article aims to analyze an unexplored angle of the protection of humanitarian aid.

**The protections afforded to escorted convoys under IHL**

The principle of passive precautions: A protection for escorted convoys rather than an obstacle to the legality of using armed escorts

Intuitively, armed escorts by a party to the conflict could qualify as a measure covered by Article 58(c) of AP I, as they protect humanitarian convoys from potential attacks. Indeed, Article 58(c) refers to “other necessary precautions to protect … civilian objects under [the party’s control] against the dangers resulting from military operations”. However, a closer look at the use of armed escorts can reveal that such escorts could themselves be contrary to Article 58(c) as they could qualify as military operations endangering civilian objects by increasing the risk that the convoys could be harmed as collateral damage. Thus, the question of whether the practice of armed escort by a party to the conflict is even allowed under IHL, given the application of the principle of passive precautions as interpreted below, is raised. Each element of the material scope of Article 58(c) is examined below to address this question.

Regarding the notion of military operations under Article 58(c) of AP I, “the use of the term ‘military operations’ rather than ‘attacks’ (as in the general rule) may well mean that subparagraph (c) applies to a broader range of activities” such as armed escorts. Some challenge this interpretation, arguing that “the scope of the application is no different, regardless of the different language used”. But this last interpretation is against the letter of Article 58(c) and the understanding in the Conventions of the notion of military operations, which are understood in their ordinary meaning in this provision as “all movements and acts related to hostilities that are undertaken by armed forces”. As such, the first interpretation should be retained, and armed escorts should fall under the notion of military operations as understood in Article 58(c).

---

28 AP I, Art. 58(c).
31 ICRC Commentary on AP I, above note 12, p. 600, para. 1875. The Commentary gives an additional definition of military operations as “the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat” (emphasis added) in the context of Article 3 of AP I: see *ibid.*, p. 66, para. 152. It can be argued that if used in this sense, the practice of armed escorts would not fall under the qualification of military operations because such escorts are not per se carried out with a view to combat. However, the definition given under the Commentary on Article 48 of AP I should be preferred when it comes to the protection of the civilian population as expressed under the Commentary itself: “this term is used in several articles in this Section … and it may be useful to refer to the commentary thereon”. See *ibid.*, p. 600, para. 1875.
As to the notion of danger, the application of this concept is unclear in the context of Article 58 of AP I. Its ordinary meaning refers to “the possibility of harm or death to someone”. As such, danger may be equated with a risk of a conduct arising from military operations, such as targeting in the case of armed escorts. This is supported in light of the temporal scope of Article 58, whereby passive precautions are to be taken before the actual attack occurs.

With regard to the notion of control, interpretations vary. On the one hand, Sandoz, Swinarski and Zimmerman interpret the notion of control as control over territory. On the other hand, Jensen asserts that the notion of control should be understood as control over persons or objects. In the case of escorted convoys, both thresholds overlap in practice. Indeed, escorting a convoy indicates that the escorting party has control over the delivery of the goods, as it is a modality of delivery that the party can accept, refuse or impose. Further, the party controlling the territory is the one consenting to this modulated delivery and providing the escort in the territory that it controls. Since both thresholds overlap, an escort other than the forces of a State that is a party to the conflict may also be considered as controlling the relief consignments in the sense of the customary rule equivalent to Article 58(c).

In light of the above, it can be argued that the use of armed escort constitutes in itself a dangerous military operation because it increases the risk that the convoy will be attacked as collateral damage. As such, this use can be contrary to Article 58(c), which requires that the parties to the conflict avoid military operations endangering civilians or civilian objects under their control. While this is true in IACs, difficulties can arise in NIACs. Indeed, the ICRC Customary Law Study identifies the obligation to take passive precaution as customary. This customary nature has further been clearly stated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Kupreskic case. However, the ICRC fully equates the scope of the customary rule with the treaty rule only in IACs. In NIACs, the scope is narrower in that the sole obligation of a party to the conflict is to take all feasible precautions to protect civilian objects under its control against the effects of attacks rather than the wider notion of military operations. In order to overcome this difficulty, it

32 E. T. Jensen, above note 29, pp. 61, 156.
35 ICRC Commentary on AP I, above note 12, p. 692, para. 2239.
37 ICRC Customary Law Study, above note 5, Rule 22.
38 Ibid., Rules 22–24.
39 ICTY, Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 524.
40 The customary nature of the obligation to avoid locating military objectives in densely populated areas can, however, be doubted: see M. Sassòli, above note 34, p. 78.
41 ICRC Customary Law Study, above note 5, Rule 22.
may be argued that the obligation of precautions is an overarching principle stemming from the obligation of constant care to “spare the civilian population, civilians and civilian objects” traditionally imposed on the attacker,\(^\text{42}\) which applies to a broader range of operations.\(^\text{43}\)

Nonetheless, it is flawed to consider that the principle of passive precautions expressed in Article 58(c) implies that each and every resort to armed escort by parties to the conflict is prohibited. Indeed, this obligation should be fulfilled to the extent of what is “reasonably practicable” or “practically possible”.\(^\text{44}\) There is a consensus that the assessment of the feasible measures is extremely context-dependent. It is “a matter of fact”\(^\text{45}\) that is assessed in light of the “circumstances ruling at the time”.\(^\text{46}\) Traditionally, this formulation is understood to allow for legitimate military requirements to be taken into account in the requirement of feasibility of the measures.\(^\text{47}\) Beyond this traditional understanding, however, humanitarian concerns may also play a role in the feasibility assessment. For example, the US Law of War Manual includes in the circumstances encompassed by the feasibility of passive precautions the humanitarian benefits arising from taking the precaution.\(^\text{48}\) In the case of armed escorts, taking the said precautionary measure consists in abstaining from escorting the convoy—but then the humanitarian benefit stemming from taking the precaution is null as the goods do not reach the population if targeted or harmed as collateral damage. The UK also takes the view that humanitarian considerations should be taken into account in the feasibility requirement.\(^\text{49}\)

Further, regarding the availability of “other viable alternatives”\(^\text{50}\) in order to assess the feasible character of a precaution, there are indeed alternatives to armed escorts. In practice, they include “cultivation of greater acceptance with local stakeholders, Parties to the Conflict and other relevant stakeholders, humanitarian negotiations, de-conflation arrangements, humanitarian pause, [and] humanitarian corridors”.\(^\text{51}\) The fact that armed escorts were resorted to after considering these kinds of alternatives may justify that taking passive precautions as encompassed under Article 58 was not feasible. This conclusion concurs with the requirements of the IASC non-binding framework, which insists on the use of armed escorts as a means of last resort, after the exhaustion of these available alternatives.\(^\text{52}\)

\(^{42}\) AP I, Art. 57.


\(^{44}\) W. H. Boothby, above note 36, p. 131.

\(^{45}\) Ibid., p. 132.

\(^{46}\) This interpretation is accepted by the Netherlands, the UK and “at least eight other States”: see E. T. Jensen, above note 36, p. 165. The United States is also included: see M. Sassoli, above note 34, p. 83.


\(^{49}\) W. H. Boothby, above note 36, p. 131.

\(^{50}\) G. Corn and J. A. Schoettler, above note 43, p. 830.

\(^{51}\) OCHA, above note 25, p. 62.

\(^{52}\) IASC, above note 16, p. 6.
In sum, in the author’s view, the practice of armed escort falls under Article 58(c) of AP I applicable in NIACs under Rule 22 of the ICRC Customary Law Study, and it violates this provision only when used in a systematic manner, without considering alternatives. As such, Article 58 does not constitute an obstacle to the legality of the use of armed escorts but rather sets strong requirements to their use. Those requirements further protect humanitarian convoys, in line with the existing non-binding framework addressed to organizations on the resort to armed escorts.53

Convoys stopped as a result of attacks on an armed escort which is a party to the conflict: Application of the principle of proportionality

When an armed escort to a humanitarian convoy is attacked, the convoy might be incidentally damaged, stopped from proceeding, or both if partially damaged. Considering the reverberating effects on the civilian population of the attack on the escort is essential for assessing the lawfulness of the attack.

Taking into account the reverberating effects on the civilian population of an attack on the armed escort is especially relevant when the convoy is incidentally halted. This is because contrarily to incidental destruction of relief supplies,54 incidental halting of a convoy is not necessarily covered by the prohibition on the use of starvation of the civilian population as a method of warfare.55 Indeed, the halting does not constitute an attack on, destruction of or removal of objects indispensable to the civilian population in the sense of the prohibition. In some cases, relief supplies could fall under the scope of the prohibition because they are rendered useless—for example, foodstuffs may perish because of the prolonged incidental halting of a convoy. Outside such cases, the incidental halting does not fall under the specific prohibition against attacking, destroying, removing or rendering useless objects indispensable to the civilian population. Neither does it fall under the general prohibition on starvation of the civilian population because it is the consequence of an attack that is purported to pursue a military advantage.56

53 It is interesting to note that this reasoning based on passive precautions applied to armed escorts to humanitarian convoys is also coherent with the way in which escorts must be used in other contexts, such as medical units. In the context of medical units, armed escorts shall be resorted to in exceptional circumstances. Moreover, the resort to armed escorts is subsidiary in that it only occurs when the lightly armed medical personnel are not sufficiently numerous to ensure the protection of the medical unit or where the medical personnel are not armed. Further, the use of force must be made for defensive purposes. Lastly, the escort may not use heavy weapons. The Commentary on GC I also specifies that the armed escort must have been assigned to guard the medical unit to the exclusion of any military objective surrounding it. See ICRC Commentary on GC I, above note 14, para. 1874.

54 Article 54(2) of AP I prohibits the destruction of such goods “whatever the motive”. Although Article 14 of AP II is drafted differently, a similar reasoning applies. See ICRC Commentary on AP II, above note 12, para. 4807; ICRC Customary Law Study, above note 5, Rule 54.

55 AP I, Art. 54; AP II, Art. 14; ICRC Customary Law Study, above note 5, Rule 54.

Moreover, when the convoy is halted, the obligation to facilitate the unimpeded passage of the convoy still applies.\(^{57}\) Provided that this obligation also applies to the attacking party,\(^{58}\) it may be questioned whether the incidental impediment of the passage of the convoy by the attack is in breach of the obligation. Indeed, Article 70(2) of AP I does not specify the type of impediment covered by this rule. The Commentaries refer to administrative impediments, denial of access and harassment as illustrations,\(^{59}\) and customary IHL requires the impediment to be “deliberate”.\(^ {60}\) As such, with the purpose of an attack on the escort being the pursuit of a military advantage, one may wonder whether the incidental impediment falls under the obligation to facilitate the unimpeded passage of the convoy, at least under the customary rule and potentially under the treaty rule.

Because the incidental halting is covered neither by the prohibition on starvation nor the impediment of the passage of the convoy, correctly assessing the proportionality of the attack on the escort by considering its reverberating effects on the civilian population is extremely important. The proportionality rule applies to an attack, in the sense of an “act of violence against the adversary, whether in offence or in defence”,\(^ {61}\) against a legitimate target escorting a humanitarian convoy. If the convoy is merely stopped because of an attack on an escort, it appears that it does not fall under the scope of Article 51(5)(b) of AP I because there is no “loss of life, injury to civilians, damage to civilian objects, or a combination thereof”.\(^ {62}\) However, this conclusion is flawed as it does not take

---

57 See GC IV, Art. 23 on the free passage of specific consignments; GC IV, Art. 59 on the obligation to permit free passage of supplies on their way to occupied territories and guarantee their protection; AP I, Art. 70(2) on the obligation to facilitate unimpeded passage of relief consignments; and ICRC Customary Law Study, above note 5, Rule 55 as the latter’s customary equivalent.

58 Strictly speaking, the Commentary on Article 70(2) of AP I envisages the addressees of the obligation as the signatories of AP I who control a territory through which the relief supplies are passing (ICRC Commentary on AP I, above note 12, paras 2824, 2828). It is silent on the impediment of humanitarian aid by a State Party in another State Party’s territory through means other than direct attacks on the supplies—these attacks are already covered by other rules of IHL. In the case of an attack on an armed escort to a humanitarian convoy, it may be that a party to the conflict is impeding the passage of the convoy in another State Party’s territory without directly attacking the consignments. If it is considered that the attacking party is not an addressee of the obligation to facilitate the unimpeded passage of the convoy because it does not control the territory where the relief action is taking place, this would lead to absurd results. In addition, the letter of Article 70(2) refers to “Parties to the conflict” and “Each High Contracting Party”. This wording, combined with an interpretation of the provision in good faith, would lead to the inclusion of this attacking party as an addressee of this provision. This interpretation in good faith also applies to Rule 55 of the ICRC Customary Law Study, above note 5, which refers to the facilitation of the unimpeded passage of relief consignments by the parties controlling the areas through which the supplies are passing. Article 59 of GC IV applicable in situations of occupation is interpreted more broadly in the Commentaries and refers to “states concerned” without specifying whether they are those through which relief supplies are passing. See 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, p. 321.

59 See ICRC Commentary on AP I, paras 2805, 2829.

60 ICRC Customary Law Study, above note 5, Commentary on Rule 55.

61 AP I, Art. 49.

62 Ibid., Art. 51.
into account the actual harm to civilians caused by the halting of the transportation of the objects concerned. This harm is reflected in the reverberating effects of the attack, which are those that are not directly and immediately caused by the attack but are nevertheless the product thereof.63 The author examines an application of the reverberating effects doctrine in the following paragraphs.

On the side of the expected military advantage to be gained, this advantage is the annihilation of the armed escort.64 If the attacking party seeks the advantage of stopping the convoy, this advantage is merely political, as part of the politicization of humanitarian aid.65 The military advantage remains the annihilation of the escorting party, and even this small military advantage can render the attack lawful where only minimal incidental harm to property is expected.66 Moreover, the context of the conflict may change the value of the military advantage.67 In a highly asymmetric conflict, a few soldiers may have a higher value as a military advantage to the weaker party, such as a non-State armed group, than the same amount of escorting military in another context.68

On the side of the incidental harm, the attacker should take into account the reverberating effects of the attack on the civilian population. In contemporary practice, the question of reverberating effects in the proportionality assessment has been posed *inter alia* in the case of the use of explosive weapons in urban areas,69 cyber warfare70 and the targeting of dual-use objects71 because of the interconnectivity of the military objective with the civilian infrastructure incidentally harmed. This question is controversial in multiple aspects, but the controversy can be mitigated when applied to convoys incidentally halted by an attack on the armed escort.

First, on the very existence of an obligation to take those effects into account, the proponents of this obligation emphasize that the use of “the qualifiers ‘expected’ and ‘incidental’ do[es] not limit the relevant incidental harm to direct effects only, unlike the relevant military advantage which must be ‘concrete and direct’”.72 Moreover, they also hold that the purposive interpretation of Article 51(5)(b) of AP I leads to the inclusion of indirect effects

64 The author retains the definition of a military advantage as annihilating or weakening enemy forces. See ICRC Commentary on AP I, p. 685, para. 2218.
72 L. Gisel, above note 66, p. 44.
in the proportionality assessment\(^73\) and provides for a legal basis to this obligation.\(^74\) By contrast, opponents of this obligation argue that as the anticipated military advantage must be concrete and direct, so must the expected incidental harm. To them, only the direct effects of the attack on civilian objects or the civilian population must be taken into consideration in the proportionality assessment.\(^75\) To this author, the fact that States increasingly accept the need to factor reverberating effects into the proportionality assessment\(^76\) strengthens the argument in favour of the existence of such an obligation.

The temporal and geographical scope of this obligation is less controversial. The *travaux préparatoires* of AP I indicate that States explicitly rejected the attempts to limit incidental harm to the areas surrounding the military objective.\(^77\) Similarly, there is no requirement that the effects be limited in time.\(^78\) Consequently, “provided that the harm falls into one of the categories identified in Additional Protocol I, the geographic or temporal proximity of the harm to the attack is not determinative”.\(^79\) This means that even an injury taking place away from the location of the attack on the armed escort and not immediately after the attack can be factored into the proportionality assessment.

Further, regarding the material scope of application of the obligation, the most controversial issue is the fact that the incidental harm expected from the reverberating effects of the attack must be foreseeable. It is particularly difficult to determine whether the effects accounted for should be restricted to those brought about in one causal step. Some argue that “the number of causal steps between the attack and the harm” is not determinative.\(^80\) However, others opine that this relationship is limited to one causal step.\(^81\) This aspect of the controversy can be mitigated in the case of a humanitarian convoy stopped as a result of an attack on an armed escort to the convoy. Indeed, contrarily to objects targeted in cyber warfare and urban warfare, and to dual-use objects for which reverberating effects are traditionally discussed, a humanitarian convoy is not integrated into an extensive network of services for the civilian population. When a humanitarian convoy is stopped as a result of an attack on the escort, the deprivation of humanitarian assistance already brings the injury in one causal step, although it

---


\(^76\) L. Gisel, above note 66, p. 44.

\(^77\) Ibid., p. 44.

\(^78\) I. Henderson, above note 75, p. 128.


\(^80\) Ibid., p. 18.

\(^81\) L. Gisel, above note 66, p. 47.
may occur later in time. In addition, in many cases, the population in question is already inadequately supplied with essential goods, to the extent that the injury is probable. For example, the deprivation of food supplies likely leads to hunger, especially if the civilian population is food insecure. If hunger is an injury within the meaning of Article 51(5)(b) of AP I, it should not be excessive in relation to the military advantage.

Hence, the consequences of stopping the convoy are more directly foreseeable than those arising in a complex network of essential services. This mitigates the traditional controversy surrounding the foreseeability of reverberating effects. In other terms, when humanitarian convoys are incidentally halted, it is the delineation of the notion of injury brought about in the first causal step that would narrow down the foreseeability criteria. By contrast, in the case of attacks on essential services integrated into a complex network, it is the question of the number of causal steps which defines the contours of the notion.

Moreover, with regard to foreseeability, opponents of the obligation to take into account reverberating effects of attacks argue that “there are too many potential variables outside of the attacker’s control that make it practically impossible to consider these effects as ‘expected’.” Among those, the willingness of the enemy to repair the harm may arise in the case of a humanitarian convoy incidentally halted as a result of an attack on the armed forces escorting it. Even some of the proponents of such a doctrine have expressed that this willingness is relevant in the assessment. However, this issue is controversial; it does not have a clear answer. To answer these concerns, the author suggests that the politicization of humanitarian aid comes into play to infer the willingness of the enemy to mitigate the effects of an attack on an armed escort to a humanitarian convoy. For example, a pattern of denial of access to humanitarian aid may indicate a lack of willingness on the part of the attacker to mitigate the reverberating effects of an attack in the future.

82 Most provisions on humanitarian assistance reflect this reality: see, for example, AP I, Art. 70(1); AP II, Art. 18; GC IV, Art. 59.
83 The standard of foreseeability in considering this first causal step remains open. Even proponents of the obligation to account for reverberating effects in the assessment of proportionality disagree on this meaning. In particular, the different interpretations of foreseeability vary from likelihood, probability and reasonable causality to a subjective criteria consisting of an open inquiry or even a criteria encompassing effects which would not have happened but for the attack. See L. Gisel, above note 66, pp. 118–119. This author interprets the notion of “expected” in Article 51(5)(b) of AP I as “likely” or “probable” because this is the ordinary meaning of the concept. As such, it is not necessary to be able to trace back the injury to the civilian population to the specific incidental halting of the convoy in question.
84 As previously examined, this deprivation is not necessarily covered by the prohibition on starvation of the civilian population, if the food supplies are not yet rendered useless in the sense of the prohibition for instance.
85 L. Gisel, above note 66, p. 44. Here, a difficulty that remains is that in an attack of opportunity, the attacker of the escort to the convoy may not know the nature of the specific consignment being transported and may thus be unable to correctly assess the reverberating effects on the civilian population. This is a shared difficulty with the traditional debate surrounding reverberating effects of attacks on the civilian population.
86 Ibid., p. 49.
87 Ibid., p. 49.
Furthermore, there is a strong tendency against “the idea that humanitarian assistance [as a mitigating measure] could be viewed as broadening the possibilities of attack”. The author agrees with this statement. In the case of a humanitarian convoy, the fact that the attacker of its escort is aware that the relief convoy is not the only relief convoy destined to civilians or sends another convoy instead to compensate for the reverberating effects of the attack cannot create an open door for collaterally impeding humanitarian assistance. Similarly, the fact that the attacker expects the convoy to be halted only temporarily, or that the attacker knows that the other party is also under an obligation to facilitate the unimpeded passage of the convoy after the attack on the escort, cannot open such a door.

A final difficulty which may arise is that it is controversial whether the obligation to account for reverberating effects in the proportionality assessment is present when the assessment is undertaken under the customary rule of proportionality. However, practice is evolving in this direction.

All in all, without solving the question of reverberating effects in abstracto, this author suggests that the specific case of humanitarian convoys incidentally stopped from proceeding offers an opportunity for the application of the reverberating effects concept, and does not pose the same controversial questions on the matter as those arising from contemporary practice regarding cyber warfare, explosive remnants of war and the targeting of dual-use objects. As such, it is an avenue for enhancing the protection of humanitarian convoys and correctly assessing the proportionality of an attack against an armed escort which is a party to the conflict.

It appears that a categorization of the nature of the collateral damage would operationalize the criteria of foreseeability. Approaches to classifying the reverberating effects depending on the nature of the objects surrounding the attack have been made in the area of the use of explosive weapons. While for civilian lives such an approach could “lead to a slippery slope towards considering that the lives of some civilians ‘weighed less’”, these ethical considerations are less strong for objects. Further, this approach is in line with the principle of humanity underlying IHL.

88 Ibid., p. 51.
89 In addition, the obligation that the passage of the convoy remains unimpeded is an obligation of means that the other party may be considered as having fulfilled after the attack in light of security concerns, for example. See ICRC Commentary on AP I, above note 12, para. 2829. As such, the attacking party may not even have certainty that the convoy would be halted only temporarily.
90 I. Robinson and E. Noble, above note 73, p. 116.
92 L. Gisel, above note 66, p. 61.
93 Ibid., p. 61. See also I. Henderson, above note 75, p. 192.
94 ICTY, Kupreskic, above note 39, para. 524.
Attacks on convoys: The status of escorted convoys under IHL

In practice, humanitarian convoys are targeted in order to prevent access of the relief consignments into enemy-controlled areas, for instance.\textsuperscript{95} In addition, in the specific case of the use of armed escorts, humanitarian convoys are at higher risk of being targeted due, \textit{inter alia}, to confusion as to the impartiality of humanitarian organizations vis-à-vis the parties to the conflict.\textsuperscript{96}

Yet, IHL is clear on the fact that humanitarian relief objects must be respected and protected.\textsuperscript{97} Contrary to medical units,\textsuperscript{98} however, humanitarian convoys are not specially protected under IHL. For targeting purposes,\textsuperscript{99} relief objects are considered civilian objects protected under Article 52 of AP I and Rule 7 of the ICRC Customary Law Study.\textsuperscript{100} Consequently, relief objects cannot be targeted unless they turn into military objectives.

When relying on the applicable targeting rules, it appears that the mere presence of the armed escort is not sufficient to turn the convoy into a military objective. Formally, the aid is no longer perceived as neutral when escorted by a party to the conflict because the relief convoy does not maintain “an absolute distance from the different parties to the conflict”.\textsuperscript{101} For targeting purposes, however, what matters is whether this situation is more than an absence of formal neutrality and rather a situation falling under Article 52 of AP I. In the case of escorted humanitarian convoys, the most relevant situation in which the relief objects would turn into a military objective would be a \textit{use} of these convoys which fulfils the requirements of Article 52 and its customary equivalent. For example, the mixed transport of weapons along with humanitarian assistance and the case of diversion of humanitarian goods to combatants could amount to such a use.

As such, humanitarian convoys remain protected under IHL,\textsuperscript{102} even when joined by an armed escort: they must be respected in that they may not be attacked unless they fulfil the requirement of a military objective under Article 52 of AP I. The mere presence of the escort does not automatically lead to the convoy’s fulfilment of those requirements.

\textsuperscript{95} For example, in Syria. See UN Security Council, \textit{UN Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into the Incident involving a Relief Operation to Urum Al-Kubra, Syrian Arab Republic on 19 September 2016}, UN Doc. S/2016/1093, 21 December 2016, para. 19.
\textsuperscript{96} For example, in Nigeria. See OCHA, above note 25, p. 163.
\textsuperscript{97} ICRC Customary Law Study, above note 5, Rule 32.
\textsuperscript{98} GC I, Arts 19, 21.
\textsuperscript{100} ICRC Customary Law Study, above note 5, Commentary on Rule 32.
\textsuperscript{102} ICRC Customary Law Study, above note 5, Rule 32.
The limits to the protections afforded to escorted humanitarian convoys under IHL

It is essential to identify some limitations that could nuance the application of the framework identified in the present article. First, the definitions of armed escorts laid out in both the Commentary to GCI, in the specific context of medical units, and the UN Office for the Coordination of Humanitarian Affairs (OCHA) Civil-Military Coordination Field Handbook state that the escort has a defensive function. According to the latter, armed escorts are a “security measure that serves as a visible deterrent to a potential attack and, if necessary, acts in self-defence against an attack”.103 In the author’s view, the fact that a non-State armed group or the armed forces of a State which is a party to the conflict escorting the convoy is acting in defence of the convoy against an attack on the convoy from another party to the conflict or in self-defence against an attack on their person may lead to the question of whether the law enforcement paradigm instead prevails. In addition, the nature of some escorting parties, such as peacekeeping missions and PMSCs, may beg similar questions. Lastly, regardless of the nature of the escort, some situations other than an attack against the escort or against the convoy would also exclude the application of an IHL framework. This is the case with opportunistic criminality by an organized armed group against the convoy or the resort to an escort to resist searches of the convoy.

Non-State armed groups or armed forces of a State acting in self-defence or in defence of the convoy against attacks by another party to the conflict

From the perspective of the armed escort, the first question to highlight is whether this “security measure” amounts to a military operation against which the convoy under its control should be protected to the maximum extent feasible as per Article 58(c) of AP I, or to a law enforcement operation subject to the law enforcement paradigm as a paradigm which “continues to govern all exercise by parties to the conflict of their authority or power outside the conduct of hostilities”.104 The answer to such a question is not necessarily clear-cut. On the one hand, the resort to the armed escort clearly occurs in the context of the conduct of hostilities, because it is an attempt to protect the convoy from the effects of such hostilities. In addition, as previously explained, provided that the convoy remains a civilian object, if used systematically, the practice of armed escorts may in itself violate Article 58(c) because it qualifies as a military operation endangering the civilian convoy in the sense of this provision. Moreover, “the resort to means and methods of warfare between parties to an

103 OCHA, above note 25, p. 6.
armed conflict is governed by the legal paradigm of hostilities even if the ultimate purpose of [the] military operations is to maintain, restore, or otherwise impose public security, law, and order.\textsuperscript{105} On the other hand, however, it remains uncertain whether the resort to an armed escort qualifies as a method of warfare in that while it may contribute to the war effort, it does not necessarily directly or actually inflict harm on the enemy.\textsuperscript{106} Lastly, these uncertainties may be strengthened if the escorting party is a non-State armed group, since whether or how the law enforcement paradigm applies to such groups is controversial.\textsuperscript{107}

The same question regarding the applicable paradigm from the perspective of the escort—who can be targeted given their status as armed forces of a State or non-State armed group which is a party to the conflict—arises in cases of the use of armed force in self-defence against an attack on their person by the other party to the conflict. In the author’s view, the defensive reaction of the escort can be qualified as conduct of hostilities because of the pre-existing conflict; the fact that, at least from the perspective of the attacker, the attack occurs in the context of the conduct of hostilities; the definition of “attack” in IHL as potentially occurring not only in offence but also in defence;\textsuperscript{108} and the fact that the escort actually and directly inflicts harm\textsuperscript{109} on a legitimate target\textsuperscript{110} who is a party to the conflict.

Similarly, in the author’s view, in cases of the use of force in defence of the convoy by the military or an armed group which is a party to the conflict against an attack on the convoy which is unlawful, the unlawful character of the attack does not affect the prevailing paradigm for such a use of force on both the attacker and the escort’s side. Indeed,

in practical terms, the conduct of hostilities certainly includes all attacks, that is to say, offensive or defensive operations involving the use of violence against the adversary, whether (lawfully) directed against legitimate military targets or (unlawfully) against protected persons or objects.\textsuperscript{111}

Application of the IHL framework to peace forces

Peace forces often have a mandate to protect civilians.\textsuperscript{112} In this context, they use force in “defence of the mandate”\textsuperscript{113} with a gradual response ranging from

\textsuperscript{105} Ibid., p. 75 (emphasis added).
\textsuperscript{106} Ibid., p. 72.
\textsuperscript{108} AP I, Art. 49.
\textsuperscript{109} Or at least affects its military capacity—see N. Melzer and G. Gaggioli, above note 104, p. 74.
\textsuperscript{111} N. Melzer and G. Gaggioli, above note 104, p. 73.
\textsuperscript{113} Ibid., para. 128.
deterrence, such as resorting to armed escorts, to direct confrontation when civilians are at risk.\footnote{Ibid., para. 128.} When peace forces are escorting humanitarian convoys in situations of armed conflict, questions related to the applicability of the IHL framework delineated in the present article may arise.

One may wonder how UN peace forces may be bound by the principle of precautions as interpreted in the present article. The now widely cited Secretary-General’s Bulletin on “Observance by United Nations Forces of International Humanitarian Law” famously sets the engagement of UN forces in armed conflicts as combatants as a prerequisite for the application of the fundamental principles and rules of IHL.\footnote{Secretary-General’s Bulletin, “Observance by United Nations Forces of International Humanitarian Law”, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 1.} Those principles include the obligation to protect the civilian population from the dangers resulting from military operations.\footnote{Ibid., Section 5.4.} Given the lack of a clear definition\footnote{Mathew Happold, “Comment: Obligations of States Contributing to UN Peacekeeping Missions under Common Article 1 of the Geneva Conventions”, in Heike Krieger (ed.), Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region, Cambridge University Press, Cambridge, 2015, p. 369.} of the situations in which peace forces are engaged as combatants,\footnote{Which may be the case even in non-forcible peacekeeping mandates: see S. Tully, above note 11, p. 26.} it is difficult to assess whether the Bulletin can serve as a legal basis to infer that peace forces should avoid the systematic use of armed escorts. A more solid legal basis would be Article 1 common to the four Geneva Conventions, which the updated Commentary of 2016 interprets as imposing an obligation on national contingents put at the disposal of international organizations to respect and ensure respect for IHL in the same way as States, to the extent that the organization retains command and control over the operation.\footnote{ICRC Commentary on GC I, above note 14, para. 140. See also Eve Massingham and Annabel McConnachie, “Common Article 1: An Introduction”, in Ensuring Respect for International Humanitarian Law, 1st ed., Routledge, London, 2020, pp. 1–11.} In that sense, and if peace forces can be considered as a party to the conflict,\footnote{M. Sassòli, above note 1, p. 471. On criteria for the support-based theory, see Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, International Review of the Red Cross, Vol. 95, No. 891–892, 2015, p. 584.} the same question as to whether the escorting operations falls within the purview of Article 58(c) of AP I under the conduct of hostilities paradigm which arises for State forces escorting a convoy can be posed here. An additional difficulty is that the principle of passive precautions would apply as matter of customary law, which is not the same in IAC as in NIAC, as previously examined.

Moreover, if peace forces are a party to the conflict and are considered legitimate targets, in case of a use of force in self-defence or in defence of the convoy, the same questions as those that arise for parties to an armed conflict can be raised here \textit{mutatis mutandis} and answered accordingly. Moreover, an additional layer from the attacker’s perspective compared to the armed forces of a State or a non-State armed group that is party to the conflict escorting the convoy is whether the attack falls within the conduct of hostilities or not if UN

\begin{footnotesize}
\begin{itemize}
\item \footnote{Ibid., para. 128.}
\item \footnote{Secretary-General’s Bulletin, “Observance by United Nations Forces of International Humanitarian Law”, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 1.}
\item \footnote{Ibid., Section 5.4.}
\item \footnote{Which may be the case even in non-forcible peacekeeping mandates: see S. Tully, above note 11, p. 26.}
\item \footnote{M. Sassòli, above note 1, p. 471. On criteria for the support-based theory, see Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, International Review of the Red Cross, Vol. 95, No. 891–892, 2015, p. 584.}
\end{itemize}
\end{footnotesize}
peace forces are not considered legitimate targets. If not, it means that the obligation to consider the reverberating effects of the attack does not apply to the attacker since the attack does not even fall under the conduct of hostilities paradigm.

Application of the IHL framework to private military and security companies

When considering attacks on convoys, the central question is whether the a priori unlawful character of the attack against the civilian convoy gives rise to the application and precedence of the conduct of hostilities paradigm or not. When PMSCs guard or defend a civilian object against unlawful attacks, they are considered as not directly participating in hostilities because the defensive reaction lacks a belligerent nexus. Therefore, it appears that a PMSC escorting a humanitarian convoy generally does not need to respect Article 58(c) of AP I as interpreted in the present paper, since it does not prevail in the first place. However, this author has examined the conditions under which humanitarian convoys turn into military objectives, which are scarce but do exist. As such, it is not always a given that the attack against a humanitarian convoy is not legitimate and therefore that the PMSC is defending the convoy in self-defence. In light of this, a PMSC might be precluded from systematically escorting humanitarian convoys under Article 58(c) through the obligation of States—as parties to the conflict—to ensure respect for IHL, national laws and their contract.

When an attack on the escort falls under the conduct of hostilities paradigm, difficulties which blur the application of the IHL framework considered in the present article arise. PMSC members may not know that the convoy has turned into a military objective and thus that the practice of armed escort falls under the conduct of hostilities paradigm. Moreover, the fact that PMSC members are in the vicinity of a convoy which has turned into a military objective does not mean that they are legitimate targets. Yet, this assessment is crucial to the attacker even before envisaging the proportionality principle considered in the present article. In light of such uncertainties, this author agrees with Sassòli that PMSC staff should not be put in such ambiguous situations, in order to enhance protection surrounding humanitarian access.

121 M. Sassòli, above note 1, p. 551.
123 Ibid., p. 467.
124 Ibid., p. 262.
125 Ibid., p. 264.
126 M. Sassòli, above note 1, p. 552.
127 L. Cameron and V. Chetail, above note 122, pp. 467, 432. On the status of PMSCs, see ibid., p. 386. It is also worth noting that the presence of a PMSC in the vicinity of the convoy does not per se turn the convoy into a military objective.
128 M. Sassòli, above note 1, p. 552.
129 Even when paradigms other than the conduct of hostilities prevail, uncertainties arise as to whether a right to self-defence would be granted to private individuals, and whether such a right would also be granted
Looting convoys and convoys resisting searches

The nexus requirement has been understood to require that a conduct took place “in the context of and was associated with” an armed conflict. In the author’s view, when a convoy is halted and looted by a party to the conflict in order for it to proceed further into the territory under that party’s control, the belligerent nexus is sufficiently clear and the situation falls under the conduct of hostilities paradigm: it is covered by Rule 32 of the ICRC Customary Law Study, and if force is used by the escort in order to proceed, that force needs to comply with IHL. However, when the convoy is looted as a result of opportunistic criminality by an organized armed group, the conduct lacks a belligerent nexus, it is covered by international human rights law and domestic law, and the force used by the escort as a result must comply with the law enforcement paradigm. This is clear when the armed escort is comprised of State military forces. However, in a NIAC, where a non-State armed group which controls a territory requires members of its own group to escort a convoy which is then looted by an organized criminal group, the situation might not be as clear-cut. Indeed, the position according to which “the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their de facto control is inherently linked to the conflict in question” has been put into question and can be opposed to the position where an armed group acting against ordinary criminals lacks a belligerent nexus.

Regarding escorted convoys resisting searches, the use of an armed escort does not indicate an intent to resist a search of the consignments to which the parties are entitled. This is supported by the fact that the arrival of the relief consignments is anticipated. Indeed, in both IACs and NIACs, technical arrangements may be concluded between the parties concerned. Lattanzi notes:

Concrete modalities for carrying out relief activities are left in the hands of impartial organizations, albeit under a certain level of supervision by the state concerned and any non-state entity, sometimes in accordance with special agreements between states/armed groups and relief personnel.


131 E. Pothelet, above note 130.

132 See GC IV, Art. 59; AP I, Art. 70; ICRC Customary Law Study, above note 5, Rule 55.

These agreements may include the requirement not to be escorted.\(^{136}\) Therefore, the parties concerned already consent to the armed escort. When a party did not consent to an armed escort—in such arrangements, for instance—it may indicate an intent to resist search, but such resistance triggers at best a denial of entry and “raise[s] suspicion and may justify the use of force according to a law enforcement paradigm”.\(^{137}\)

**Conclusion**

Far from offering a one-size fits all solution, this article has aimed to explore the framework for armed escorts to humanitarian convoys under IHL because they may be at higher risk of being damaged or halted due to attacks by a party to the conflict on the convoy or on the escorting party. To this end, the author has analyzed whether resorting to armed escorts is in line with the principle of passive precautions, by which the escorting party may be bound. Further, this article has suggested that the proportionality assessment of attacks on the escort from a party to the conflict halting the convoy should take into account the reverberating effects of the attack on the civilian population. Lastly, this article has confirmed that the presence of an armed escort does not necessarily turn the escorted convoy into a legitimate target. As such, this observation clarifies how to assess current attacks on humanitarian convoys—caused, for instance, by a perceived lack of impartiality of the humanitarian organization supplying humanitarian assistance. This author has also defined the limitations of this framework in order to identify the situations that it covers, given the diversity both of the actors escorting the convoy, which range from the military to PMSCs, and of the use of force against the convoy, which can range from attacks to organized crimes. In doing so, the author hopes to shed some light on a novel and important aspect of the protection of humanitarian aid under IHL. This article will hopefully foster further reflections both on the legal implications of the practice of armed escorts to humanitarian convoys and on the way in which these implications can be refined to meet the realities on the ground.

---

136 This is the case in the Democratic Republic of the Congo, where the rare humanitarian organizations that have access to the desired areas must be unescorted, pursuant to the requirements of non-State armed group commanders. See OCHA, above note 25, p. 163.
137 M. Sassòli, above note 1, p. 405 (emphasis added).
Greener insurgencies? Engaging non-State armed groups for the protection of the natural environment during non-international armed conflicts

Thibaud de La Bourdonnaye
Thibaud de La Bourdonnaye is a young professional specializing in international humanitarian law. He graduated summa cum laude from the LLM in international humanitarian law and human rights at the Geneva Academy of International Humanitarian Law and Human Rights in 2020. He also holds an LLM in public international law from Leiden University and a bachelor’s in international relations from the University of Geneva.

Abstract
As belligerent parties, non-State armed groups (NSAGs) contribute to environmental damage in non-international armed conflicts. Drawing from the actual practice and doctrine of NSAGs, this article unpacks the legal and policy framework for engaging them on the protection of the environment. It analyzes the international humanitarian law rules protecting the environment binding on NSAGs. To improve environmental protection, a model of environmental responsibilities under international human rights law and international environmental law based on the
NSAG’s level of territorial control is suggested, as a matter of policy. This article then explores how to engage NSAGs on the legal and policy framework identified and proposes a model unilateral declaration for the protection of the natural environment.

**Keywords:** environmental protection, environmental obligations, environment in armed conflicts, international humanitarian law, international human rights law, international environmental law, non-State armed groups, non-international armed conflicts, engagement, compliance, commitment.

**Introduction**

In addition to causing intense human suffering and destruction of infrastructures, armed conflicts may also lead to the degradation of the natural environment, which has been characterized as the “silent victim” of such situations. The adverse impact of armed conflicts on the environment became a serious concern with the Vietnam War. This conflict raised awareness due to the use of napalm and a herbicide known as Agent Orange, resulting in large-scale environmental damage.

Nowadays, the majority of armed conflicts are of a non-international nature. Under international humanitarian law (IHL), non-international armed conflicts (NIACs) are defined as

*protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups, arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organization*.

As belligerent parties to NIACs, non-State armed groups (NSAGs) may contribute to the “degradation, or even destruction, of parts of the natural environment,

---

1 The natural environment consists of “the natural world together with the system of inextricable interrelations between living organisms and their inanimate environment, in the widest sense possible". See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, Geneva, 2020 (ICRC Guidelines), p. 17, para. 16. The term “environment" is also used in this article.


6 Armed groups that are parties to a NIAC are called non-State armed groups (NSAGs). See ICRC, above note 4, pp. 2–3.
including animals, vegetation, soil, water systems and entire ecosystems”.\(^7\) In addition, serious humanitarian consequences can result from environmental damage, as it further increases the vulnerability of civilian populations already affected by NIACs.\(^8\) It is therefore essential to engage NSAGs in order to protect the environment and the conflict-affected communities dependent upon it. To this end, this article starts by exploring, in turn, the actual practice and doctrine of NSAGs in relation to the natural environment.

Building on the perspective of NSAGs, the following sections discuss the legal and policy framework for engaging them on the protection of the natural environment. The legal framework consists of the applicable IHL rules protecting the natural environment. Under the law of international responsibility, an NSAG is responsible for violating these rules, although the consequences of such violations remain unclear.\(^9\) At the least, an insurrectional movement that becomes the new government of a State is responsible for any violation of its international obligations attributed to it during the insurrection period.\(^10\) The article then highlights that NSAGs are increasingly seen as having certain non-binding responsibilities in addition to their legal obligations. Considering the need for greater environmental protection, the article proposes that as matter of policy, NSAGs should incur environmental responsibilities under international human rights law (IHRL) and international environmental law (IEL) according to their level of territorial control. Finally, recommendations on how to promote this legal and policy framework with NSAGs are provided. A model unilateral declaration for the protection of the natural environment in armed conflict is suggested as a potential way forward.

The natural environment from the perspective of non-State armed groups

Shaping the problem: Practices of non-State armed groups that are harmful to the environment during non-international armed conflicts

During NIACs, NSAGs damage the environment in a number of ways. First, the exploitation of natural resources has recently “attracted heightened international

---


\(^8\) Ibid.


attention mainly in its guise as a form of financing for [NSAGs]." 11 The United Nations Environment Programme (UNEP) notes that “at least forty percent of all [NIACs] over the last sixty years have a link to natural resources”, 12 and specifies that since 1990, at least eighteen civil wars have been fuelled by natural resources: diamonds, timber, oil, minerals and cocoa have been exploited in internal conflicts in countries such as the Democratic Republic of Congo, Côte d’Ivoire, Liberia, Sierra Leone, Angola, Somalia, Sudan, Indonesia and Cambodia. 13

Poaching and hunting may also constitute another source of financing for NSAGs. It has been reported that a range of NSAGs, including the LRA [Lord’s Resistance Army] and the Janjaweed, are significantly involved in elephant poaching in the Garamba National Park of north-eastern DRC [Democratic Republic of the Congo]. The evidence suggests that these groups are involved with the actual poaching of the animals, following which they trade the ivory for supplies and funds. 14

In addition, the LRA launched attacks inside the Garamba Park and killed park rangers. 15 These practices can result in the significant decline of wildlife populations. For example, during the 15-year civil war in Mozambique, the Gorongosa National Park lost more than 90% of its animals. … The elephant population declined from 2,000 to 200, as elephants’ meat was used to feed soldiers and their ivory sold to finance the purchase of weapons, ammunition and supplies. 16

The conduct of hostilities can cause significant environmental damage, in particular when it takes place in urban areas. 17 The use of explosive weapons in urban areas is notably concerning for the environment, as it “creates vast quantities of debris and…"
rubble, which can cause air and soil pollution”. In 2019, Action on Armed Violence “recorded 44 different non-State actors using explosive weapons”. The biggest non-State users of explosive weapons were the so-called Islamic State (IS), the Ukrainian separatists, the Taliban, the Houthi rebels and the Haftar forces. The prevailing category of explosive weapons used by NSAGs were improvised explosive devices, a large proportion of which were deployed in urban areas.

The use of landmines by NSAGs is also well documented. Between 2003 and 2004, “it was found that 60 armed groups allegedly used landmines in 21 countries”. In 2019, “Landmine Monitor identified new use of antipersonnel mines by NSAGs in Afghanistan, India, Myanmar, Nigeria, Pakistan, and Yemen”. The use of landmines is concerning for the environment; indeed, they have killed and maimed large numbers of specimens of wildlife and domestic species worldwide. Landmines set in motion a series of events leading to environmental degradation in the forms of soil degradation, deforestation, pollution of water resources with heavy metals and possibly altering entire species’ populations by degrading habitats and altering food chains.

Finally, certain tactics of warfare employed by NSAGs have caused varying degrees of environmental damage. The Revolutionary Armed Forces of Colombia have strapped bombs to donkeys or horses to conduct attacks. Serious environmental consequences resulted from the scorched earth tactic employed by IS when it was forced to retreat as the Iraqi forces, supported by an international coalition, advanced. In 2016, the group set ablaze nineteen oil wells near Mosul, creating vast toxic fumes which poisoned the surrounding environment and the local

population.\textsuperscript{27} Boko Haram uses Lake Chad’s “wetlands for shelter to launch attacks”\textsuperscript{,28} and

has resorted to using natural resources as a weapon and part of their strategy of violence. They have poisoned water sources such as wells and streams in areas where they were dislodged by state troops, making water use dangerous for both humans and livestock.\textsuperscript{29}

The doctrine of non-State armed groups: Guardians of the environment?

Doctrine refers to

all standard principles that guide the action of arms carriers at strategic, operational and tactical levels, independently of the forms these principles take. It therefore encompasses all directives, policies, procedures, codes of conduct, reference manuals and rules of engagement – or their equivalents – that serve to educate, train and guide arms carriers during their careers, giving them a common vocabulary and shaping the decision-making process, tactics and behaviour in operations.\textsuperscript{30}

The doctrine of NSAGs sheds light on their position regarding the environment. It allows us to understand the environmental rules that they have decided to adopt. Analyzing NSAG doctrine is also relevant for engaging these groups on the protection of the environment. When NSAGs share their doctrine externally, accountability for violations can be required. If the doctrine falls short of their environmental legal obligations, it still represents an entry point for engaging them on the adoption of standards consistent with applicable law.\textsuperscript{31}

The National Movement for the Liberation of Azawad (Mouvement National de Libération de l’Azawad, MNLA) has expressed a general commitment to observe IHL rules protecting the natural environment. The “Texte organique pour l’organisation et la règlementation des forces armées du MNLA” requires “regional commanders, including senior officers responsible for the supervision, training and operations of MNLA forces …[]” to ensure that IHL

\begin{thebibliography}{9}
\bibitem{28} Katharina Nett and Lukas Rüttinger, \textit{Insurgency, Terrorism and Organised Crime in a Warming Climate: Analysing the Links between Climate Change and Non-State Armed Groups}, Climate Diplomacy, Berlin, 2016, p. 12.
\bibitem{29} \textit{Ibid.}, p. 18.
\end{thebibliography}
rules are respected during military operations, in particular in relation to “… the environment”.

The doctrine of some NSAGs includes absolute prohibitions protecting the environment. The Rules for the Conduct of War of the Kurdistan Workers Party (Partiya Karkerên Kurdistanê, PKK) state that “[f]orests will not be burned or otherwise destroyed” and that “[w]eapons that burn, such as napalm, lava, and phosphorous, or create destruction to humans, plants, animals and the ecological balance shall not be used”. The Guidelines on the Code of War of the Chin National Front (CNF) hold that “[t]he use of weapons and technologies that can damage the environment for a very long period of time must be avoided”. On the other hand, the National Liberation Army of Colombia adopted a qualified provision to refrain from damaging the environment; according to its Code of War, “acts of sabotage shall, as far as possible, avoid causing environmental damage”.

Some NSAGs have committed to protecting the environment with the aim of preserving it for future generations. The Ogaden National Liberation Front (ONLF) has affirmed that it “shall confront all initiatives, which negatively impact our environment as a matter of national duty to protect our environment for future generations”. Other NSAGs have combined the protection of posterity with the preservation of wildlife. According to a resolution of the Sudan People’s Liberation Movement/Army (SPLM/A), the group “shall do everything to … protect and develop [our wildlife resources] for us and for posterity”. The decline of rhinos and other wildlife populations in the DRC prompted the commitment of the LRA to do “whatever possible to live in harmony with the animals, and to act as their curators, and do everything possible to see that they are not harmed for posterity”. During peace talks with Uganda, the head of the LRA delegation said that “the statistics we were shown were devastating and shocked us”. The LRA representative also signed a pact assuring rangers of the Garamba park that, “provided they properly identify themselves and not attack us, we undertake to fully cooperate with them”. Despite its commitment to protecting endangered species and collaborating with park rangers, however, the LRA “continued to launch attacks inside the park and kill rangers, as well as poaching elephants to finance operations”.

33 As cited in J. Somer, above note 31.
34 Ibid.
35 Ibid.
36 Ibid. (emphasis added).
37 Ibid.
38 Ibid.
39 Ibid.
41 Ibid.
42 J. Somer, above note 31; see also S. Sivakumaran, above note 15, p. 528.
The example of the LRA shows that there can be a gap between the doctrine of NSAGs and their actual practice. According to Bangerter, the effectiveness of codes of conduct – as a form of doctrine – depends on many factors, including the existence of complementary measures such as “dissemination, training and sanctions”. Bangerter has highlighted three additional factors that need to be taken into consideration. First, “codes of conduct are aspirational”. This means that they are “not a description of what is, but of what should be, what the group wants to be”. The fact that environmental protection is part of an NSAG’s doctrine may signify that the group’s leadership recognizes it as a challenge in terms of members’ behaviour, rather than a reflection of the group’s “ability to successfully prevent such acts from ever taking place”. Second, individual fighters do not always follow group rules. Third, an NSAG may “be blamed for acts committed by people whom it does not control”. It is notably acknowledged that “the underlying evidence linking NSAGs to poaching is often more tentative than may be thought”, and that in some contexts “[p]oachers do not belong to [NSAGs] but are rather related to criminal networks”.

In conclusion, failing to consider the role of NSAGs regarding environmental protection in NIACs would miss an important part of the equation. On the one hand, NSAGs are part of the problem, as they have proven to be perpetrators of environmental damage in many cases. On the other hand, a study of their doctrines reveals that at least some of them are not indifferent to the environment. However, the doctrines of NSAGs express different standards of environmental protection. It is thus important to identify the legal and policy framework for engaging them on this matter.

The legal framework: Environmental obligations under international humanitarian law

In 2020, the International Committee of the Red Cross (ICRC) released the updated Guidelines on the Protection of the Natural Environment in Armed Conflict (ICRC Guidelines). The ICRC Guidelines set down a concise commentary of the IHL rules protecting the natural environment, “more than half” of which reflect

---

43 Olivier Bangerter, Internal Control: Codes of Conduct within Insurgent Armed Groups, Small Arms Survey, Graduate Institute of International and Development Studies, Geneva, 2012, p. 28. These measures are addressed in more detail below.
44 Ibid., p. 36.
45 Ibid.
46 Ibid.
48 Ibid., p. 37.
49 G. Waschefort, above note 14, p. 617.
50 Ibid., above note 14.
51 ICRC Guidelines, above note 1.
obligations for NSAGs. The purpose of this section is to identify these rules and discuss the main issues arising from their application by NSAGs, in light of these groups’ actual practice and doctrine.

NSAGs are bound by IHL, no matter the content of their doctrine. Under customary IHL, the natural environment is a civilian object to which the general rules on the conduct of hostilities apply. Consequently, the principle of distinction prohibits the direct – or indiscriminate – targeting of the environment, unless and for such time as it meets all the constitutive elements of a military objective. The absolute prohibition against burning forests enshrined in the PKK Rules for the Conduct of War thus goes beyond the law, as a part of a forest could be burned if it were to become a military objective under IHL.

Even when a legitimate objective is targeted, the principle of proportionality prohibits launching an attack “which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated”. The scope of incidental damage to be taken into account includes the indirect effects of the attack on the environment which are “reasonably foreseeable”. For example, an NSAG planning an attack on a military base close to a river “should ask questions such as, is the river used as drinking water for nearby communities, is there sensitive fish habitat in the river, [and] what would the impact of harmful chemicals be on water quality over the longer term”.

The question that arises is how to assess whether an attack is excessive or not. It is acknowledged that “in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate”. A straightforward example of a disproportionate attack would be the burning of “an entire forest to reach a single minor target”. However, striking a balance between a military advantage and incidental environmental damage may be more difficult in less clear-cut

---


54 ICRC, above note 31, p. 484.


57 Ibid., Rule 43(C).

58 ICRC Guidelines, above note 1, p. 56, para. 117.


60 ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13 June 2000, para. 22.

61 UNEP, above note 2, p. 13.
scenarios, as “[t]here is no precise formula”\textsuperscript{62} for such a calculation. Some consider that the proportionality assessment “inevitably involves subjective value judgments”.\textsuperscript{63} Consequently, incidental damage to the environment is likely to carry more weight for NSAGs fighting “for the rights of national, ethnic or religious minorities, which often include an environment, natural resources or ‘homeland protection’ aspect”,\textsuperscript{64} compared to those exclusively seeking to weaken their enemy’s military force.

Pursuant to the principle of precautions, NSAGs must take “constant care” to spare the natural environment in the conduct of military operations, which includes troop movements and manoeuvres.\textsuperscript{65} The principle of precautions in attack requires NSAGs to take “all feasible precautions … to avoid, and in any event to minimize”, incidental damage to the natural environment, notably through their choice of means and methods of warfare.\textsuperscript{66} Before an attack, an NSAG must do everything feasible to ascertain that a part of the natural environment targeted qualifies as a military objective, and to assess whether an attack against another legitimate objective may be expected to cause excessive incidental damage to the natural environment.\textsuperscript{67} During an attack, if the part of the natural environment directly targeted proves to be mistakenly regarded as a military objective, or the incidental damage to the environment is disproportionate, the NSAG “must do everything feasible to cancel or suspend the attack”.\textsuperscript{68} An NSAG which has a part of the natural environment under its control must, as a defending party, “take all feasible precaution to protect [it] against the effects of attacks”.\textsuperscript{69}

Some NSAGs have reported that, based on their proportionality assessment, “a decision is made with regards to whether to proceed or not, and if so, to plan the attack in such a way as to minimize collateral damage to civilians and, in one case, to the environment”.\textsuperscript{70} However, collecting information to ascertain the military nature of a targeted part of the environment, predicting the direct and reverberating consequences of an attack to the environment and ultimately minimizing such consequences may be practically challenging for NSAGs, in particular those with limited capabilities.\textsuperscript{71} Legally speaking, every NSAG is bound by the principles of proportionality and precaution, which means that every NSAG has to make such an assessment when planning and conducting an attack. However, an NSAG’s respect for these principles, or lack thereof, is

\textsuperscript{62} ICRC Guidelines, above note 1, p. 57, para. 121.
\textsuperscript{65} ICRC Customary Law Study, above note 55, Rule 15; ICRC Guidelines, above note 1, p. 58, para. 126.
\textsuperscript{66} ICRC Customary Law Study, above note 55, Rules 15, 17.
\textsuperscript{67} \textit{Ibid.}, Rules 16, 18.
\textsuperscript{68} \textit{Ibid.}, Rule 19.
\textsuperscript{69} \textit{Ibid.}, Rule 22.
\textsuperscript{71} A. Al-Dawoody and S. Gale, above note 59.
conditioned by what the group can materially comply with in practice.\textsuperscript{72} The “feasible” nature of precautions indicates that they may “vary depending on factors such as … the situation and capabilities of the parties to the conflict, the resources, methods and means available, and the type, likelihood and severity of the expected incidental civilian harm, including harm to the natural environment”.\textsuperscript{73} What matters is whether the NSAG has exhausted all the available means when assessing environmental damage.\textsuperscript{74}

The means and methods of warfare that NSAGs may employ are not unrestricted. In terms of methods (i.e., tactics), for example, the starvation of the civilian population is prohibited.\textsuperscript{75} A corollary to this rule is the prohibition against “attack[ing], destroy[ing], remov[ing] or render[ing] useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.\textsuperscript{76} The latter represent “natural elements that are or may be the product of human intervention”, which are by definition part of the natural environment.\textsuperscript{77} The incidental effects of hostilities on the environment are also indirectly inhibited by the prohibition against attacking works or installations containing dangerous forces (such as dams and nuclear power stations) if such attacks “may cause the release of dangerous forces and consequent severe losses among the civilian population”.\textsuperscript{78} Finally, attacks against the natural environment by way of reprisal are prohibited.\textsuperscript{79}

The regulation of means of warfare (i.e., weapons) also provides indirect protection to the environment, because of the inherent capacity of those means to cause extensive environmental damage. Accordingly, all NSAGs are prohibited from using weapons that are by nature indiscriminate,\textsuperscript{80} as well as poisonous,\textsuperscript{81} biological\textsuperscript{82} or chemical weapons.\textsuperscript{83} The use of herbicides,\textsuperscript{84} landmines\textsuperscript{85} and incendiary weapons\textsuperscript{86} is also restricted for all NSAGs. An NSAG engaged in a NIAC against a State party to the relevant weapon treaty may be bound by additional

\textsuperscript{73} ICRC Guidelines, above note 1, p. 59, para. 129.
\textsuperscript{74} Ibid., paras 129–130.
\textsuperscript{75} ICRC Customary Law Study, above note 55, Rule 53; 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. 14.
\textsuperscript{76} AP II, Art. 14; ICRC Customary Law Study, above note 55, Rule 54.
\textsuperscript{77} ICRC Guidelines, above note 1, p. 18, para. 16.
\textsuperscript{78} AP II, Art. 15; ICRC Customary Law Study, above note 55, Rule 42.
\textsuperscript{79} ICRC Customary Law Study, above note 55, Rule 148.
\textsuperscript{80} Ibid., Rule 71.
\textsuperscript{81} Ibid., Rule 72.
\textsuperscript{82} Ibid., Rule 73.
\textsuperscript{83} Ibid., Rule 74.
\textsuperscript{84} Ibid., Rule 76.
\textsuperscript{85} Ibid., Rules 81, 83.
\textsuperscript{86} Ibid., Rules 84–85.
restrictions in the use of incendiary weapons and landmines, and by positive obligations aiming to minimize the impact of explosive remnants of war. IHL does not prohibit per se the use of explosive weapons. However, whether their deployment can comply with the general rules on the conduct of hostilities, particularly in populated areas, raises “serious questions.” In the ICRC’s view, “explosive weapons with a wide impact area should be avoided in densely populated areas”.

Rules on the treatment of persons not or no longer taking a direct part in hostilities may also provide indirect protection to the natural environment. Environmental damage amounting to violence to their lives and persons, as well as any form of ill-treatment, is absolutely prohibited. Environmental damage which would de facto result in the displacement of the civilian population is also prohibited.

In addition to the prohibition against attacking objects indispensable to the survival of the civilian population and works and installations containing dangerous forces mentioned above, the respect of certain other specially protected objects represents indirect environmental obligations for NSAGs. Parts of the environment may qualify as cultural property benefiting from special protection. The natural environment forming part of non-defended localities or demilitarized zones is also protected against attacks.

Environmental protection is also provided by rules governing enemy property. The destruction or seizure of property of an adversary, including parts of the natural environment such as natural resources, is prohibited, unless required by imperative military necessity. The necessity must be of a military nature, which means that destruction or seizure must be necessary to achieve the only legitimate aim during an armed conflict – that is, “to weaken the military forces of the enemy”. Other necessities based on “political, economic, diplomatic or personal considerations” are excluded. Consequently, it would not be justified to destroy or seize any part of the natural environment in order to finance the armed conflict. The destruction or seizure of a part of the natural environment qualifying as a military objective would a fortiori be lawful.

87 ICRC Guidelines, above note 1, Rule 23.
88 Ibid., Rule 24.
89 Ibid., Rule 25.
91 Ibid.
92 Article 3 common to the four Geneva Conventions; AP II, Art. 4.
93 AP II, Art. 17; ICRC Customary Law Study, above note 55, Rule 129(B).
96 Ibid., Rules 43(B), 50.
97 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868.
100 S. R. Johansen, above note 98, p. 348.
addition, the rule applies to “operations not amounting to attacks”, such as during “military movements and manoeuvres”.\textsuperscript{101} For example, imperative military necessity may authorize chopping down a section of trees, either to provide construction material for military barracks\textsuperscript{102} or because the trees are preventing access to the only safe location in which to establish a military camp.\textsuperscript{103}

Contrary to the prohibition against destruction or seizure, the prohibition against pillage\textsuperscript{104} requires appropriation “for private or personal use”.\textsuperscript{105} The act of pillage covers the appropriation of parts of the natural environment constituting private or public property, including natural resources, without the consent of the owner, and in violation of IHL.\textsuperscript{106} As the owner of natural resources will most often be the State, the State will never, by definition, commit pillage. It can thus be considered that the prohibition of pillage as applicable in NIACs is discriminatory against NSAGs.\textsuperscript{107}

If the latter two rules apply to the exploitation of natural resources, it is concerning from a humanitarian perspective that an NSAG would be prevented from exploiting natural resources for the benefit of the civilian population under its control because it would either violate the prohibition against destruction and seizure, or amount to pillage. One suggested solution is to apply a specific provision of the law of occupation by analogy.\textsuperscript{108} According to Article 55 of the Hague Regulations, the Occupying Power is designated

as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.\textsuperscript{109}

The rules of usufruct “allow the occupying power to use and to own the fruits or proceeds of immovable public property but not to use the underlying capital, or substance, of such property”;\textsuperscript{110} this permits “reasonable exploitation [of natural resources] if it takes place at the same rate as before the occupation began”.\textsuperscript{111} Applying the rules of usufruct by analogy to NSAGs exercising territorial control has the advantage of providing “a legal basis for natural resource exploitation to [NSAGs] as de facto authorities without undermining the fabric of State

\begin{flushleft}
\textsuperscript{101} Ibid., p. 346.
\textsuperscript{102} US Department of Defense, \textit{Law of War Manual}, 2016, para. 5.17.2.2.
\textsuperscript{103} ICRC Guidelines, above note 1, p. 75, para. 180.
\textsuperscript{104} ICRC Customary Law Study, above note 55, Rule 52.
\textsuperscript{105} International Criminal Court, \textit{Elements of Crimes}, Art. 8(2)(e)(v).
\textsuperscript{106} ICRC Guidelines, above note 1, p. 76, para. 183.
\textsuperscript{107} M. Sassòli, above note 63, p. 294.
\textsuperscript{109} 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), Art. 55.
\textsuperscript{110} M. Sassòli, above note 63, p. 332.
\textsuperscript{111} Ibid.
\end{flushleft}
sovereignty”. This attractive solution comes up against the fact that in NIACs, “neither territory seized by insurgents nor that retained or regained by the incumbent Government can be tagged as subject to belligerent occupation”.

Other customary rules are only “arguably” applicable in NIACs, and it is therefore unclear whether they are binding on NSAGs. This includes the obligation of “due regard” for the natural environment in military operations, the prohibition of “widespread, long-term and severe damage to the natural environment”, and the prohibition of using the destruction of the natural environment as a weapon. In light of the current trend towards greater environmental protection, even if these rules may not be part of customary IHL yet, they are likely to become so in the future. It should be noted that the CNF Guidelines establish a lower threshold than the IHL prohibition against causing serious damage to the natural environment, as they only require “long-term” damage to the environment rather than the three cumulative elements of “widespread, long-term and severe” damage under IHL.

The rules with uncertain customary status in NIACs may be brought into force by means of ad hoc commitments, such as the conclusion of special agreements under Article 3 common to the four Geneva Conventions, or unilateral declarations including those provided under Article 96(3) of Additional Protocol I (AP I) in the case of national liberations wars as defined in Article 1(4) of AP I. It is therefore encouraged that NSAGs bring into force additional rules protecting the environment through the conclusion of ad hoc commitments, either unilaterally or with other belligerent parties. The ICRC and the International Law Commission (ILC) have notably recommended that such agreements designate “areas of major environmental importance” as demilitarized zones or non-defended localities.

The policy framework: Environmental responsibilities under international human rights law and international environmental law

Environmental responsibilities under international human rights law

While the continued applicability of IHRL in armed conflict is uncontroversial, whether and to what extent it is binding on NSAGs as a matter of law remains

---

112 D. Dam-de Jong, above note 108.
114 ICRC Customary Law Study, above note 55, Rule 44.
115 Ibid., Rule 45.
116 Ibid.
117 Ibid., commentary on Rule 45; S. Sivakumaran, above note 15, p. 527.
118 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), Arts 1(4), 96(3).
119 ICRC Guidelines, above note 1, Recommendation 18.
121 See S. Sivakumaran, above note 15, pp. 83–86.
unsettled. In light of recent practice, “it seems accepted that armed groups that exercise territorial control and fulfil government-like functions thereby incur responsibilities under [IHRL]”. The purpose of this section is not to rehearse the practice and debate surrounding this issue, but rather to address the environmental responsibilities of NSAGs under IHRL as a matter of policy.

IHRL can contribute to the protection of the environment by covering areas not addressed by the IHL of NIACs, such as through the protection of minorities or the right to an effective remedy, as discussed below. When both IHL and IHRL apply simultaneously to a particular issue, the two bodies of law are “complementary” and “mutually reinforcing”. For example, the right to health under IHRL can complement the IHL obligations to protect and care for the wounded and sick, as it “addresses medical needs which are independent from the armed conflict as such, and extends to healthy people as well as those who are already sick”. This discussion is important not only for the protection of the environment as such, but also for the “60 to 80 million people [living] under the direct State-like governance of armed groups”, who may suffer from environmental harm without benefiting from the protection of the territorial State.

Two approaches to environmental protection under IHRL can be discerned. The approach generally adopted by human rights bodies consists of identifying specific human rights within the IHRL framework that protect the environment, including civil and political rights such as the right to life, as well as economic, social and cultural rights, such as the rights to an adequate standard of living, of minority groups to enjoy their own culture and traditional practices, and to health, housing and family. For instance, in its General Comment No. 36, the Human Rights Committee (HRC) reiterates the adverse impact of environmental degradation on the enjoyment of the right to life, and lists environmental measures that should be implemented to “respect and ensure” this right. The jurisprudence of the HRC also indicates that States have the

122 ICRC Commentary on GC III, above note 53, para. 551.
124 ICRC Commentary on GC III, above note 53, para. 551.
127 Common Article 3(2); AP II, Arts 7–8; ICRC Customary Law Study, above note 55, Rules 109–111.
129 ICRC, above note 4, p. 2.
130 UNEP, above note 2, pp. 48–50; ICRC Guidelines, above note 1, pp. 26–27.
131 HRC, General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/36, 3 September 2019, para. 62.
obligation to protect the rights to life and to privacy, family and home against
environmental degradations committed by third actors which are reasonably
foreseeable, and leaves open the possibility that environmental degradation may
amount to torture or to cruel, inhuman or degrading treatment.132

The second approach adopted by the United Nations (UN) Special
Rapporteur on Human Rights and the Environment is to argue in favour of a
broader right to a “safe, clean, healthy and sustainable environment”.133 The
related obligations are developed in the Framework Principles on Human Rights
and the Environment.134 The 16 principles are considered to represent “a
reflection of actual or emerging [IHRL]”,135 and refer to human rights obligations
globally. For example, Principle 1 provides that “States should ensure a safe,
clean, healthy and sustainable environment in order to respect, protect and fulfil
human rights”.136 This entails

restrain[ing] from violating human rights through causing or allowing
environmental harm; protect[ing] against harmful environmental interference
from other sources …[;] and tak[ing] effective steps to ensure the
conservation and sustainable use of the ecosystems and biological diversity
on which the full enjoyment of human rights depends.137

The next step is to determine the scope of environmental responsibilities of NSAGs
under IHRL. A pragmatic approach would not consider that all NSAGs should
respect, protect and fulfil the entire scope of human rights. Rather, it is
increasingly accepted that the scope should vary according to a “sliding scale”,
based on an NSAG’s territorial control and related capacity.138 As a starting
point for this assessment, a distinction can be made between the negative
obligation to respect human rights and the positive obligations to protect and
fulfil human rights.139 On the one hand, the obligation to respect consists of
restraining “from interfering with or curtailing the enjoyment of human rights”,140

132 HRC, Portillo Cáceres v. Paraguay, Communication No. 2751/2016, UN Doc. CCPR/C/126/D/2751/2016,
20 September 2019.
133 John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the
Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/37/59, 24 January
2018.
135 Ibid., p. 3.
137 Ibid., commentary on Framework Principles 1 and 2, pp. 7–8.
138 Tilman Rodenhäuser, Organizing Rebellion: Non-State Armed Groups under International Humanitarian
pp. 146–209; A. Bellal, above note 123; Geneva Call, Positive Obligations of Armed non-State Actors:
139 This approach has notably been adopted by Milanovic as regards the extraterritorial application of human
rights treaties. Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles,
and Policy, Oxford University Press, Oxford, 2011, pp. 209–219. The ICRC has also made a distinction
between negative and positive obligations for the application of the law of occupation. ICRC
Commentary on GC III, above note 53, para. 356.
professionalinterest/pages/internationallaw.aspx.
which requires a group only to exercise control over the conduct of its members.  
On the other hand, the obligation to protect entails “protect[ing] individuals and 
groups against human rights abuses”\(^{142}\) and the obligation to fulfil necessitates 
taking “positive action to facilitate the enjoyment of basic human rights”.\(^{143}\) These positive obligations require “a far greater degree of control over the area in 
question”.\(^{144}\)

The distinction between positive and negative human rights obligations can be 
applied to two categories of NSAGs. The first category includes NSAGs acting as 
State-like entities, which means that they “exercise territorial control and fulfil 
government-like functions”.\(^{145}\) The second category is residual and includes 
NSAGs that do not exercise territorial control, or those that exercise territorial 
control but only to a limited extent that does not allow them to fulfil 
government-like functions. While establishing intermediate categories is tempting 
from a theoretical point of view, it would be difficult to determine the scope of 
human rights responsibilities of NSAGs exercising varying degrees of territorial 
control.\(^{146}\)

The first category of NSAGs acting as State-like entities should have human 
rights responsibilities akin to the human rights obligations of the territorial State.\(^{147}\) 
For example, they should take specific measures to protect the right to health of the 
persons living under their control, and particularly of vulnerable groups. This 
requires “taking into consideration the dangers and risks of environmental 
pollution” for children’s health,\(^{148}\) as well as protecting “[t]he vital medicinal 
plants, animals and minerals necessary to the full enjoyment of health of 
indigenous peoples”.\(^{149}\) Pursuant to the general approach to environmental 
protection under IHRL, NSAGs acting as State-like entities should conduct a 
prior assessment of the environmental impact of their activities on the enjoyment 
of human rights\(^{150}\) and provide effective remedies for human rights violations 
resulting from environmental harm.\(^{151}\)

---

142 UN Human Rights, above note 140.
143 Ibid.
145 ICRC Commentary on GC III, above note 53, para. 551.
146 Rodenhäuser suggests three categories of NSAGs: “groups exercising quasi-governmental authority in 
defined territory; groups exercising de facto control over territory and population; [and] groups not 
exercising control over territory and population”. T. Rodenhäuser, above note 138, p. 148. See also 
Geneva Call, above note 138.
147 See T. Rodenhäuser, above note 138, p. 178. In addition to NSAGs exercising government-like functions, 
some have even argued that “armed non-State actors exercising … de facto control over territory and 
population must respect and protect the human rights of individuals and groups”. See UN Human 
Rights, above note 123.
1990), Art. 24(2)(c).
149 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, “Article 12: 
Reasoning by analogy to States’ obligations implies that the environmental responsibilities of such NSAGs deriving from economic, social and cultural rights should be subject to a progressive realization, taking into account the maximum of their available resources. Likewise, NSAGs should be able to limit qualified civil and political rights provided that the limitation is justified. However, it is difficult to see how NSAGs could derogate from the provisions enshrined in human rights treaties and comply with the procedural obligation to notify the derogation, as they cannot become parties to these instruments.

NSAGs that do not exercise territorial control, or that exercise territorial control but only to a limited extent that does not allow them to protect and fulfil human rights, should at least respect human rights. They should thus “refrain from violating human rights through causing or allowing environmental harm”. Respecting the right to health notably requires that parties “refrain from unlawfully polluting air, water and soil, … [and] from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health”. As noted above, the right to health under IHRL complements the IHL rules applicable in NIACs by extending to persons who are not wounded or sick. It can also be argued that this specific obligation is complementary to the IHL prohibition against using such weapons during the conduct of hostilities and the prohibition against violence to life and person of those not or no longer directly participating in hostilities. The complementarity approach between IHL and IHRL improves the protection of the environment in NIACs.

Environmental responsibilities under international environmental law

In contrast to IHL and IHRL, IEL lays down obligations protecting the environment as such. It is therefore important to raise the question of whether NSAGs should comply with this branch of law in order to enhance environmental protection in NIACs.

It is generally accepted that IEL, except for the treaties expressly providing otherwise, continues to apply in armed conflicts. Whether it is binding upon NSAGs remains unexplored, however. Several arguments suggest that NSAGs could have IEL obligations. First, the World Charter for Nature, although not

152 ICESCR, Art. 2(1).
153 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 4(3).
155 CESCR, above note 149, para. 34.
156 As discussed above. The Treaty on the Prohibition of Nuclear Weapons, 7 July 2017 (entered into force 22 January 2021), prohibits the use of nuclear weapons by States parties to the Treaty.
157 Common Article 3(1)(a).
158 Although it initially developed as an anthropocentric body of law. See, for example, the 1900 Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa which are Useful to Man or Inoffensive, or the 1902 Convention for the Protection of Birds Useful to Agriculture.
159 UNEP, above note 2, p. 52; ICRC Guidelines, above note 1, pp. 23–26.
legally binding, holds: “States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: […] implement the applicable international legal provisions for the conservation of nature and the protection of the environment.”

Second, the legal theories explaining how IHL and IHRL bind NSAGs could be applied to IEL. Pursuant to the doctrine of legislative jurisdiction, an NSAG would be bound by the IEL obligations in force for the territorial State, because of the latter’s “competence to legislate for all natural and legal persons under its jurisdiction”. For NSAGs acting as State-like entities, the same IEL obligations could devolve with “the exercise of de facto governmental functions”. Finally, NSAGs could be bound by customary IEL should they possess the required international legal personality.

This debate deserves a more detailed discussion than the length of this article allows. It is suggested that while NSAGs do not have obligations under IEL as a matter of law, the need to enhance environmental protection in NIACs means that NSAGs should have certain responsibilities under IEL as a matter of policy. This is not unrealistic, as some NSAGs have already included IEL principles in their doctrines. As mentioned above, the doctrines of the ONLF, the SPLM/A and the LRA provide for the protection of the environment with the aim of preserving it for future generations. This commitment relates to the IEL principle of intergenerational equity. According to this principle, “[the] present [generation] cannot leave the environment in a worse condition than it had for itself. [The principle] requires taking into consideration impacts of current activities on future generations … to avoid irreversible environmental damage.”

Similarly to what was submitted in the section on IHRL above, an approach based on negative and positive IEL obligations should apply to the two defined categories of NSAGs. This aligns with the IEL principle of common but differentiated responsibility, which establishes that although all States must participate in the protection of the environment, their obligations depend “on the level of their economic development, circumstances and capabilities”.

For the first category of NSAGs acting as State-like entities, the scope of their IEL responsibilities would be comparable to the IEL obligations of the territorial State. If the latter is party to the Convention Concerning the Protection of the World Cultural and Natural Heritage, the NSAG should “set up within its territories, where such services do not exist, one or more services for the

---

165 Ibid., p. 54.
protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions”.

It could also comply with customary IEL rules, such as the principle of prevention and the emerging precautionary principle. The former requires the NSAG to exercise due diligence – that is, to adopt appropriate measures when implementing activities in its own territory to prevent significant environmental damage, particularly when such damage is of a transboundary nature. This obligation can generally be fulfilled by conducting an environmental impact assessment, a tool that is not unknown to NSAGs. In the Agreement Concerning National Reconciliation, Human Rights and the Environment, the CNF agreed that “environmental impacts assessments shall be conducted in regards to all development projects in Chin State. To facilitate such a process, it is agreed that an independent committee shall be formed made up of independent experts.”

The precautionary principle requires that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. The appropriate measures to take depend on the capabilities of their author. For the second category of NSAGs, they should comply with the negative obligations under IEL. For example, an NSAG operating on the territory of a State party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora should refrain from trading endangered species in violation thereof. Pursuant to the “no harm” rule, an NSAG exercising...

---

166 Convention for the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151, 16 November 1972 (entered into force 17 December 1975), Art. 5(b).
168 According to Michael Bothe, the principle of precaution is a “fundamental rule of modern customary environmental law”. Michael Bothe, “Protection of the Environment in Relation to Armed Conflicts”, in Dieter Fleck (ed.), above note 125, p. 343. However, the customary nature of the precautionary principle remains contested. See Meinhard Schröder, “Precautionary Approach/Principle”, in Max Planck Encyclopedia of Public International Law, 2014, paras 16–21.
172 Rio Declaration, above note 170, Principle 15. The precautionary principle applies in armed conflict and entails that “the lack of scientific certainty may not be invoked to justify not taking preventive measures to protect the environment during an attack”: ICRC Customary Law Study, above note 55, Rule 44. See also ICRC Guidelines, above note 1, p. 58, para. 124.
173 Rio Declaration, above note 170, Principle 15.
limited territorial control should not implement an activity that would cause environmental harm outside its territory, particularly if the environmental damage is caused to the territory of a non-belligerent State.\textsuperscript{176}

In addition to the model of environmental responsibilities suggested above, IEL rules could also inform the IHL obligations of NSAGs. The ILC Draft Principles on Protection of the Environment in Relation to Armed Conflicts interpret the obligations of an Occupying Power in light of the IEL framework.\textsuperscript{177} This could be applied to the select issue of exploitation of natural resources by NSAGs based on the application of Article 55 of the Hague Regulations by analogy. Therefore, an NSAG would only be permitted to exploit natural resources “for the benefit of the population [under its control] and for other lawful purposes under [IHL] … in a way that ensures their sustainable use and minimizes environmental harm”.\textsuperscript{178} In the Agreement Concerning National Reconciliation, Human Rights and the Environment, the CNF also agreed “that in extracting natural resources from above and underground within Chin State, the principles of Free Prior and Informed Consent shall be observed in accordance with the desire of the Chin people”.\textsuperscript{179}

In conclusion, all NSAGs have environmental obligations under IHL. As a matter of policy, NSAGs that do not exercise territorial control or exercise it only to a limited extent should comply with the negative obligations under IHRL and IEL, while NSAGs acting as State-like entities should additionally comply with the positive obligations provided under these bodies of law. The doctrine and practice of some NSAGs confirm that this model can be considered realistic.

Engaging non-State armed groups on the protection of the environment

Bangerter has held that “the mere existence of a body of law is not enough to ensure that it is applied; it would be naïve to hope that [NSAGs] could be won over by the mere existence of international law”.\textsuperscript{180} In addition, the first section of this article highlighted the potential discrepancy between the doctrine and actual practice of NSAGs regarding environmental protection. Therefore, it is crucial to identify effective methods and actors of engagement to improve the compliance of NSAGs with the legal and policy framework detailed above.

\textsuperscript{176} In situations of international armed conflict, some authors have argued that “[t]he Trail Smelter principle may afford protection to non-belligerent, neutral territories by establishing state responsibility for environmental damage caused outside the state where the acts or events entailing such damage occur”, Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities”, \textit{International Review of the Red Cross}, Vol. 92, No. 879, 2010, p. 585.
\textsuperscript{178} \textit{Ibid}. For a similar view, see D. Dam-de Jong, above note 108.
\textsuperscript{179} CNF Agreements, above note 171.
Methods and actors of engagement to improve non-State armed groups’ compliance with the legal and policy framework protecting the natural environment

Certain methods for improving compliance with humanitarian norms by NSAGs have been recommended.\(^{181}\) In terms of legal tools, the UN Secretary-General has affirmed that the development of codes of conduct, unilateral declarations and special agreements, as envisaged under [IHL], through which groups expressly commit to comply with their obligations or undertake commitments that may go beyond what are required by the law, can play a key role and should be encouraged.\(^{182}\)

As they cannot become parties to IHL, IHRL or IEL treaties, NSAGs “may feel they lack ‘ownership’ over international norms”.\(^{183}\) Compliance can be improved by enabling NSAGs to issue their own commitments to respect environmental norms, as this would “increase their sense of ownership over” the latter.\(^{184}\) For instance, a unilateral declaration provides the opportunity for NSAGs to express a specific commitment to abide by environmental norms in the form of a public statement. Unilateral declarations do not require the consent of the adverse party to the conflict and are thus particularly valuable where a special agreement cannot be concluded.\(^{185}\) This may offer a significant advantage in practice, because “States are often reluctant to enter into special agreements with [NSAGs], in order to avoid supporting the groups’ efforts to gain political legitimacy”.\(^{186}\) The process of issuing a unilateral declaration may be initiated by the NSAG itself or may result from negotiations with humanitarian organizations or other relevant actors.\(^{187}\)


183 A. Bellal and S. Casey-Maslen, above note 181, p. 6.

184 M. Sassòli, above note 181, p. 29. See also S. Sivakumaran, above note 181, pp. 130–131.


This article proposes a model unilateral declaration for the protection of the natural environment in armed conflict as a potential way forward. As noted by the UN Secretary-General, a unilateral declaration allows NSAGs to express a commitment that may go beyond their legal obligations. Based on the legal and policy framework discussed above, the model unilateral declaration suggested includes a preamble and ten key environmental norms, consisting of IHL obligations as well as responsibilities under IHRL and IEL providing protection to the environment.

As illustrated above, a commitment to respect environmental norms expressed by an NSAG is not in itself sufficient to guarantee compliance. Following its issuance, the model unilateral declaration should be implemented in the internal regulations of the NSAG, such as in a code of conduct. This means that environmental norms contained in the declaration should be translated into a language that is understandable for the fighters and adapted to the characteristics of each NSAG on a case-by-case basis, such as whether the NSAG exercises territorial control or not. In addition, the adoption of the model unilateral declaration— or other means of commitment providing protection to the environment—should be complemented by certain policy measures in order to be effective. First, ensuring that fighters know and understand the environmental norms included in the declaration requires that those norms be widely disseminated in their translated form. Second, the NSAG should provide training to its fighters in accordance with such norms. Third, breaches thereof should be addressed by a working system of disciplinary sanctions established by the NSAG.

Enhancing NSAGs’ compliance with environmental norms requires sustained engagement, in particular by humanitarian actors. In order for actors engaging with NSAGs to resort to “strategic argumentation”, it is vital to identify the reasons for NSAGs to comply with them or not. As the consequences of environmental harm may only appear in the long term, there is a potential discrepancy based on whether an NSAG reasons in short- or long-term outcomes, or whether it focuses on “the conflict itself” rather than its “ultimate objective”. Compliance by NSAGs claiming to fight on behalf of a community can be improved because it is only if the environment is safeguarded during the conflict that the community can envisage a sustainable future. For example, the

188 According to the ICRC, “[i]f an armed group has made a unilateral declaration, the development of a code of conduct that includes IHL can be suggested as a logical ‘next step’.” See ibid., p. 22.
189 See S. Sivakumaran, above note 181, pp. 133–137; M. Sassòli, above note 181, p. 25.
190 For more details on dissemination, training and sanctions measures, see O. Bangerter, above note 43, pp. 28–32.
191 Engagement by other actors is also important. The World Wide Fund for Nature and UNESCO have notably attempted to protect the environment in certain contexts. See K. Walker, above note 64.
193 This consideration impacts respect for IHL rules, according to O. Bangerter, above note 180, p. 384.
194 Ibid.
SPLM/A claimed to fight “for a peaceful homeland”, which prompted its decision to ban anti-personnel landmines. When necessary, additional sources of influence such as “local customs, beliefs and traditions” can also complement the message. The overlap between Islamic law and IHL rules protecting the natural environment has notably been addressed by other authors.

Actors engaged with NSAGs on the protection of the environment could use the model unilateral declaration “to strengthen their dialogue with [NSAGs] through the negotiation process preceding such declarations”. Sustained engagement should also continue after the unilateral declaration has been issued, in order to monitor whether the NSAG complies with its commitments and to discuss environmental protection more generally.

The ICRC has a longstanding practice of humanitarian engagement with NSAGs in order to ensure humanitarian assistance and protection for persons affected by NIACs. The legal basis for this engagement derives from common Article 3, according to which the ICRC has a right to offer its services to parties to a NIAC. In contexts where protecting the environment is “a matter of humanitarian necessity”, the ICRC could disseminate the ICRC Guidelines to promote the adoption of rules protecting the natural environment in the doctrines of NSAGs. As mentioned above, the ICRC also recommends that parties to the conflict should conclude special agreements establishing demilitarized zones in order to protect “areas of major environmental importance”.

The non-governmental organization Geneva Call engages NSAGs and aims to improve their compliance with humanitarian norms through the implementation of standardized unilateral declarations called Deeds of Commitment. A new Deed of Commitment for the protection of the environment may represent a suitable avenue for securing greater compliance by NSAGs with the legal and policy framework identified. It would combine the advantages of issuing a unilateral declaration with the guarantee that Geneva Call will assist and monitor its implementation.


196 ICRC, above note 4, p. 9.


199 See Ibid.

200 See ICRC, above note 4.

201 Ibid., p. 2.

202 ICRC Guidelines, above note 1, Recommendation 17, pp. 82–83.

203 For further information, see the Geneva Call website, available at: www.genevacall.org.
We acknowledge the danger for the environment inherent to situations of armed conflict;

We are concerned with the immediate and long-term impact that environmental damage has on the right of everyone to enjoy their fundamental human rights;

We recognize the importance of respecting and protecting the environment for present and future generations;

We affirm our determination to respect and protect the environment from the effects or dangers of military action;

We reaffirm our obligation to respect the rules on the conduct of hostilities as applicable to the environment;

We reject the notion that any cause, for whatever reason, may justify attacking the environment by way of reprisal as well as unlawful damage, pillaging or unnecessary destruction of the environment;

We recognize that this declaration is no substitute for existing legal rules, including Article 3 common to the Geneva Conventions, customary international humanitarian law and, where applicable, Additional Protocol II to the Geneva Conventions.

Taking due account of our legal obligations under international humanitarian law and our responsibilities under international human rights law and international environmental law to protect the environment,

We hereby commit ourselves to the following principles:

1. Respecting the natural environment as a civilian object unless and for such time as it meets all the constitutive elements of a military objective. This includes not launching indiscriminate attacks. It also includes not launching an attack against a military objective which may be expected to cause incidental damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.
2. Not attacking works and installations containing dangerous forces, cultural objects and places of worship, objects indispensable to the survival of the civilian population, and non-defended localities or demilitarized zones.

3. Taking all feasible precautions to avoid, and in any event to minimize, incidental damage to the natural environment. This includes taking all feasible precautions in the absence of scientific certainty as to the effects on the environment of certain military operations.

4. Respecting the prohibition or restriction on the use of certain weapons inherently destructive of the natural environment, such as poisonous, biological, chemical or incendiary weapons, as well as herbicides and anti-personnel mines. Means or methods of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment must not be used.

5. Giving due regard to the protection and preservation of the natural environment in the conduct of military operations.

6. Not pillaging parts of the natural environment, including natural resources, and not destroying or seizing parts of the natural environment unless required by imperative military necessity.

7. Endeavouring to conclude additional agreements providing further protection to the environment, in particular for areas of major environmental importance.

8. Further endeavouring, in areas where we exercise authority, to:
   i) Refrain from exploiting natural resources unless on existing sites as required by imperative military necessity or for the benefit of the population under our control, and only in a sustainable manner.
   ii) Respect and take all feasible measures to protect and fulfil the human rights of the population under our control, which require the enjoyment of a safe, clean, healthy and sustainable environment, such as the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development. Particular care shall be given to vulnerable groups among the population.
   iii) Conduct an environmental impact assessment for proposed activities that are likely to have a significant adverse impact on the environment.

9. Undertaking dissemination, education and training measures within our ranks to implement effectively the environmental norms contained in this declaration. In case of breach, enforcing these norms through a system of disciplinary sanctions which respects the fundamental rights of each individual in accordance with internationally recognized standards.

10. Cooperating with impartial humanitarian and other relevant organizations towards environmental protection.
Conclusion

The protection of the environment within and outside armed conflict has become a major challenge as there can be no human sustainability absent a healthy environment. Since the awareness generated by the consequences of the Vietnam War, the nature of armed conflicts has evolved. Environmental protection during NIACs now requires further reflection. The purpose of this article was to examine this issue from the perspective of NSAGs as the main belligerent parties to such conflicts. Many IHL rules protecting the natural environment constitute legally binding obligations for NSAGs, but some of them should nevertheless be clarified, in particular the prohibitions against pillage and destruction or seizure of property in relation to NSAGs exploiting natural resources for the benefit of the population living under their control. In addition, the binding nature of IHRL and IEL on NSAGs is an unsettled legal issue. At the least, NSAGs should have environmental responsibilities under IHRL and IEL as a complement to IHL rules for better environmental protection. IHRL and IEL comprise negative and positive obligations which, as a matter of policy, could apply according to an NSAG’s level of territorial control in order to guarantee a realistic model.

While a coherent legal and policy framework is needed, equally essential is an effective engagement process by humanitarian and other relevant actors. Indeed, some NSAGs may not be indifferent to environmental protection but may lack the capacity to implement environmental norms. As an entry point for engagement, the model unilateral declaration for the protection of the natural environment in armed conflict would be a convenient way forward to promote environmental protection with NSAGs.
Collaborating with organized crime in the search for disappeared persons? Formalizing a humanitarian alternative for Mexico

Issa Cristina Hernández Herrera*

Issa Cristina Hernández Herrera holds a master’s in transitional justice, human rights and the rule of law from the Geneva Academy for International Humanitarian Law and Human Rights.

Abstract

The search for the more than 90,000 disappeared persons in Mexico has highlighted the need to establish relations of collaboration with organized crime groups in order to access not only relevant information to clarify the fate and whereabouts of the missing, but also territories under the control of organized crime groups for carrying out field searches. Given the ineffectiveness of formal, prosecutorial approaches and the considerable success of grassroots, victim-led search strategies, this paper argues for the need for a broader humanitarian approach to the search for the missing that is victim-centred and complementary to accountability mechanisms. The article advances a proposal to formalize this approach through the International Committee of the Red Cross’s (ICRC) involvement in search activities, given the ICRC’s unique organizational nature, expertise and humanitarian mandate.

* The author is grateful to Sandra Krähenmann and Ana Srovin Coralli for their vital guidance in drafting this article, and to the interviewees who provided invaluable insight on the realities of the search for disappeared persons. Email: issa.hernandezherrera@geneva-academy.ch.
Keywords: disappearances, humanitarian approach, organized crime, perpetrator collaboration, urban violence.

Introduction

From 15 March 1964 to the beginning of August 2021, the official number of disappeared and missing persons in Mexico rose to more than 92,000. This figure corresponds, to a great extent, to systematic disappearances perpetrated within two main identifiable periods of widespread violence: the “Dirty War” from the late 1960s to the early 1980s, and the “War on Drugs” from 2006 to date. While the former was characterized by State-sponsored violence through counter-insurgency tactics used to silence political opposition – notably including enforced disappearances – the current period is distinguished by generalized violence and disappearances perpetrated by a plethora of State and non-State actors, namely organized crime groups, sometimes in collusion with one another. This situation has prompted a wide range of joint efforts from different

---

1 Following the terminology used by Mexican legislation, a missing person is one whose absence cannot be linked to the commission of a crime, whereas a disappeared person is one whose absence is effectively presumed to be related with a crime. See Mexico, General Law on Forced Disappearance of Persons, 16 November 2017 (GLD), Art. 4(XV–XVI), available at: https://tinyurl.com/nd8hdjme (all internet references were accessed in October 2021).

2 The Mexican National Search Commission regularly updates the number of missing and disappeared persons. See: https://versionpublicarppndo.segob.gob.mx/Dashboard/ContextoGeneral.

3 Ana Srovin Coralli, Coordination between the Search and Criminal Investigations concerning Disappeared Persons: Case Studies on Bosnia and Herzegovina and Mexico, Swisspeace, Basel, 2021, pp. 40–41. Out of the total number of disappeared persons, an estimate of 70% correspond to the “War on Drugs” period. See Pablo Ferri, “México eleva la cifra de desaparecidos de la Guerra al narco a más de 60.000”, El País, 7 January 2020, available at: https://elpais.com/internacional/2020/01/07/mexico/1578423047_621821.html.


5 For a context overview, see Inter-American Commission on Human Rights, The Human Rights Situation in Mexico, 31 December 2015, pp. 63–96. For a particular example of State-perpetrated disappearances within the context of militarization of public security as part of the strategy against the “War on Drugs”, see Inter-American Court of Human Rights, Alvarado Espinoza et al. v. Mexico, Series C, No 370, Judgment, 28 November 2018, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_370_ing.pdf.


7 “At the same time, there are instances where State forces clearly work for or with criminal organisations or manifestly fail to intervene in the commission of atrocious acts. Such collusion indicates that it is often not possible to distinguish between ‘crime’ and ‘State’ in the Mexican context.” L. Guercke, above note 6, p. 346.
stakeholders, such as victims,\textsuperscript{8} the Mexican government, non-governmental organizations (NGOs) and international institutions, to address what is considered a crisis amidst decades of violence.

Landmark achievements have been made to address disappearances, such as enacting the General Law on Forced Disappearance of Persons (General Law on Disappearances, GLD) in 2017, which entailed a comprehensive criminalization of enforced disappearances and disappearances perpetrated by individuals.\textsuperscript{9} Particularly, the GLD introduced a new understanding of the search for disappeared persons as a separate but fundamental pillar for addressing disappearances, parallel to criminal investigations,\textsuperscript{10} via the creation of National and Local Search Commissions.\textsuperscript{11} Despite these efforts, the challenge of accounting for thousands of disappeared persons remains high.\textsuperscript{12} Particularly, even with the GLD and its revitalized search framework set in place, information that can effectively lead to clarifying the fate and whereabouts of the disappeared, and from which search strategies and plans can be established, may be elusive and difficult to obtain for authorities.

Relevant information for search purposes, defined as that which is required for clarifying the fate and whereabouts of disappeared persons, includes \textit{ante mortem} data, the circumstances of the disappearance, names of witnesses and perpetrators, and \textit{post mortem} data, such as identified bodies and locations of graves.\textsuperscript{13} However, in reality this information is only scarcely available to authorities in some cases and, even when it is available, it might not be sufficient.

\textsuperscript{8} The definition of “victims” followed by this paper includes both disappeared persons and their families, inasmuch as both the International Convention for the Protection of All Persons from Enforced Disappearances, Article 24(1), and Mexican legislation recognize broad definitions of victimhood. See General Victims Law, Mexico, 2013, Arts 2, 4.

\textsuperscript{9} While enforced disappearances are understood as per the International Convention for the Protection of All Persons from Enforced Disappearance, including the distinct characteristic of State involvement, disappearances perpetrated by individuals are defined as “the deprivation of liberty of a person with the aim of hiding the victim or his or her fate or whereabouts”, with no participation of the State whatsoever. GLD, above note 1, Arts 27, 34 (author’s translation). For this paper, the term “disappearance” will be used to encompass both conducts, only differentiating between them when necessary.

\textsuperscript{10} Before the GLD, criminal investigations and searches for disappeared persons were tasked to the same institution, namely the prosecutors’ offices. After consultation with victims, civil society and State institutions, the GLD introduced the revolutionary change of partially separating the search and the criminal investigations into two different processes, therefore entrusting them to different institutions: the search is predominately dealt with by the Search Commissions, while the criminal investigation is retained by prosecutors’ offices. A. Srovin Coralli, above note 3, p. 50. However, it is important to note that Search Commissions are not the only authorities that search, as prosecutor’s offices are also required and allowed to carry out certain acts of search according to the GLD. See, for example, GLD, above note 1, Art. 70(VII–VIII), 70(XVIII).

\textsuperscript{11} Both National and Local Search Commissions are governmental authorities exclusively tasked with the obligation of searching for disappeared and missing persons. GLD, above note 1, Art. 50.

\textsuperscript{12} For example, three years after the creation of the National Search Commission, a grand total of only 396 people—less than 1% of the total number of disappeared persons—have been found by this authority, Secretaría de Gobernación, Request for Access to Public Information No. S.I. 0401600014521, 23 August 2021 (on file with author).

to find the disappeared person or persons in question. While collaboration\textsuperscript{14} with people who possess relevant information is fundamental for a successful search process, it is not unusual for people to abstain from sharing such information out of fear of reprisals or criminal prosecution.\textsuperscript{15}

Whereas collaboration aimed at acquiring relevant information can be established with various actors under different regimes, such as witness protection or family and victim participation, this paper will focus exclusively on collaboration with organized crime groups.\textsuperscript{16} Members of these groups usually have valuable inputs for search purposes, either because they are perpetrators of disappearances or because they possess privileged information due to their involvement in organized crime structures and their territorial control in certain areas. Besides the growing recognition of the role of organized crime groups as perpetrators of disappearances,\textsuperscript{17} organized crime groups have become key actors behind the specific phenomenon of disappeared migrants in Mexico, a problem of transnational dimensions and specific challenges that has called for the adoption of concrete legal and humanitarian responses.\textsuperscript{18} Moreover, attesting to the importance of the information that these groups possess, there are publicly known examples of search endeavours that were only successful after some type of tip-off was received from organized crime groups or some channel of communication was established with such groups, as will be explored later in this paper.

Given that collaboration with organized crime groups in search activities in Mexico is still a rather under-researched phenomenon, this paper first describes how these relationships take place. In general, it can be said that both formal and informal methods of collaboration have been put into practice, the former led by the criminal law framework for prosecution of crimes, and the latter led by families of the disappeared and victims’ groups. This paper’s analysis shows that the current legal framework relies too heavily on the prosecutorial approach to search activities, failing to accommodate victims’ needs for effective collaboration

\textsuperscript{14} The term “collaboration” must not be understood as furthering a criminal activity, but as a legal term – found in several legislations, particularly across Latin America – that refers to cooperation between perpetrators (alleged or otherwise) of a crime, particularly organized crime members, and authorities, for truth and/or justice purposes. This term is sometimes referred to jointly as colaboración eficaz, “effective collaboration”, although it varies from country to country. For an overview of collaboration regimes in Mexico, Brazil and Peru, see Idheas, Estudio introductorio sobre la figura de beneficios por colaboración, Mexico, 20 July 2020, available at: https://tinyurl.com/9d3mjts.

\textsuperscript{15} M. Crettol et al., above note 13, p. 592.

\textsuperscript{16} Notably, this article will not deal with State-perpetrated disappearances, without prejudice to the need to take them into account and to explore alternatives to establish effective measures to facilitate information-sharing and other forms of collaboration by State-related perpetrators or witnesses.

\textsuperscript{17} In Mexico, this recognition is evidenced by the GLD’s criminalization of “disappearances perpetrated by individuals”, where no State involvement is needed to commit said crime. This is an attempt to deal not only with the growing involvement of non-State parties in disappearances but also with the overall uncertainty regarding the identity of perpetrators vis-à-vis the frequent impossibility of distinguishing between “crime” and “State”. See L. Guercke, above note 6, pp. 346–347.

\textsuperscript{18} For an extensive analysis of this particular issue, see Gabriella Citroni, “The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants”, International Review of the Red Cross, Vol. 99, No. 905, 2017.
with organized crime groups. Therefore, this paper argues for the need for a broader humanitarian approach to search endeavours that is victim-centred and complementary to justice-seeking mechanisms, in order to fulfil victims’ right to know the fate and whereabouts of their disappeared relatives. Finally, it advances a proposal to operationalize this approach through the involvement of the International Committee of the Red Cross (ICRC) in search activities in Mexico.

Existent practices of collaboration in the search for the disappeared in Mexico

Formal methods: The prosecutorial approach of benefits for efficient collaboration

The Mexican criminal legal framework offers benefits, under the criminal law system, for perpetrators who collaborate with the investigation and prosecution of certain crimes, as well as for those who contribute to locating victims. Specifically, the GLD allows varying degrees of reduced sentencing for perpetrators if the information they provide effectively leads authorities to the whereabouts of the person they are being accused of disappearing, or if they share information that clarifies the fate of the missing and aids in identifying those responsible. However, the fact that collaboration benefits are ruled by the criminal law framework entails serious limitations. Firstly, for reduced sentencing to be applicable, the perpetrator must have been identified and detained, and must have been prosecuted or sentenced for the crime of enforced disappearance or disappearance perpetrated by individuals. Given that 92.4% of crimes committed in Mexico are either not reported or not investigated by authorities, there is little to no chance of actually applying any benefits in practice. Moreover, while thousands of disappearance-related investigations remain open, only a grand total of thirty-five convictions have been achieved, attesting to overall impunity for disappearances alongside the State’s weak prosecutorial capacities.

Secondly, perpetrators can only access reduced sentencing as per the GLD if (1) they are being charged with the crimes of either enforced disappearance or disappearance perpetrated by individuals, and (2) the information they provide relates to the victim or victims that they are being charged with disappearing. Therefore, a person being prosecuted for any crime other than the two listed above cannot access any benefits for their collaboration, even if the information

19 For an introductory overview of the benefits legal regime, see Idheas, above note 14.
20 GLD, above note 1, Art. 33(II–IV).
they share is relevant to disappearance-related cases, or if they are charged with other disappearance-related crimes. The results of this narrow applicability have been evident: up to May 2020, the Federal Prosecutor’s Office reported no record of ever using any of the benefits provided by the GLD.

Thirdly, since the benefits of collaboration apply exclusively within the criminal law framework, the Search Commissions have no faculties of participation or interference in these processes. This is a crucial shortcoming to recognize: the main authority responsible for the search for disappeared persons cannot participate in the only available legal process to access relevant information for search purposes, and cannot offer any benefits to collaborative perpetrators.

Therefore, the design of the benefits for collaboration provided by the law has been considered insufficient by government and civil society alike, not only because of their rather limited applicability but also due to the current prosecutorial practices of the State. An example of this is the paradigmatic case of the forty-three disappeared students of Ayotzinapa, Guerrero, in September 2014. While presumed perpetrators have been detained, the students’ families and representatives have stated that there is no use in prosecuting the perpetrators if the State cannot get from them relevant information to locate their loved ones. Implicitly recognizing the existing legal framework’s constraints and seeing the need for a new regulation, President Andrés Manuel López Obrador created, by presidential decree, the Commission for Truth and Access to Justice for the Case of Ayotzinapa in 2018. In the decree, the secretary of government was given the mandate to design a new, ad hoc mechanism for collaborating with perpetrators and witnesses who might possess substantial information on the case. While this mechanism is yet to be created, it testifies to the federal government’s initial recognition of the need to access relevant information for search purposes, and the incapability of the current framework for fostering collaboration relations with perpetrators. Additionally, a year after the aforementioned decree, President López Obrador included a specific commitment to further the benefits for effective collaboration regime within the framework of implementation of the GLD, although concrete proposals or changes in this regard are also pending.

23 The GLD recognizes certain conducts as crimes related to disappearances – such as hiding or destroying a victim’s remains – even if the perpetrator did not take part in the abduction per se. GLD, above note 1, Art. 37.
24 Fiscalía General de la República, Request for Access to Public Information No. 00017000151521, 24 May 2020 (on file with author).
25 Comisión Nacional de Búsqueda, Insumos para beneficios por colaboración eficaz, 2020 (internal document, on file with author).
26 A. Srovin Coralli, above note 3, p. 69.
28 Presidencia de la República, Decreto por el que se instruye establecer condiciones materiales, jurídicas y humanas efectivas, para fortalecer los derechos humanos de los familiares de las víctimas del caso Ayotzinapa a la verdad y al acceso a justicia, Mexico, 4 December 2018, Art. 6.
29 Presidencia de la República, “Presidente López Obrador presenta Plan de Implementación de la Ley General en Materia de Desaparición Forzada de Personas”, 4 February 2019, Point 11, available at:
Within civil society, new discussions on creating and operating successful collaboration schemes have been held by different stakeholders and families of the disappeared. For example, in 2019 a federal senator hosted a small, informal seminar with representatives of NGOs, prosecutors, judges and defence lawyers to discuss the possibility of reforming the benefits regime. While participants recognized the impracticability and disuse of the current benefits framework, the highly technical question of how a new system of benefits could best be implemented was left unanswered.  

Informal methods: The open secret of citizen-led searches

Informal methods of collaboration take place within what has been called búsqueda ciudadana (search by citizens, or citizen-led searches), as opposed to State-led searches for the disappeared. The phenomenon of victims’ groups and families conducting searches independently from State authorities has been documented in various places in Latin America, as well as in Spain. Particularly, Mexico and Colombia have witnessed that “in the face of political and scientific regimes ruled by impunity and normalized violence, [relatives of disappeared persons] create new forms of civism around forensic knowledge”. In Mexico, as forensic science is under a crisis of credibility and capacity highlighted by impunity, governmental corruption and indifference, and lack of political will, relatives of the disappeared are indirectly forced to start searching for their loved ones by their own means, putting themselves at risk: “Their situation is characterized by values of a certain liberal self-governance such as prudentialism (managing one’s own actions to avoid getting killed) and self-improvement (learning about law, forensic science and narcopolitics) to navigate uncertainty.”

www.gob.mx/presidencia/prensa/presidente-lopez-obrador-presenta-plan-de-implementacion-de-la-ley-general-en-materia-de-desaparicion-forzada-de-personas.

30 Idheas, Relatoría del conversatorio “Beneficios por colaboración”, Mexico, 14 May 2019.
34 Due to the general context of violence alongside limited forensic capacities in Mexico, there are approximately 50,000 human remains pending forensic identification. Therefore, families of disappeared persons and victims’ groups advocated for the creation of an Extraordinary Forensic Identification Mechanism, accepted by the Mexican federal government in early 2020. See Movimiento por Nuestros Desaparecidos México, “MNDM: Más de 50,000 personas fallecidas sin identificar en los servicios forenses del país”, 10 December 2020, available at: https://movndmx.org/wp-content/uploads/2020/12/Comunicado-MNDM-10-diciembre-2020.pdf; Secretaría de Gobernación, Acuerdo SNBP/001/2019 por el que se aprueba la creación del Mecanismo Extraordinario de Identificación Forense, Mexico, 19 March 2020.
36 Ibid., p. 59.
Within citizen-led searches, relationships of collaboration between families and organized crime have been created, and while these are mostly undocumented, they constitute an open secret—“everyone who works with victims knows that everyday information on localization of mass graves is obtained and that those who provide said location data are people who participated in the events”.37 Through this understanding of citizen-led searches, three main types of organized crime–victim collaboration can be identified: victim-initiated communication, organized crime-initiated communication, and organized crime cooperation for field searches.

Victim-initiated communication

It is not uncommon for families of the disappeared to approach organized crime group members, on their own initiative and at their own expense, in order to get any type of relevant information they can obtain.38 For example, during an interview, one family member stated:

They are easy to find; everyone knows who the local kingpins are. Therefore, I have requested meetings with them quite a few times and asked them to give me information that can help me locate my relatives. That is all I ask of them. I tell them that I do not want to harm them or put them in jail, just their information.39

However, these endeavours entail serious risks. As the same interviewee explained: “I do not do that anymore. One day they came to my home and kidnapped me in front of my family. … I managed to escape. I am still scared.”40 In general, it is important to recognize that victim-led searches are accompanied by significant safety threats. From 2010 to date, at least twelve murders of victim-searchers have been recorded, and these individuals’ activism and search-related work is strongly suspected to be the reason behind their homicides.41

The phenomenon of individual family members searching on their own has steadily evolved into highly organized and professionalized victims’ groups that search at the community, regional and even national levels. Of particular interest is the extent to which these grassroots initiatives have expanded and organized in Mexico through the ambitious National Search Brigades, dating back to 2016 and still operating, where groups of families, NGOs, religious leaders and communities come together not only for search activities but also for legal counselling, healing of social fabric and sensitivity training, among others.42

37 Idheas, above note 30, p. 13 (author’s translation).
38 E. Schwartz-Martin and A. Cruz-Santiago, above note 33, p. 67.
39 Anonymous interview with relative of disappeared persons, Mexico, March 2021 (on file with author).
40 Ibid.
42 Álvaro Martos and Elena Jaloma Cruz, “Desenterrando el dolor propio: Las Brigadas Nacionales de Búsqueda de Personas Desaparecidas en México”, in Javier Yankelevich (ed.), Desde y frente al Estado:
Brigade organizers employ what they call a “humanitarian approach”, a logic of exclusive interest in finding the disappeared and not in prosecutions, consisting of establishing dialogues with low-rank State authorities and community members with the aim of raising awareness of the harms caused by the disappearances. The targeted groups for these workshops are people who have established communication channels with organized crime groups and could thus eventually provide information on the fate and whereabouts of the disappeared. The Brigades’ working group on humanitarian sensitization, for example, sets up a “mailbox of peace” during its workshops in schools, churches and other public spaces, where people can leave messages to the families and victims: “This has given us an ample diversity of messages that go from letters of support to even information for the searches, which we then use, always respecting the anonymity [of the information provider].”

Organized crime-initiated communication

The humanitarian dialogues and sensitization strategies employed by the National Search Brigades have yielded valuable results, leading to the second type of collaboration: organized crime groups have approached victims, on their own initiative, to share relevant information on the disappeared. As recounted in an interview with a Brigade participant, the following two examples of this collaboration scheme can be offered. Firstly, after the inaugural religious service of the First National Search Brigade, a crying man approached the staff saying that, until that day, he had not realized the pain he had caused; he stated that he did not participate directly but was involved in disappearance-related crimes, and provided the information he had on the matter. Secondly, during the Third National Search Brigade, a perpetrator gave information on the grave and identity of one of his victims, asking in return for the Brigade organizers to search for his own disappeared brother.

Perpetrators and organized crime groups have approached victim-searchers even outside the concerted humanitarian strategies highlighted above. Besides the National Search Brigade framework, the most documented case of organized crime collaboration is that of Colinas de Santa Fe. On 10 May 2016, when Mexico celebrates National Mother’s Day, two men gave the mothers of Colectivo Solecito, a victims’ group, a map that pinpointed the location of Colinas de Santa Fe, north of the port of the state of Veracruz. Taking what was called by the local press “the macabre gift”, the group decided to search the
ten-hectare land and found Latin America’s biggest mass grave to date, with 298 bodies and more than 22,000 bone remains.\footnote{Rubén Martín, “Colinas de Santa Fe: Barbarie y resistencia en México”, Sin Embargo, 18 August 2019, available at: www.sinembargo.mx/18-08-2019/3630804.} Another critical example of information-sharing took place in Tijuana, where anonymous and very precise messages detailing the location of mass graves were sent to the father of a disappeared boy. This led to the discovery in 2009 of a site in Ojo de Agua, an area bordering the United States, in which bodies had been chemically dissolved and buried, leaving them impossible to forensically identify. After this discovery, a former bricklayer was detained and confessed to having “taken care of” approximately 300 bodies as part of his job for the Sinaloa Cartel.\footnote{Alberto Nájar, “México: El hombre que disolvió en ácido a 300 personas”, BBC News, 22 August 2014, available at: www.bbc.com/mundo/noticias/2014/08/140821_mexico_desaparecidos_pozolero_an.} A third case was recorded in Nayarit, where an anonymous informant told the father of a disappeared person that they had “precise information of about 20 clandestine graves ordered by officers of Nayarit’s Prosecutor’s Office, including the Nayarit Police”.\footnote{Idheas, Verdad a voces: La pesadilla nayarita continúa, Mexico, 10 December 2020, p. 10 (author’s translation), available at: www.idheas.org.mx/wp-content/uploads/2020/12/Gaceta_DIGITAL.pdf.} This information led the victims’ group Colectivo Familias Unidas por Nayarit to search for and find a total of thirty-three bodies in three different clandestine graves in January 2018.\footnote{Ibid., p. 11.}

Admittedly, there have also been instances of anonymous communications claiming to have relevant information about the fate and whereabouts of disappeared persons that have turned out to be false, or even used against the families in (sometimes successful) attempts at extortion.\footnote{Universidad Iberoamericana, Manual de acciones frente a la desaparición y la desaparición forzada: Orientaciones para las familias mexicanas de personas desaparecidas, Mexico, 2019, pp. 18, 22, 94.} Other times, perpetrator-initiated communication has been made while demanding ransoms, or has even tragically ended with the disappearance and eventual homicide of hopeful relatives after meeting up with people who promise information.\footnote{See, for example, the case of Pablo Miramontes Vargas, one of twelve family-searchers murdered in connection with their search endeavours. Miramontes Vargas was searching for his disappeared brother, César Alejandro. A. Nuño, above note 41.} Therefore, while there are examples of fruitful perpetrator-initiated communication, there are also numerous unsuccessful instances that have led to crimes against and further victimization of the families of disappeared persons. Here again, the issue of safety is pre-eminent, highlighting the need for an alternative that continues to allow citizen-led searches while reducing the inherent risks of such activities.

**Organized crime cooperation for field searches**

The third type of collaboration relates not to information-sharing *per se* but to removing obstacles to search efforts. On some occasions, victim-searchers are granted permission to access territories under the *de facto* control of organized
crime groups and are even given their protection during the search. Stemming from the fact that a considerable part of the Mexican territory is either directly or indirectly controlled by different organized crime groups, searches for the disappeared encounter the additional obstacle of processing fields under the command of such groups. Most of the examples given so far have taken place on the former lands and properties of organized crime groups, either abandoned or retaken by the Mexican State. Nevertheless, it is unclear to what extent search plans have been halted or affected due to the inability of both victim and State searchers to access identified mass graves. The fact that citizen-led searches have higher possibilities of gaining said access, made possible thanks to the humanitarian discourse surrounding grassroots search activities, is remarkable: “There are zones which neither the police nor the army can enter, but they let the [National Search] Brigade in.”

Evaluating current needs for fostering collaboration with organized crime

As seen so far, the pressing need for information on the disappeared and the fact that the law does not provide mechanisms for effective collaboration with organized crime groups have generated practices that entail severe risks to families, people who conduct searches, and even collaborative members of organized crime groups. Furthermore, the limited options available for collaboration result in a failure to accommodate the needs of the families of the disappeared and to take advantage of the willingness to cooperate that organized crime groups have shown.

In particular, the fact that organized crime groups have responded positively to humanitarian proposals in various cases, and have even replicated this approach unilaterally, disrupts assumptions about perpetrator cooperation. The idea that perpetrators are unlikely to come forward willingly and that revealing the truth is never in their interest, although true in some contexts, proves to be insufficiently nuanced when looking more closely at practice. The logic of the “carrot and stick”, consisting of approaching perpetrators with either threats of prosecution or rewards for their cooperation (amnesties being the most popular example of the latter), might not be the only motivation for perpetrators to share information. For instance, besides the examples given so far related to Mexico, another precedent lies with the work done by the Truth and Reconciliation Commission for Sierra Leone. While it lacked the power to grant amnesty to perpetrators that came forward, and could not guarantee, either, that


54 Anonymous interview with Brigade organizer 1, above note 45.

the Special Court for Sierra Leone would not use their testimonies in eventual criminal proceedings,

[i]t is a fact … that many perpetrators did come forward and cooperate with the Commission and this despite either the absence of a carrot or the presence of a stick. The willingness or reluctance of perpetrators to participate … may have far less to do with promises of amnesty or threats of prosecution than many think.56

It cannot be denied that some perpetrators, especially those already serving sentences, and persons deprived of their liberty who possess information relevant to the search for the disappeared, may indeed only be willing to collaborate if reduced sentencing or some other benefit can be offered to them. However, examples like these invite us to think about the possibility of seeing perpetrator collaboration under a broader perspective. As social actors are not defined by a single identity but represent a complex mix of cognitive structures,57 further aspects that shape their world views ought to enter into our analysis. An important example of these missing aspects is religion, which “can often act as an independent motivating force in politics by functioning as the lens through which actors understand the world and their role there-in”.58 For a more in-depth analysis of perpetrator motives and incentives for collaboration with truth-seeking or even accountability mechanisms, scholarship must contest frozen identities and go beyond exclusive legal understandings of the social actors involved. As perpetrators—and organized crime groups, for that matter—are neither homogenous groups nor exclusive categories,59 different strategies for enhancing collaboration, beyond the “carrot and stick” logic of legal proceedings, should be put in place.

For this purpose, the humanitarian approach in the search for the disappeared offers an alternative for new collaboration strategies. Indeed, what the typologies of informal practices have in common is an underlying logic of humanitarianism, either implicit or explicit, from which a discourse of confidentiality, and even mercy—sometimes with clear religious undertones—in alleviating victims’ suffering, is built. Citizen-led searches in Mexico have been pushed towards creating their own understandings and practices of a humanitarian approach: to be a humanitarian and to sideline—though without forgetting—the fight for justice has been, for some, the best option for getting answers and for owning processes of truth from the grassroots.

58 Ibid., p. 25.
59 It has been widely recognized that perpetrators can be, and not uncommonly are, victims too. See, for example, Primo Levi, “The Grey Zone”, in P. Levi, The Drowned and the Saved, Abacus, London, 2013.
Pathways towards a broader humanitarian understanding

Recently, more comprehensive understandings of what a humanitarian approach to the search for disappeared and missing people entails have been developed in international fora. For example, Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell argue in favour of a humanitarian approach, constructed as one which does not inquire as to who is responsible for the disappearance and properly manages confidential information as a key instrument for obtaining information from reluctant witnesses and perpetrators.60 These authors highlight the use of confidentiality and even anonymization of data as part of a protective framework to incentivize the collaboration that is needed to account for missing persons.61 Vishakha Wijenayake is another author who has recently recalled the importance of humanitarian mandates in the context of the search for the disappeared, understanding the humanitarian approach as not only juxtaposed to the accountability approach but also complementary to it.62 She stresses that even though police and prosecutorial investigators are effective in gathering sensitive information, they can also be unresponsive to victims’ needs, and furthermore, that families’ goals may go beyond accountability, and thus spaces for truth-seeking should be provided through more than just criminal justice means.63

In Mexico, both the GLD and the Homologated Search Protocol64 claim to operate under a humanitarian principle, defined as actions focused on alleviating the suffering and uncertainty of the families of disappeared persons.65 While broad enough to include a wide range of measures, this definition does not allude to the expanded humanitarian approach delineated above – namely, one that is separated from justice-oriented mechanisms (albeit not undisputedly so66) and based on confidentiality. Therefore, the current search framework makes no explicit mention of or distinction between these two approaches.

Even though complementarity between the prosecution and truth-seeking logics was intended by the GLD,67 the search framework set in place finds itself too immersed in the accountability logic and would thus be inconsistent with the expanded humanitarian approach proposed above. First and foremost, there is a general obligation for persons who have knowledge of an event that may constitute a crime to report it to the competent investigative authorities; notably,

60 M. Crettol et al., above note 13, pp. 592, 602–603.
61 Ibid., pp. 612–613.
63 Ibid., pp. 659–660.
64 The Homologated Search Protocol is a policy by the National Search Commission that establishes search procedures and processes, best practices and standards, and terms of coordination with prosecutorial authorities.
65 GLD, above note 1, Art. 5(IV); Homologated Search Protocol, Mexico, 2020, para. 35.
66 See, for example, the historically different understandings of what a humanitarian approach is and its consequences on forensic action between the ICRC and Argentine Forensic Anthropology Team. Adam Rosenblatt, “The Danger of a Single Story about Forensic Humanitarianism”, *Journal of Forensic and Legal Medicine,* No. 61, 2018, p. 76.
67 A. Srovin Coralli, above note 3, pp. 50–51.
this obligation is reinforced when the person in question is a public servant who acquired said knowledge within the exercise of their public functions,68 including authorities tasked with search activities. Moreover, not only is the National Search Commission under an obligation to collaborate, share information and maintain constant communication with crime investigation authorities in matters regarding disappeared persons69, but it also has limited powers and therefore ought to collaborate with investigative authorities for certain search activities.70 These provisions translate into an inability on the part of national authorities to communicate with organized crime groups in a confidential manner, or to build collaborative relationships free from prosecutorial threats or pretences. Authorities in charge of the search for disappeared persons are thus unable to work under an expanded humanitarian approach that can act independently from prosecutorial logic. Ultimately, the absence of a balance between the humanitarian and the accountability mandates has proven prejudicial for establishing collaboration with organized crime groups: systematically, the criminal law framework has been unable to establish collaboration, to yield results, or even to be practicable for prosecutors. This imbalance makes the legal framework for searches more of an impediment than a helpful tool for gathering information and communicating with organized crime groups.

Nevertheless, it is key to recognize that it is no coincidence that the search system is merged with accountability provisions and thus presents an uneven framework. In drafting the GLD, families lobbied for and worked towards a law that could effectively counter day-to-day impunity and force indifferent authorities to perform their duties.71 Therefore, even the establishment of reduced sentencing in the GLD was met with scepticism and controversy, as some victims perceived that benefits for perpetrator collaboration were an inappropriate reward, while others recognized their essentiality.72

Certainly, the criminal and the humanitarian approaches have been falsely dichotomized before, presenting victims with a false and unfair choice between justice and truth.73 These experiences have highlighted the necessity of clearly defining what a humanitarian approach entails for the purposes of searching for the disappeared, from a positive (i.e., its constitutive elements, its essentiality) rather than a negative (what it is not, such as an “absence of criminal prosecutions”) conceptual construction. This strategy could be helpful to refute

69 GLD, above note 1, Art. 53 (XX-XXIII), 53(XL); Homologated Search Protocol, above note 65, paras 292–296.
70 For example, when a search warrant to enter a property is necessary, when clandestine graves are being processed, for exhumation procedures, and for all forensic-related operations. A. Srovin Coralli, above note 3, p. 67.
71 Anonymous interview with an employee of an international organization, Mexico, March 2021 (on file with author).
73 V. Wijenayake, above note 62, p. 646.
the dichotomy and clear up its misunderstandings, such as the equating of humanitarianism with impunity. Admittedly, some positive interpretations of the humanitarian approach have been given, such as the definition that includes confidentiality as a constitutive element. Nonetheless, positively defining humanitarian mandates by connecting them to a victim-centred approach based on the rights and needs of families would resonate more not only with those families but perhaps even with perpetrators, witnesses and the rest of society at large. With a victim-centred logic, arguments in favour of a humanitarian approach would have less chance of being translated as views against the accountability model in search activities.

Furthermore, the issue at hand is not that of favouring one approach over the other but seeking to ensure that both approaches work under a complementarity logic. Both the Guiding Principles for the Search for Disappeared Persons and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence have advocated for equal efforts to fulfil both approaches as mutually reinforcing. The aim, ultimately, is to instate a framework that allows victims’ right to – and claims for – truth to be operative, through effective collaboration schemes with perpetrators and organized crime groups, while also accommodating their right to justice.

Formalizing alternatives for effective collaboration with organized crime groups: An opportunity for the ICRC

As seen from the sections above, the Mexican search framework highlights the need for a change and expansion in order to foster effective collaboration with organized crime groups, including convicted perpetrators and persons being tried for crimes unrelated to disappearances. However, while legal reforms may well be in order, the lengthy processes involved and the scepticism – or even opposition – that some victims have towards offering benefits for collaboration within criminal prosecutions would pose several challenges. Additionally, changes at the legal level would still be insufficient to reach free and active organized crime group members who are not detained or facing prosecution, significantly narrowing the required applicability for effective collaboration. Furthermore, reforms would not accommodate the proposed humanitarian approach, inasmuch as virtually all Mexican public officials are bound to the obligation of denouncing crimes and sharing information with investigative authorities, and would thus be unable to offer confidentiality vis-à-vis prosecutions. This aspect also points to the fact that part of the success of the humanitarian approach in citizen-led searches has been precisely because public authorities are not involved; thus, the perception that

organized crime groups have of the nature of the searches and the searchers bears a substantial weight on their decision to collaborate.

Hence, even if legal reforms took place, an alternative that tackles these gaps would be required. Such an alternative would also need to have the following characteristics:

- operates outside the criminal law framework without undermining it;
- practices confidentiality lawfully;
- facilitates safe collaboration by minimizing the expected risks from engaging with active organized crime groups;
- enables an adequate humanitarian image and perception.

To advance such an alternative, aimed at operationalizing the humanitarian approach to search activities, the ICRC’s involvement as a fourth party in search processes (in addition to victim-searchers, Search Commissions, and prosecutor’s offices), operating alongside the accountability-led framework, could be key. The following proposal explores the possibility of the ICRC engaging as an intermediary for direct communication between organized crime groups and searchers (families and authorities alike), in order to strengthen the already existing practices of informal collaboration by providing a more institutionalized, security-based approach. The idea of institutionalization, although built around the premise of reaching active organized crime groups and their members, could also apply to persons deprived of their liberty, either under criminal processes or already convicted for crimes, related or not to disappearances. This option could target a broader range of perpetrators that could have relevant information for the search. As pointed out before, perpetrators can have a broader set of information-sharing motives beyond a material *quid pro quo* logic. Therefore, by ensuring the confidentiality and safety of their interventions, even when no legal benefits can be offered for participating in a humanitarian information-sharing process, the existence of this alternative could encourage their participation.

Concretely, by approaching these groups and seeking either their information related to disappeared persons or their consent for searches to be carried out in their controlled territories, the ICRC could work as an initiator and facilitator of communication, as well as a receiver of information. Once in possession of the relevant information, the ICRC could share it with search authorities and victim-searchers, without revealing the source or other details that could be used to identify or prosecute the collaborative witness/perpetrator/informant, in order to uphold a strictly humanitarian mandate.

This proposal is not entirely alien to the ICRC’s own agenda of humanitarian action; on the issue of missing persons, in 2003 the 28th International Conference of the Red Cross and Red Crescent delineated the goal of encouraging organized armed groups to resolve the issue of missing persons, assisting families and victims, and participating in prevention strategies.75

---

Moreover, the ICRC has recognized the issue of missing persons as an integral part of its mandate and as an institutional priority, centring the humanitarian approach on the needs of affected victims, including the paramount right to know the fate and whereabouts of their loved ones. Most recently, the ICRC’s Missing Persons Project has dedicated one of its four pillars to mechanisms to clarify the fate and whereabouts of the missing, explicitly looking at ways to ensure complementarity with other approaches besides the humanitarian one. All these policies, relevant to disappeared persons, established the foundation for exploring and expanding the ICRC’s work on collaborating with organized crime groups.

It is essential to recognize that the ICRC’s potential participation in the Mexican context stands regardless of whether or not Mexico’s context of violence can be classified as a non-international armed conflict (NIAC), as it falls into the category of “other situations of violence” (OSVs). While already working on issues related to disappeared and missing persons in Mexico, the ICRC has the possibility, through its right of humanitarian initiative, of offering its services by expanding its current activities into actively enabling and fostering collaboration schemes with organized crime groups. Ultimately, to achieve the implementation of its humanitarian activities, the ICRC would have to seek the Mexican State’s consent, while remaining clear that this offering does not constitute any sort of interference in the internal affairs of the State, and that the ICRC’s further engagement would have no impact with regard to conflict classification or the legal status of perpetrators.

Therefore, for engaging in OSVs, if a concrete situation of violence has significant humanitarian consequences (with due regard to the nature of these consequences, their severity and their magnitude) and the humanitarian action considered by the ICRC constitutes a relevant response to the identified humanitarian consequences (analyzing the ICRC’s identity and nature, and its

77 Ibid., p. 540.
78 Ibid., p. 544.
79 The case of Mexico is controversial regarding conflict classification. While some have advocated for the situation in Mexico to be recognized as a NIAC, the Mexican government and the ICRC itself have not classified it as such. For arguments in favour, see, for example, Geneva Academy of International Humanitarian Law and Human Rights, “Non-International Armed Conflicts in Mexico”, RULAC, available at: www.rulac.org/browse/conflicts/non-international-armed-conflict-in-mexico. For arguments against, see, for example, Diego Ruiz Gayol, “Applying International Humanitarian Law to Apples and Oranges. The Situation of Violence in Mexico: A Non-International Armed Conflict?”, July 2020 (unpublished, on file with author).
80 The areas of work include forensics, training, implementation of the GLD, and psychosocial support to victims. ICRC, Annual Report 2020: Mexico, 22 April 2020, p. 19.
82 Ibid., p. 302.
specific competences, resources and expertise, among other factors\textsuperscript{83}, the ICRC’s involvement is not only possible but also desirable, and may even be pressing. The arguments for why the ICRC’s participation would constitute an ideal response to Mexico’s situation regarding disappeared persons—namely, that this situation entails humanitarian consequences to which only the ICRC’s organizational nature, work policies and unique expertise can respond—coincide with the ICRC’s own criteria for involvement in OSVs, as seen below.

The disappeared and their families: Significant humanitarian consequences

In Mexico, widespread violence related to organized crime since the “War on Drugs” has been considered to have triggered a humanitarian emergency, particularly taking the situation of disappearances as amounting to a humanitarian crisis.\textsuperscript{84} In particular, disappearances, enforced disappearances and issues pertaining to unidentified bodies are among the situations recognized by the ICRC as resulting in humanitarian consequences that seriously affect people and victims outside the classification of armed conflicts.\textsuperscript{85} Furthermore, the ICRC recognizes that its non-exhaustive list of humanitarian consequences stems from violations of international human rights law.\textsuperscript{86} Therefore, given that international jurisprudence is unanimous in considering disappeared persons’ families’ suffering as a form of ill-treatment or even torture,\textsuperscript{87} their situation entails clear and significant humanitarian consequences.

The ICRC’s unique organizational nature and expertise: Key for humanitarian alternatives

The ICRC possesses various qualities that are relevant to the implementation of a humanitarian approach to the issue of disappeared persons in Mexico. Firstly, as an impartial, neutral and independent organization with an exclusively humanitarian mission, the ICRC has a unique nature that can constitute an alternative outside and parallel to the criminal law framework. As the ICRC’s approach to disappeared persons remains exclusively focused on the humanitarian imperative of the families’ need to know the fate and whereabouts of their disappeared relatives, it does not participate in accountability processes, while still acknowledging families’ rights to and demands for justice.\textsuperscript{88} In this regard, the ICRC’s practice is to inform victims of the available mechanisms and

\textsuperscript{83} Ibid., pp. 290–296.
\textsuperscript{85} Ibid., pp. 290–291.
\textsuperscript{86} ICRC, above note 81, p. 291.
\textsuperscript{88} ICRC, above note 76, p. 540.
opportunities for seeking justice, avoiding undermining their capacity for self-protection and their right to participate in these processes. As such, the ICRC operates in parallel with accountability mechanisms, and for Mexico, this means that no lengthy reform process or any compromise of the criminal law framework would have to occur to operationalize the proposed humanitarian approach. In turn, this would allow the existing accountability structure to continue its anti-impunity work while the humanitarian approach is truly operationalized, enabling a more symmetrical interaction between the two. As there exists great asymmetry between the two approaches, *prima facie* disregarding the complementarity principle, strengthening the humanitarian approach is imperative if a truer form of mutually reinforced approaches is to be achieved.

Secondly, as the ICRC does not participate or cooperate in accountability processes, it can work on a confidential basis. Indeed, ICRC staff enjoy a general evidentiary privilege, consisting of the privilege of non-disclosure and testimonial immunity, and as such, they cannot be compelled to provide information to investigative authorities or courts. The reason for this is clear: if the information given to the ICRC under confidentiality clauses “were used in legal proceedings in favour of or against one of the parties to an armed conflict, this would inevitably undermine the perception of—and trust in—the ICRC as truly neutral in that conflict”. Confidentiality as a working method has thus historically allowed the ICRC to establish and maintain effective dialogue with armed non-State actors and to protect its personnel, as security is primarily based on the parties’ recognition of the organization as neutral, impartial and independent. These evidentiary privileges are completely unique to the ICRC, and as such, no other humanitarian organization or even government authority, including the National and Local Search Commissions, could offer the confidentiality guarantees that the ICRC can. Hence, only through the ICRC can those perpetrators and organized crime group members willing to collaborate be ensured—to a certain extent—that the information they give will be used solely for the humanitarian purpose of finding the disappeared. Nevertheless, this guarantee is admittedly limited. While the ICRC can indeed ensure that no personal information of the informant will be shared with searchers, the sole use of said information to search for and find disappeared persons can yield evidence that could, eventually, be used for criminal investigations and procedures. This aspect illustrates why, by strengthening the humanitarian approach, its accountability counterpart is not *per se* diminished but is actually reinforced—i.e., complementary.

89 V. Wijenayake, above note 62, p. 652.
91 Ibid., p. 434.
92 Ibid., pp. 435–436.
94 For an analysis of the converging of the humanitarian and criminal approaches in the context of Sri Lanka, see I. Lassée, above note 55, pp. 626–629.
Thirdly, the ICRC has a reputable history of humanitarian engagement with armed non-State actors. This work has been deemed a precondition for its safe access to persons and territories affected by OSVs, and as the only way to ensure that these groups understand the neutral, independent and impartial mandate of the organization. Therefore, as the safety of ICRC beneficiaries and staff is always a pressing concern, the acceptance of this neutral, impartial and independent nature is what allows the ICRC to work with armed groups and could, eventually, permit groundwork with organized crime groups. Safety-wise, this engagement could fill the gap between the current needs of the search for disappeared persons and the current capacities of citizen-led searches. Whereas the latter have developed considerable practical knowledge around communicating, petitioning and collaborating with organized crime groups, security issues continue to be among the most significant concerns when carrying out their activities. The inclusion of the ICRC as a mediator of communication and information-sharing between organized crime groups and victim-searchers could mitigate the risks to both parties. While the latter would not have to expose themselves, organized crime group members willing to collaborate could have the added guarantee that their cooperation would be confidential. Accordingly, confidentiality could lessen the risks of prosecution-related repercussions, as well as repercussions from within organized crime groups’ own ranks.

Finally, to approach organized crime groups from a purely humanitarian interest (i.e., finding the disappeared), with confidentiality guarantees, fosters the perception of the ICRC as a neutral, independent and impartial organization. As mentioned before, citizen-led searches have been successful partly because of the image they give to organized crime groups; by not being authorities or rival groups, they can establish dialogues from an exclusively humanitarian standpoint. The ICRC could mirror and strengthen this image, and in turn this perception can function by itself as an incentive for establishing trust and collaboration. Moreover, as the ICRC is positioned as an international organization with no dependence on the Mexican government, it can effectively sidestep the political strife not only between organized crime and the State but also between organized crime groups themselves, and thus be perceived as an external actor with a limited, humanitarian interest.

On the dangers of the “humanitarianization” of organized crime-related violence

As humanitarian organizations have steadily expanded their mandates to include urban settings –along with organized crime and narco-trafficking-related violence...
violence—the phenomenon of “humanitarianization of urban violence” has encountered a critical series of concerns that warns against the costs of this new framing. Among scholars’ concerns are governments’ avoidance of political responsibility vis-à-vis the impartiality and neutrality of the humanitarian frame, the sidelining of development and redistributive strategies, the depoliticization of international responsibility regarding light arms and narcotics-related violence in Latin America, and the possibility of undermining contentious social movements. For the ICRC, the costs have been associated with its neutrality, as it has engaged with violence reduction activities by deterring people from joining armed groups, classified armed actors according to their motives, and established dialogues predominately with national authorities but only to a lesser extent with non-State armed groups.

While these concerns are related to the general expansion of the humanitarian field and are thus not specific to the present proposal of expanding ICRC activities for disappeared persons, they are still pertinent cautions moving forward. The concepts of complementarity and a victim-centred approach already delineated in this paper are vital for addressing them. The expansion of the humanitarian approach with the sole aim of fostering collaboration with organized crime groups for disappearance-related issues is a very targeted proposal of humanitarianization, based on victims’ needs, and therefore does not necessarily entail a depoliticization of the overall context of violence. As the inclusion of a humanitarian approach seeks to work as an added value, complementary with all other existent structures and policies put in place, it would not entail a superposition of the humanitarian framework or a choice between the “political” and “apolitical” strategies for addressing high levels of violence.

Furthermore, engagement with organized crime groups could present an opportunity for the ICRC to strengthen its neutrality practice. Whereas the ICRC’s humanitarian dialogue tends to be weaker with non-State actors for reasons beyond its control, in many urban violence contexts those limited relationships have been denounced as partly a policy of choice due to the cautiousness of engaging with parties deemed as having primarily criminal or economic motives. Therefore, by engaging with organized crime groups for the humanitarian imperatives of finding the disappeared, the ICRC’s commitment to enter into dialogue with all relevant parties for humanitarian purposes can be reinforced.

97 K. Bergtora Sandvik and K. Hoelscher, above note 84, pp. 175–176.
98 M. Bradley, above note 96, pp. 1076–1078.
99 Ibid., p. 1074.
Conclusion

The situation of disappeared persons in Mexico calls for innovative approaches to address victims’ rights and needs, and among them, the question of collaboration with organized crime groups needs greater attention. To this end, this paper has advanced a proposal towards a broader humanitarian understanding of the search for the disappeared through the involvement of the ICRC, based on the shortcomings of the current legal framework and informed by the practices and demands of the field. The potential added value that the ICRC could bring to the Mexican context could be complementary to all of the ongoing justice and prosecutorial efforts and, as such, could reinforce a victim-centred approach to disappearance-related issues.

Additionally, this paper has questioned the traditional conceptions of perpetrator collaboration based on the “carrot and stick” logic. If the human rights field can break through the victim–perpetrator dichotomy and acknowledge that the more systematic violence there is, the more closely linked these two actors are, significant progress in truth-seeking and even justice mechanisms could take place. For this purpose, further interdisciplinary research100 on the motives, incentives and identities of organized crime groups and perpetrators beyond legal considerations—the roles of religion, ideology, socio-economic status etc.—could be a step forward.

Finally, the proposal that the ICRC should engage with organized crime groups for humanitarian purposes inserts itself within a wider frame of current challenges and questions for the humanitarian field, such as the humanitarianization of urban violence and the unique contributions that the ICRC as a lead humanitarian actor can bring to contemporary violence issues. While the humanitarian approach to disappeared persons has gained considerable attention in post-conflict contexts, further discussion is needed on its possible contributions and pitfalls for situations that escape the dominant paradigms of NIAC classification. If this discussion is to be meaningful, however, it must take place first and foremost with victims and affected communities as active participants with agency.

100 See, for example, the interdisciplinary questions of identity of victims and perpetrators, including “grey zones”, in Undine Kayser-Whande and Stephanie Schell-Faucon, “Transitional Justice and Conflict Transformation in Conversation”, Politorbis, No. 50-3, 2010, pp. 102–104.
For whom the bell of proportionality tolls: Three proposals for strengthening proportionality compliance

Won Jang*

Won Jang is an independent humanitarian researcher. He holds a master of international affairs degree from the School of International and Public Affairs at Columbia University.

Abstract

The State-centric bias in proportionality in international humanitarian law, where non-State armed groups (NSAGs) are expected to adhere to the same rigour of proportionality as States, regardless of how unrealistic that expectation is, has not often been considered in ideas to improve compliance with proportionality. This article puts forth three proposals—a Comprehensive Proportionality Assessment Framework, capacity-building for military actors, and rapid multidisciplinary assessment teams—that aim to reduce State-centric bias and strengthen proportionality compliance not just for States but for all parties to conflict, including NSAGs.

Keywords: proportionality, proportionality assessments, dual-use items, rapid multidisciplinary assessment teams, archives for proportionality assessments.

* The views in this article are the author’s own and do not necessarily reflect the positions of any organizations with which he is currently or has previously been affiliated. The author would like to thank Gabor Rona, Charles Sabga, Amir Khouzam, Adam Day, Ruben Stewart and the anonymous peer reviewers for their comments and feedback.
Introduction

If proportionality was a bell, and its ring was a call to abide by proportionality, who would be able to hear it toll? As international humanitarian law (IHL) currently stands, not everyone. The act of balancing military necessity and incidental harm when assessing proportionality is one of the trickiest questions for military planners and academics who think through the prism of IHL. And although both State forces and non-State armed groups (NSAGs) have the obligation to consider proportionality when planning and conducting attacks, NSAGs are severely lacking in their capacity to conduct informed proportionality assessments, compared to State actors such as regular military forces. This article frames the gap between the legal obligation to comply with proportionality and the lack of capacity of NSAGs to conduct proper proportionality assessments as a “State-centric bias”, where NSAGs are expected to adhere to the same rigour of proportionality as States, regardless of how infeasible or unrealistic that expectation is.

In many cases, NSAGs are unable to comply with proportionality because of a genuine lack of capacity or understanding. They can justify their disregard for proportionality by asserting that they do not possess the knowledge or tools for proportionality assessments, and use this as a pretext for intentionally disregarding proportionality. Furthermore, they are largely unable to determine when to attack dual-use objects—objects that carry out civilian and military functions simultaneously—and when not to.

In addressing these gaps, this article does not demand legal revisions to IHL but instead proposes policy solutions. The article calls for (1) a Comprehensive Proportionality Assessment Framework (COPAF) that provides guidance in assessing proportionality, (2) capacity-building support for military actors so that they may learn and use COPAF, and (3) rapid multidisciplinary assessment teams (RMATs) within military structures to carry out proportionality assessments using COPAF.

COPAF includes elements previously identified by academic IHL literature as important in conducting proportionality assessments, such as the location of civilians and civilian objects and the choice of weapons used in attacks, among many others. The other two proposals—capacity-building support for military actors, and RMATs—are tools and processes which ensure that COPAF is used more effectively. Ultimately, the three proposals work in tandem to counter the State-centric bias in proportionality and strengthen proportionality compliance.

Legal basis for information-gathering in proportionality assessments

The legal basis for proportionality is enshrined in Article 51(5)(b) of Additional Protocol I (AP I), which prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a
combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Article 51(5)(b) gives rise to what in the IHL community have been called proportionality assessments (even though the word “proportionality” is never used in Article 51), where a military commander assesses the concrete and direct military advantage anticipated and compares it with the expected incidental harm in order to make a decision to attack or not.

Accurate information relevant to the situation at hand is needed for the military commander to execute an attack that will be proportionate. The types of information needed, some of which will be discussed later in this article, include the location of civilians and civilian objects, the choice of weapons to use, and cultural property in the State where the attacks might be conducted. However, the exact standards or requirements are nowhere to be found in AP I.

The more information (especially on the potential extent of incidental harm) the military commander has, the better chances the commander has of making an informed decision that will comply with the rule of proportionality. While the military advantage side of the assessment might be relatively clearer for the military commander (as the commander’s forces will be the ones who will be initiating the attack), those responsible for planning attacks must do everything feasible to have access to information and analysis on a range of factors that can affect incidental harm, and must make use of this information in their assessments. In assessing expected incidental harm, belligerents must rely on information that they have, or can reasonably be expected to have, from all sources in the circumstances. Information that is “reasonably available” is a minimum standard that belligerents must meet, and should belligerents possess information over and above what they can reasonably be expected to have in the circumstances, they must make use of it. The operative terms to be emphasized here are “do everything feasible to have access to information” and “information that is reasonably available”, which are worded passively despite the centrality of information and information-gathering when assessing proportionality.

The actions that one can take to gain access to information today were inconceivable to military actors decades ago, and information that would have been considered extremely unreasonable to have when AP I was adopted in 1977 is considered reasonably available in 2021. For example, a 1976 paper on proportionality mentioned the advances in military intelligence and information-gathering which would have been inconceivable in 1977. The actions that one can take to gain access to information today were inconceivable to military actors decades ago, and information that would have been considered extremely unreasonable to have when AP I was adopted in 1977 is considered reasonably available in 2021. For example, a 1976 paper on proportionality mentioned the advances in military intelligence and information-gathering which would have been inconceivable in 1977.

---

3 The absolute amount of information is not the only important factor, however, as too much information can be detrimental and inhibit decision-making. Information needs to be relevant, accurate and timely.
4 E.-C. Gillard, above note 2, p. 47.
gathering and gave the example of ELINT, or electromagnetic intelligence (now more commonly known as electronic intelligence), which the United States used around the world at the time. ELINT is based on the interception of electronic signals that do not contain speech, text or other communication information, and was still considered an advanced technology at the time. But for ELINT to work, it needs entities that emit electronic signals, and it is useless on entities that do not.

The author of the paper and most of the general public in 1976 (with the exception of legendary science-fiction author Arthur C. Clarke) could not have imagined the possibility of tracking and acting on entities that do not emit electronic signals, as many modern militaries are able to do through the Global Positioning System (GPS). It was only in 1973 that the GPS project was first approved by the US Department of Defense, and the first experimental GPS satellites were launched in February 1978. In the twenty-first century, however, it is perfectly reasonable to assume that well-equipped military forces would have access to GPS information, enabling them to know the real-time location of friendly and enemy forces even if those forces do not emit electronic signals—something that in the 1970s would have been conceivable only in the realm of the imagination. In other words, what was unreasonable in the past is reasonable now, and what is considered unreasonable is subject to technological advances and other variables that change as time progresses. Information that is reasonably available for proportionality assessments is not an immutable concept.

Given that the “information that is reasonably available” requirement is a relative concept whose outer limits undergo constant expansion as information-gathering capabilities evolve, in order to conduct proper proportionality assessments, we must emphasize not the mere need to have the best information possible, which is a passive stance, but the obligation to gather the best information possible. All parties to conflict should actively seek out as much credible and rigorous information as possible. But when taken at face value, AP I does not seem to provide a legal basis for the obligation to gather the best information possible to use in proportionality assessments. The answer to the absence of explicit guidance may not lie in Article 51, but in Article 57(2)(a)(ii),

7 Arthur C. Clarke predicted a GPS-like technology in a letter he wrote in August 1956: “My general conclusions are that perhaps in 30 years the orbital relay system may take over all the functions of existing surface networks and provide others quite impossible today. For example, the three stations in the 24-hour orbit could provide not only an interference- and censorship-free global TV service for the same power as a single modern transmitter, but could also make possible a position-finding grid whereby anyone on earth could locate himself by means of a couple of dials on an instrument about the size of a watch.” See “Did Arthur C. Clarke Predict GPS?”, Technovelgy, available at: www.technovelgy.com/ct/Science-Fiction-News.asp?NewsNum=2967.
9 At an international expert meeting on proportionality, however, experts unanimously agreed that commanders have an obligation to proactively seek out and collect relevant and reasonably available information. See Laurent Gisel (ed.), International Expert Meeting: The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law, ICRC and University of Laval, June 2016, p. 48.
which states that it is necessary “to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”. Specifically, if the phrase “all feasible precautions in the choice of means and methods of attack must be taken” is read in conjunction with the fact that choice of weapons is one of the key elements which should be considered when predicting the incidental harm aspect of a proportionality assessment, then Article 57(2)(a)(ii), at a minimum, can be interpreted to require that military commanders (1) have information about the nature and specifications of potentially deployable weapons, (2) understand how different variables such as timing, environment, and characteristics of the civilian population could affect the impact of weapons if deployed, and (3) have hands-on access to the aforementioned information for consideration leading up to the time of the attack.

Furthermore, Article 57(2)(a)(i) states that attackers shall “do everything feasible to verify that the objectives to be attacked are … military objectives … and that it is not prohibited by the provisions of this Protocol to attack them”. Therefore, Article 57, as a whole, can be interpreted to mean that those who plan and/or decide an attack are obliged to do everything feasible to verify that an attack against a military objective is not prohibited because it would violate the rule of proportionality, and to refrain from such an attack if it did. Here it must be noted that requiring parties to do “everything feasible” to verify is a relative standard. Several States, such as Algeria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the UK, indicated upon ratification of AP I that they interpret the term “feasible” as “that which is practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations”.

However, there is nothing within Article 57 itself that delineates the exact temporal boundaries of doing “everything feasible”. While it is reasonable to think that States define “feasible” as what is practically possible at the precise time of the decision to attack, the word preceding “feasible” is “everything”, which means it can encompass all possible options regardless of any reservations expressed by States on temporal boundaries. Hence, “everything feasible” can be interpreted to include all feasible actions taken leading up to the decision to attack, such as gathering the best information possible for a proportionality assessment. Nothing in AP I contradicts or forbids this interpretation, which also aligns with Article 57(2)(a)(ii)’s requirement to take feasible precautions in the choice of means and methods of attack. Again, the choice of means and methods of attack is an essential consideration in a proportionality assessment.

10 AP I, Art. 57 (emphasis added).
11 E.-C. Gillard, above note 2, p. 43.
12 Ibid., p. 16.
13 Ibid.
Returning to the broader question of whether information-gathering should be not a need but an obligation, it should be if we accept the maximalist interpretation of “everything feasible” proposed above. While this is certainly not an incontrovertible interpretation, it is a legally defensible position and one that would actually benefit parties to conflict. If they considered information-gathering—or, for that matter, gathering the largest amount of credible information possible—as an obligation, it would help overcome the State-centric bias that exists in IHL in general, and in proportionality in particular. This State-centric bias in proportionality will be the focus of the following sections of this article, before introducing the three proposals for proportionality compliance in detail.

**State-centric bias in proportionality**

In binding parties to conflict to the rule of proportionality, IHL makes no distinction among the different types of State and non-State actors. It is a blanket rule applied equally to everyone. That NSAGs are bound by Article 3 common to the four Geneva Conventions and are included in the phrase “each Party to the conflict”, in the context of non-international armed conflicts, is undisputed and uniformly affirmed by international bodies.

But are the effects of this blanket imposition of IHL equally felt? There has been debate around why NSAGs are bound to and held accountable for treaties that they have never participated in developing or acceded to. States monopolize the ability to ratify treaties, and this monopoly is the foundation of the international legal system. Even customary international law is based on State practice. NSAGs are asked to comply with IHL and all its numerous articles, rules and requirements, including the rule of proportionality, without ever having been asked if they agree to be bound by them, or given the ability to contribute to their development.

Narrowing down the discussion to proportionality, the State-centric nature of IHL can be said to give rise to a “State-centric bias” wherein NSAGs are asked to comply with the same rules and requirements of proportionality as States, regardless of whether they agreed to them in the first place, and more importantly, whether they have the capacity to assess proportionality adequately. As implied above,

---

14 Whereas in the case of international armed conflicts, NSAGs would be bound by the four Geneva Conventions, AP I and the customary IHL of international armed conflicts.
18 Article 57(2)(a)(iii) of AP I notes that “those who plan or decide upon an attack” are obligated to refrain from deciding to launch any attack that might be disproportionate. This suggests that the onus is on those who have the authority to plan or decide upon an attack, which in most cases would be military commanders, to refrain from disproportionate attacks. However, regarding Article 57(2)(b) on the
when done rigorously, proportionality assessments require a considerable amount of gathered information, as well as theoretical and technical knowledge on how to use that information to weigh the anticipated military advantage against the possible incidental harm. Even certain State military forces are unable to conduct proportionality assessments with rigour and precision, much less NSAGs that generally have weaker information-gathering capabilities or loosely defined decision-making procedures for proportionality assessments. Below are some examples of how NSAGs can behave because of these weaknesses.

**Behaviour 1: Non-compliance due to genuine lack of capacity**

To note that NSAGs might not understand or have the capacity to assess proportionality is by no means a novel observation. Concepts familiar to military lawyers or IHL specialists, such as proportionality, may not be well understood by members of NSAGs, both at senior and at lower operational levels. Moreover, comprehending the rule of proportionality requires an understanding of even more fundamental concepts in IHL, such as distinguishing civilian objects and military objectives and determining when a combatant is *hors de combat*—which requires training and learning.

Even after gaining such knowledge, NSAGs would find it relatively difficult to comply with proportionality, especially when compared to States, as they often lack the material foundations needed to reify theory into practice. To assess proportionality, at the very minimum, they need information-gathering abilities, to a certain extent, and information-sharing processes and structures in which information flows from the initial observer/assessor to the final decision-maker. Needless to say, the person who orders the attack must also possess the knowledge and capacity to make a proportionality assessment before reaching a decision. These processes require material investments such as electronic equipment to enable information-gathering, communication devices for information-sharing, and qualified personnel to implement the processes. The chances of an NSAG acquiring any of the material resources needed are...
lower than those of a State. And the above list of prerequisites is by no means comprehensive—depending on the desired level of rigour and accuracy and how the “information that is reasonably available” requirement is construed, a proportionality assessment could incorporate a vast number of elements for consideration. In short, conducting proportionality assessments is a tall order even for many States, and as a rule of thumb, it is almost always taller for NSAGs.

Behaviour 2: Using lack of capacity or knowledge as a pretext

NSAGs can also use their lack of knowledge of proportionality and its constituent elements as a pretext to disregard proportionality and carry out attacks that violate the principle. This does not necessarily assume that NSAGs have an idea of what proportionality is and then intentionally disregard it, although such a possibility is not unthinkable. NSAGs can flout proportionality without even knowing that they have done so. For instance, if an NSAG launches an indiscriminate attack on an area with a high concentration of civilians but only one or two low-level enemy combatants, causing a large amount of incidental harm to civilians, and then justifies its attack by claiming that it did not know of their existence, it will have conducted a disproportionate attack without knowing what proportionality is. And if the NSAG did indeed know of the existence of civilians but decided to attack anyway and then lied, saying that it did not know of their existence, it will have used its claimed ignorance of an essential element of the proportionality assessment (i.e., whether civilians are present) as a pretext for the attack, again without having knowledge of Article 57 of AP I.

Using lack of capacity to carry out proportionality assessments as a pretext would presuppose that the ones using the pretext already know what proportionality is, so it is less likely to happen than using the claim to ignorance. Also, lack of capacity as a pretext is theoretically possible, but it is hard to find any real-life examples because military actors who have agreed to be bound by IHL and AP I would not be willing to admit, as a matter of image and pride, that they failed to carry out a proportionality assessment due to lack of capacity, despite being required to do so. A possible scenario would be one in which an NSAG has been sufficiently trained on proportionality but has no genuine intention of complying and carries out disproportionate attacks, claiming that it possesses only the theoretical knowledge and not the capacity to comply. Regardless of the likelihood of such a scenario, this article puts forth proposals to strengthen proportionality compliance which do not promise to be foolproof solutions to such deceptive behaviour but will provide some remedy.

To be clear, States can be just as duplicitous as NSAGs in using lack of capacity or knowledge as a pretext. However, while there are no exact numbers due to the secretive nature of deception, we can reasonably speculate that NSAGs are more likely to unintentionally violate proportionality and use it as a pretext

considerable amount of information about the civilian population that does not require technology or material investments to collect—information that can be used for proportionality assessments.
than State forces are, as NSAGs are likely to know less or nothing at all when it comes to proportionality.

**Behaviour 3: Inability to determine whether to attack dual-use objects or not**

Under the current state of affairs, NSAGs are largely unable to determine whether they can attack a dual-use object or not. “Dual-use” refers not simply to two uses but to two specific kinds of uses: civilian and military. The difficulty arises when the two kinds of uses are simultaneous rather than alternative – in other words, not when a facility sometimes serves civilian purposes and sometimes military purposes, but when it continuously serves both civilian and military purposes at the same time.\(^{22}\) It must be noted that the term “dual-use object” is only used colloquially for practical purposes and is not a category of objects that holds any legal significance.\(^{23}\) Once a civilian object becomes a military objective it ceases to be a civilian object,\(^ {24}\) but it can regain civilian status if the facts that made it a military objective change.

If a military objective has continuing civilian functions which if impaired would cause civilian deaths and injury and damage to civilian objects, there is general agreement that the impairment should count as incidental harm and thus should be taken into account in a proportionality assessment.\(^{25}\) A proportionality assessment on such a dual-use object would be harder than a more conventional proportionality assessment where a military objective has no continuing civilian functions that need to be factored in. And even when adverse effects caused by an attack do not qualify as one of the types of incidental harm recognized under AP I, there is some support for such adverse effects to be somehow given weight in proportionality assessments.\(^ {26}\) This “somehow” is not expanded upon, and if it were, it would be a point of contention among parties to conflict.

One thing is clear: NSAGs are ill-equipped to deal with the dilemmas related to dual-use objects. One example of a dual-use object dilemma is a situation where a one-room school is used as a military communications centre, thus becoming a military objective.\(^{27}\) If we accept the premise that somehow during the proportionality assessment, some weight needs to be given to impairment of the school’s educational function if attacked, how are NSAGs expected to go about this? Would they have information about the importance of the one-room school in terms of how many students it serves, what the value of

---

24 E.-C. Gillard, above note 2, p. 35.
25 Ibid.
26 Ibid. The types of incidental harm that are recognized by AP I are death and injury to civilians and damage to civilian objects. The Gillard paper does not define what is meant by “adverse effects” not recognized by AP I, but it can be assumed to include environmental damage, spread of disease etc.
27 Ibid.
the education they receive is, and what the repercussions would be if students were not able to receive that education because the school was blown to pieces? These are complex, multifaceted questions even for State forces to answer, and NSAGs would likely not be able to answer them at all. Even if we were to take the view that only incidental harm in the strictest legal sense (death and injury to civilians and damage to civilian objects) needed to be considered and that other adverse effects due to an attack could be neglected, it would not make things much easier for NSAGs because they would still lack the capacity to assess whether an attack would cause incidental harm and, if so, what the severity of that harm would be.

**Proposals for strengthening proportionality compliance**

Taking into account the lack of capacity of NSAGs (and even States) to comply with proportionality, this article proposes a framework for proportionality along with three mechanisms that would strengthen proportionality compliance.

**The Comprehensive Proportionality Assessment Framework**

**Premise**

Previous suggestions for clarifying the process of assessing proportionality have ranged from “a formula for such a calculation along with indicators and elements that should or should not be taken into account”\(^{28}\) to “a guidance document on proportionality during armed conflict, to clarify the nature, scope and operational requirements of the principle”.\(^{29}\) They have arisen from justified concerns about the opaque nature of proportionality—that the rule is a vague or flexible formulation which lacks definition,\(^{30}\) is subjective and inherently difficult to apply,\(^{31}\) and fails to guide decision-makers.\(^{32}\)

Admittedly, not everyone wants a more meticulous way of assessing proportionality. States and military lawyers have so far refused to quantify how the risk of losing one civilian life weighs in comparison to the potential of gaining a certain military advantage, or when the relationship between the risk and the advantage becomes excessive.\(^{33}\) Instead, they refer to “reasonableness”\(^{34}\)

---


33 M. Sassòli, above note 28, p. 522. By “excessive”, Sassòli seems to be referring to the point at which the risk of losing one civilian life is excessively larger than the military advantage to be gained from the attack.

and depend on the (rather ubiquitous) reasonable commander who is expected to make decisions based on good faith. Adding to this, military actors might not want a more refined proportionality assessment method because it could be exploited to the benefit of enemy forces if knowledge of it got into their hands— or they may simply wish not to give up the current state of ambiguity that works in favour of the military and to retain the luxury of over-evaluating the importance of the military advantage part of the proportionality equation.

The assessment of proportionality has been frequently called, by analogy, an equation. An equation is a statement showing that two amounts or values are equal; hence, when applied to proportionality, the expectation is that two or more values (or types of informational input) regarding a specific situation where an attack is being considered can be “plugged in” to produce a verdict on proportionality. However, no one has been able to put forth a definitive and mechanical equation that would resolve most, let alone all, of the proportionality conundrums that exist.

A more useful approach might be to assess proportionality not through an equation, but through a framework where the minimum standards and elements to be considered are defined, with the possibility of adding more standards depending on the respective capacities of military actors. As States and NSAGs have a considerable capacity gap, setting minimum standards to which both can realistically adhere, while providing the option of adding more elements to assess when capacity allows, would be a fair approach that reconciles the aspirational goal of applying proportionality to everyone with the reality of unequal capacities.

**Description of the framework**

The proposed framework is called the Comprehensive Proportionality Assessment Framework, or COPAF. It consists of the various types of information, previously identified in academic literature, that need to be included in a proportionality assessment, and breaks them down into two types of standards—Minimum Standards and Optional Standards—based on their importance and how feasible it would be for both States and NSAGs to obtain such information. The Minimum Standards and Optional Standards are shown in Table 1 and Table 2 respectively. The Minimum Standards are divided into primary criteria that must be considered by all parties at all times and secondary criteria that can be considered when capacity allows. The Optional Standards are not obligatory, but are nevertheless broken down into more important (primary) criteria and less important (secondary) criteria.

The distinction between Minimum Standards and Optional Standards would be that Minimum Standards include criteria that have a direct impact on

38 E.-C. Gillard, above note 2, p. 47.
human lives and bodily harm. Optional Standards, while also important in determining the effect on human lives and bodily harm, have a relatively “indirect” effect compared to the Minimum Standards. Primary and secondary criteria have been selected according to the difficulty in obtaining information, with information that is relatively difficult to attain being classified as secondary criteria.

The criteria shown in Table 1 and Table 2 make up the pieces of the proportionality puzzle that relate to incidental harm. The other half of the puzzle, military advantage, consists of pieces that are so varied and context-specific that developing common standards and criteria for COPAF would not be very useful because they would be too broad and generic to provide any sort of meaningful guidance.

Military advantage, unlike incidental harm, is required to be “concrete” and “direct” as per Article 51(5)(b) of AP I. Unfortunately, the travaux préparatoires do not provide much help in understanding the “concrete” and “direct” qualifiers, as there was no shared understanding among State delegations at the Diplomatic Conference of 1974–77 as to their meaning. As a result, experts and military actors have multiple interpretations of what these two terms mean. Therefore, rather than imposing tiered criteria as COPAF does with incidental harm, which is based on elements that for the most part have a degree of general acceptability that military advantage does not have, it would be more practical to have a checklist for self-assessment and comparison with the analysis of incidental harm. This checklist is shown in Table 3.

Considerations when using COPAF

The true value of COPAF lies in its flexibility. If military actors have the ability to assess proportionality beyond the Minimum Standards, they can include more elements as Optional Standards, adding to those suggested above. The more comprehensive the criteria used, the more meticulous the proportionality assessment will be. The military advantage side of the assessment can also add more elements if necessary, but this must be done with the objective of placing checks and balances on exaggerating military advantage, not justifying planned attacks by adding more elements, because proportionality assessments as they are carried out now already tend to favour military advantage over incidental harm.

If COPAF reins in the impulse to overemphasize military advantage, why would military actors accept it in the first place? More broadly, why would military actors accept any sort of framework or process that could possibly limit their means and methods of warfare more than their current level of self-restraint? While COPAF will certainly not have universal appeal, it does benefit

Table 1. COPAF Minimum Standards for incidental harm assessment

<table>
<thead>
<tr>
<th>Type of information</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weapons</td>
<td>Primary criteria (considered by all parties at all times)</td>
</tr>
<tr>
<td></td>
<td>• Accuracy and precision</td>
</tr>
<tr>
<td></td>
<td>• Size of direct area effect</td>
</tr>
<tr>
<td></td>
<td>• Yield (size)</td>
</tr>
<tr>
<td></td>
<td>• Type (guided/unguided, ballistic/cruise/anti-ship/anti-tank)</td>
</tr>
<tr>
<td></td>
<td>• Method of engagement (direct/indirect/air-delivered/placed, e.g., improvised explosive devices)</td>
</tr>
<tr>
<td></td>
<td>• Warhead (when relevant – explosive/blast/fragmentation/continuous rod/shaped charge)</td>
</tr>
<tr>
<td></td>
<td>• Secondary and tertiary effects (i.e., outside the direct effects)</td>
</tr>
<tr>
<td></td>
<td>• Expected casualties and damage to civilian objects</td>
</tr>
<tr>
<td></td>
<td>• Fuse type and setting (when relevant)</td>
</tr>
<tr>
<td></td>
<td>Secondary criteria (when capacity allows)</td>
</tr>
<tr>
<td></td>
<td>• Target composition and construction</td>
</tr>
<tr>
<td></td>
<td>• Angle of attack</td>
</tr>
<tr>
<td></td>
<td>• Weather (how weather conditions affect visibility, trajectory of munitions etc.)</td>
</tr>
<tr>
<td>Civilians and civilian objects</td>
<td>Primary criteria</td>
</tr>
<tr>
<td></td>
<td>• Location of civilians and civilian objects</td>
</tr>
<tr>
<td></td>
<td>• Location of persons hors de combat</td>
</tr>
<tr>
<td></td>
<td>• Location of human shields</td>
</tr>
<tr>
<td></td>
<td>• Concentration of civilians and civilian objects (density)</td>
</tr>
<tr>
<td></td>
<td>• Movement patterns of civilians depending on the time of day and seasonality</td>
</tr>
<tr>
<td></td>
<td>• Type of living (permanent settlement, migratory group, roving displaced persons, etc.)</td>
</tr>
</tbody>
</table>

Continued
<table>
<thead>
<tr>
<th>Type of information</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civilians and civilian objects</td>
<td><strong>Expected civilian casualties</strong>&lt;br&gt;<strong>Expected damage to civilian objects and structures</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Secondary criteria</strong>&lt;br&gt;- Number of vulnerable persons (elderly, children, disabled etc.)</td>
</tr>
<tr>
<td>Medical and public health consequences</td>
<td><strong>Primary criteria</strong>&lt;br&gt;- Presence of medical personnel, units and transports (which are afforded special protection under IHL)&lt;br&gt;- Presence of hospitals and health facilities</td>
</tr>
<tr>
<td></td>
<td><strong>Secondary criteria</strong>&lt;br&gt;- Extent to which public health would be compromised if medical facilities were attacked&lt;br&gt;- Possibility of public health problems prevailing because of environmental damage caused by the attack</td>
</tr>
<tr>
<td>Consequences to the natural environment</td>
<td><strong>Primary criteria</strong>&lt;br&gt;- Existence of specific types of natural environment essential to the survival of civilians in the targeted areas (rivers, lakes, forests etc.)&lt;br&gt;- Direct effects of the planned attack and whether it would cause widespread, long-term and severe damage (such as ground water contamination, flooding, uncontrollable fire, spread of disease)</td>
</tr>
</tbody>
</table>
military actors as it provides a common language and standard(s) for proportionality for both States and NSAGs. At the initial planning stage, COPAF can be used to evaluate whether a planned attack would comply with the rule of proportionality. Post-attack, it can be used by the attacking entity and by others, such as independent observers or even the entities that were attacked, to assess whether the attack complied with the rules of proportionality (granted, persons outside of the decision-making chain will only have partial information). Furthermore, COPAF can be used to review how well the attacking entity collected information/intelligence and then how accurately it assessed the Minimum and Optional Standards. Lastly, COPAF can help to shed light on reasoning around situations involving dual-use objects. While COPAF in no way produces the final judgement on proportionality as it is not an equation or formula, by helping to methodically lay out the factors that could cause incidental harm and the expected military advantages to be gained, it can aid military decision-makers in complying with the rule of proportionality.

In comparing military advantage against incidental harm, it might be tempting to assign scores or weights to the different criteria and elements in an attempt to find a formulaic solution. As certain experts have pointed out, comparing dissimilar categories such as military advantage and incidental harm is akin to comparing apples and oranges and is a thorny business. COPAF eschews the quandary by avoiding a scoring system; instead, the two additional proposals below should help complement COPAF without falling into the trap of quantification. It is also important to note that the COPAF criteria and elements are interconnected and should not be considered as disparate boxes on a scorecard to be ticked off one by one. The correlation between each criterion and element must be pondered carefully to find causality and inter-influence. For instance, a decision-maker could ask what the relationship between expected

---

Table 1, Continued

<table>
<thead>
<tr>
<th>Type of information</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consequences to the natural environment</td>
<td>Secondary criteria</td>
</tr>
<tr>
<td></td>
<td>• Leading to teratogenic, mutagenic and carcinogenic effects</td>
</tr>
</tbody>
</table>


Table 2. **COPAF Optional Standards for incidental harm assessment (to be included in a proportionality assessment by parties that have the capacity to assess)**

<table>
<thead>
<tr>
<th>Type of information</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structural engineering information</td>
<td><strong>Primary criteria</strong></td>
</tr>
<tr>
<td></td>
<td>● Structural information on the structure(s) about to be attacked</td>
</tr>
<tr>
<td></td>
<td>● Networked infrastructure (both nodes and links) connected to the structure to be attacked</td>
</tr>
<tr>
<td></td>
<td>● Estimated impact of direct and indirect damage to essential services and systems and resulting impact on civilian population</td>
</tr>
<tr>
<td></td>
<td><strong>Secondary criteria</strong></td>
</tr>
<tr>
<td></td>
<td>● Effect of previous military operations on targeted structure(s)</td>
</tr>
<tr>
<td>Cultural property</td>
<td><strong>Primary criteria</strong></td>
</tr>
<tr>
<td></td>
<td>● Location of culturally significant sites and structures</td>
</tr>
<tr>
<td></td>
<td><strong>Secondary criteria</strong></td>
</tr>
<tr>
<td></td>
<td>● Location of culturally significant artefacts and objects</td>
</tr>
<tr>
<td></td>
<td>● Historical, artistic, cultural and architectural value of objects</td>
</tr>
<tr>
<td>Particular circumstances of the area where the attack will be conducted</td>
<td><strong>Primary criteria</strong></td>
</tr>
<tr>
<td></td>
<td>● Whether the State is subject to United Nations or other sanctions, blockades or measures that could restrict its ability to repair damaged infrastructure</td>
</tr>
</tbody>
</table>
It is also pertinent to acknowledge that many modern State military forces have collateral damage estimate (CDE) methodologies that assess the magnitude of the expected loss of life, physical injuries and damage. However, these methodologies are not alternatives to proportionality assessments as they only measure the anticipated incidental harm and not the military advantage (which may be determined by States through other tools and processes). More importantly, unlike COPAF, specific CDE methodologies are inevitably and inextricably tethered to the respective State forces that created them. It would be less challenging to convince NSAGs to use COPAF (which is not created by a specific State and is catered toward NSAG use) than to convince them to accept CDE methodologies, especially methodologies from a State with which the NSAG in question is engaged in an armed conflict.

COPAF capacity-building for NSAGs

Premise

States’ obligation to disseminate the contents of AP I (and thus, disseminate knowledge on proportionality) is limited to disseminating this information to their armed forces and civilian populations. Rule 142 of the International Committee of the Red Cross (ICRC) Customary Law Study notes that States and parties to the conflict must provide instruction in IHL to their armed forces. Article 83 of AP I also mandates the dissemination of AP I for the purpose of making its legal instruments known to the armed forces and to the civilian

42 Ibid., p. 35.
## Table 3. COPAF checklist for military advantage assessment

<table>
<thead>
<tr>
<th>Type</th>
<th>Checklist</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Concrete advantage</strong></td>
<td>Is the advantage a military one?</td>
<td>Disrupting government propaganda and undermining the morale of a population is not considered a concrete and direct military advantage.</td>
</tr>
<tr>
<td></td>
<td>Is the advantage one that is not solely political, economic, financial,</td>
<td>The uncertainty of obtaining the anticipated military advantage diminishes the concreteness of the advantage to be taken into consideration.</td>
</tr>
<tr>
<td></td>
<td>social or moral?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Is there a reasonable likelihood of obtaining the anticipated military</td>
<td>Hope, speculation, hypothetical advantages, and spurious and unreliable intelligence cannot be considered.</td>
</tr>
<tr>
<td></td>
<td>objective?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Is the military advantage real or tangible, definable and quantifiable?</td>
<td></td>
</tr>
<tr>
<td><strong>Direct advantage</strong></td>
<td>Is the military advantage offered by the attack in “one causal step”? If</td>
<td>While military advantage can be gained through multiple causal steps, it would be more direct if it was done in one.</td>
</tr>
<tr>
<td></td>
<td>not, describe what the causal link from attack to military advantage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>looks like.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Is the anticipated military advantage brought about by the attack itself,</td>
<td>The sooner the military advantage manifests, the more direct the military advantage is. However, attacking the enemy for the</td>
</tr>
<tr>
<td></td>
<td>not external sources or intervening causes?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>How soon is the military advantage expected to manifest?</td>
<td></td>
</tr>
</tbody>
</table>
Building on the previous interpretation of Article 57(2)(a)(i) of AP I, however, can we assert that when attackers must do everything feasible to verify that the objectives to be attacked are not prohibited by the provisions of AP I, “everything feasible” should include putting in place systems and processes to assess proportionality—and that by corollary, NSAGs should be assisted in establishing these systems and processes because they lack capacity? This would have been an overbearing interpretation when AP I was first conceived, but in light of decades of progress on understanding and engaging with NSAGs on purposes of eroding their military strength in the long term (for instance, neutralizing weapons that the enemy possesses and might use in the future) can be considered “direct” in the sense of being the immediate result of the attack in terms of causality.

Geographic location and proximity matter, but there might a stronger and more direct military advantage by attacking objectives that are far away (for instance, attacking the distant enemy headquarters as opposed to closer field forces).

Table 3, Continued

<table>
<thead>
<tr>
<th>Type</th>
<th>Checklist</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>How close is the military advantage expected to manifest?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>purposes of eroding their military strength in the long term (for instance, neutralizing weapons that the enemy possesses and might use in the future) can be considered “direct” in the sense of being the immediate result of the attack in terms of causality. Geographic location and proximity matter, but there might a stronger and more direct military advantage by attacking objectives that are far away (for instance, attacking the distant enemy headquarters as opposed to closer field forces).</td>
</tr>
</tbody>
</table>

Source: Adopted from L. Gisel (ed.), above note 9, pp. 12–19.

population, with “armed forces” here meaning State armed forces. Thus, we can say that States have no legal obligation to disseminate knowledge on proportionality to NSAGs.43

43 However, the 2016 ICRC Commentary on Geneva Convention I states that the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed groups (para. 125), and that this obligation is not limited to the Geneva Conventions but applies to the entire body of IHL binding upon a particular State (para. 126), which would include the rule of proportionality. See 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.
different fronts, it is arguably not so any more. The need to engage with NSAGs has been well noted in academia as well as policy circles, and the United Nations (UN), ICRC and specialized organizations such as Geneva Call, the Centre for Humanitarian Dialogue and the Centre for Civilians in Conflict work on NSAG engagement from diverse angles. As COPAF was articulated as a framework for proportionality that can be used by both States and NSAGs, it can be used as the theoretical foundation for helping NSAGs build capacity to comply with the rule of proportionality. Such capacity-building would simultaneously satisfy the obligation in Article 57 of AP I to do “everything feasible”.

What kind of capacity-building?

Capacity-building for NSAGs using COPAF would bring these groups closer to fully complying with the rule of proportionality. The term “capacity-building” is used intentionally in lieu of “training”, as training presupposes a lack of knowledge and just that. While a knowledge deficit might exist, capacity-building aims not only to address that deficit but also to aid in the establishment of processes and structures that would enable the holistic implementation of COPAF. Capacity-building would include (1) theoretical training on the basic concepts of IHL and COPAF, (2) case study exercises on proportionality by which individual combatants would acquire the ability to assess proportionality to the best of their abilities in a specific conflict setting, (3) helping NSAGs to establish clear reporting lines and coordination processes through which the information needed for COPAF would flow from the field to the decision-making level, and (4) establishing an organizational structure that would allow the command level to have control over its combatants in the field.

There is a real risk that these activities, especially the latter two, could inadvertently strengthen an NSAG’s ability and resolve to conduct warfare, which would somewhat defeat the purpose of COPAF capacity-building. Stronger command lines and coordination processes could easily be used to issue orders to attack civilians. The way to mitigate this risk is closely related to the answer to another critical question – what would be the very first step in capacity-building? It would be to identify and target NSAGs that are already committed to adhering


45 At the same time, stronger command lines can be used to communicate and enforce restraints on military action. For instance, dissemination of the Taliban’s code of conduct, known as the Layeha, would be easier and more effective if the Taliban was able to unify its command and control structure and resolve the difficulties that the top leadership face in coordinating fighters at the district and provincial levels. The Taliban attempted to find solutions to such challenges when it revised the Layeha in 2010. See Thomas H. Johnson and Matthew C. DuPee, “Analysing the New Taliban Code of Conduct (Layeha): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban”, Central Asian Survey, Vol. 31, No. 1, 2012, p. 87.
to IHL but lack the capacity to convert that commitment into practice on the ground. Geneva Call has been a trailblazer in this line of work and has managed to get NSAGs – as they cannot sign international treaties – to sign an innovative instrument known as the Deed of Commitment, whereby NSAGs commit to abiding by specific humanitarian norms and agree to be held accountable for complying with those norms. Geneva Call has also used other methods, such as unilateral declarations, internal rules and regulations, and bilateral or multilateral agreements, to secure humanitarian commitment by NSAGs. It would be logical to start capacity-building with NSAGs that have formalized such commitments. This would also mitigate the risk of NSAGs expropriating newly established processes and structures to conduct more attacks instead of using them to facilitate proportionality assessments. Even more ideal would be to find and select NSAGs that have expressed specific interest in or intention to adhere to proportionality, and to build capacity with them first.

**Capacity-building by whom?**

Who, then, should carry out COPAF capacity-building for the selected NSAGs? The strongest candidates are reputable humanitarian organizations such as the ICRC and Geneva Call, which have ample experience engaging with NSAGs. However, because of its normally confidential, fieldwork-oriented approach, the ICRC might not be the ideal body to undertake this task, especially if the results of the capacity-building need to be publicized. The UN, while not a purely humanitarian organization, could play a role in capacity-building as well. Whoever takes on the role, an important factor to consider is counterterrorism legislation that prohibits providing “material support” to so-called “terrorist organizations”, an umbrella term that many NSAGs fall under. Such laws could be a chokepoint if COPAF capacity-building activities are determined to be “material support”, similar to the legal precedent set by the US Supreme Court in

46 Out of the 150 NSAGs that Geneva Call have engaged, more than half have signed one or more Deeds of Commitment or made similar pledges. See Geneva Call, *The Garance Series, No. 3: Conduct of Hostilities by Armed Non-State Actors: Report from the 2020 Garance Talks*, Geneva, 2020.

47 One of the very few NSAGs that has formally committed to the rule of proportionality is the Popular Mobilization Forces (PMF) of Iraq, which stated in its Unilateral Declaration in 2018 that it would “commit before the military attack and military operations to consider the anticipated military advantage in comparison with the expected collateral damages”. See PMF, “Declaration on the Commitment to Respect Humanitarian Norms during and in the Aftermath of Armed Conflict or Military Operations”, *Geneva Call: Their Words*, 2018, available at: https://tinyurl.com/yhwkwx2x.

48 M. Sassoli, above note 15, p. 41.

49 See Luciana Vosniak, “How the UN Can Help Ensure Non-State Armed Groups Protect Civilians”, *International Peace Institute Global Observatory*, 16 April 2021, available at: https://theglobalobservatory.org/2021/04/how-un-can-help-ensure-non-state-armed-groups-protect-civilians/. According to Vosniak, there are precedents for the UN to engage with NSAGs in order to achieve humanitarian objectives. For instance, UNSC Res. 1539 and 1612 established a framework for monitoring and reporting grave violations against children’s rights in armed conflict. UN country teams and peacekeeping missions engage in dialogue with NSAGs in order to develop action plans outlining commitments to cease practices that violate children’s rights. Similar resolutions and mechanisms can be used by the UN to engage NSAGs in capacity-building for assessing proportionality.
Holder v. Humanitarian Law Project, which found peaceful conflict resolution activities targeting Turkey’s Kurdistan Worker’s Party and Sri Lanka’s Liberation Tigers of Tamil Eelam to be “material support”. Thus, it might be better to establish a new organization solely focusing on COPAF capacity-building in order to circumvent potential obstacles and find donors willing to fund its operations without legal restrictions or conditions on engaging with NSAGs.

Capacity-building when, and for whom?

COPAF capacity-building would have the most impact if it could be carried out before armed conflict flares up. Implementing COPAF capacity-building imminent to or during hostilities would make its pre-emptive purpose moot as there would be no time to learn how to utilize and internalize the framework. Combatants should be given plenty of time to practice proportionality assessments appropriate to their level of authority with the information that is available to them during periods of peace.

Even NSAGs have different levels within their organizational structure, ranging from ground-level soldiers to mid-level commanders and the top leadership. While each level has different decision-making capacities and certain elements such as strategic military advantage might be better assessed at the strategic commander level,\(^5\) it is nonetheless essential for all NSAG members to internalize COPAF so that the observations and information relevant for proportionality assessments are gathered from the lowest levels up and are fed into the higher-level, strategic decision-making process. Furthermore, considering the loose-network nature of many NSAGs that operate in semi-independent cells without higher command oversight, it is even more imperative that capacity-building reaches as many members as possible.

If possible, civilians living under the control of NSAGs should be made aware of the concept of proportionality and COPAF. Research shows that both States and NSAGs care about the opinion of their national populations when assessing their conducts, image and political positioning.\(^5\) One of the most important features of COPAF is that it consists of criteria that anyone with knowledge of it can use to hold military actors accountable, given that the actors have agreed to use and be bound by COPAF. Media outlets, independent organizations and associations, and even the general population could point out possible violations of COPAF if they were taught what its constitutive elements were and how its processes worked. Of course, civilians would not be privy to confidential military data and information, but nonetheless, attempts to identify violations would apply pressure on NSAGs. Civilians would also need to be trained on fundamental IHL concepts to understand COPAF, such as the humanitarian principles, what *jus ad bellum* and

50 L. Gisel (ed.), above note 9, p. 64.
*jus in bello* are, and how civilians and combatants are defined in IHL. This holds true for capacity-building for NSAG members as well—they need to be trained in IHL basics before COPAF is introduced to them. However, the reasoning is somewhat circular here, as it was recommended above that COPAF be first introduced to NSAGs which show interest in complying with IHL and proportionality, and NSAGs which have shown such interest would already possess some knowledge of IHL. Nevertheless, there could be NSAGs that sincerely want to adhere to IHL but lack understanding of its rudiments, and their basic training needs to be addressed before introducing them to COPAF.

**Interactive learning**

COPAF capacity-building should be an interactive process between the recipients and those carrying out the capacity-building, not just a top-down foisting of IHL rules. Hypothetical scenarios describing situations where proportionality must be assessed\(^{52}\) can be used to spur vigorous discussions. Capacity-building in an interactive manner is also a rare opportunity to draw insights from NSAGs and to learn about their logic, values and ideologies, and the rationale behind their actions. For interactive capacity-building to become a reality, it must be conducted in a mutually respectful environment where NSAGs can be transparent and honest about their ability or inability to comply with proportionality and IHL; this would also expand the space for further engagement. Open dialogue based on reciprocity would make NSAGs feel genuinely included, enhancing a sense of ownership and willingness to do more to comply with proportionality and other parts of IHL.

**Rapid multidisciplinary assessment teams**

Conducting a proportionality assessment based on COPAF would require personnel with expertise from different disciplines and backgrounds. For example, even without mentioning a framework like COPAF, academic literature notes the need for engineers, public health experts,\(^{53}\) medical experts that can quantify mental harm\(^{54}\) etc. when assessing proportionality. At the same time, these experts would also need to understand COPAF and IHL in general and have military expertise and knowledge of the operations, tactics and strategies of the theatre of war in which they are operating.

These needs are unique and costly, and it would be beneficial for military actors to consider the establishment of rapid multidisciplinary assessment teams that would gather information for COPAF and also carry out rapid COPAF

---

52. See L. Gisel (ed.), above note 9, which makes ample use of hypothetical scenarios to facilitate discussions on the application of IHL.
54. See E.-C. Gillard, above note 2, p. 41. While mental harm is not one of the previously described elements of COPAF, it can be included as an Optional Standard. As Gillard asserts, there is no reason in principle to exclude mental harm from the scope of proportionality assessments. Again, the more elements COPAF adds, the more rigorous the assessment becomes.
assessment both *ex ante* and *ex post* – the former for the military commander to use before making a final decision to attack or not, and the latter for evaluation and accountability after the attack. RMATs would be embedded in the military command structure and would gather open intelligence, analyze military intelligence and use COPAF to produce preliminary proportionality assessments that would be disseminated to all levels of the military unit. At the final stage, the strategic decision-maker, informed by the RMAT’s preliminary proportionality assessment, would give the order to attack or not.

RMATs would gather two types of information: (1) general information about the operating environment that can be collected on a consistent basis even before active conflict, such as population, the number of civilians, and characteristics of the natural environment; and (2) information that is directly relevant to a military attack, such as weapon type, yield, and estimated damage. Gathering as much general information as possible even in relatively peaceful times would be particularly beneficial for the decision-maker because there may be carefully pre-planned attacks, totally spontaneous or reactive attacks, or any other type of attack in between the two. As the decision-maker might desire to make, or be pressured into making, a quick, on-the-fly decision due to an urgent situation, it would be advantageous to have as much pre-attained, instantly accessible information as possible even if it is to carry out a bare-bones proportionality assessment. To prepare for attacks that require quick decisions, militaries with advanced capabilities in computer modelling could even create numerous scenarios based on the information they have and, for example, predict the possible number of civilian casualties in a specific area according to the different types of weapons used.

**Benefits of RMATs**

RMATs can make use of existing methods and processes that military actors might already possess, such as CDE methodologies. Furthermore, many State forces and even NSAGs already have intelligence-gathering teams and structures in place, in which case, duplication should be avoided. The conceptual components of RMATs, such as housing multidisciplinary expertise under one roof or the use of COPAF, can be added to pre-existing teams and structures (and modified to suit those teams and structures) instead of creating new ones.

The second benefit of RMATs is the synergy that comes from housing diverse experts under one roof in order to assess proportionality. As opposed to a siloed approach where experts simply produce individual assessments in their respective disciplines and report them separately, RMATs would facilitate multidisciplinary exchanges that analyze how observations and data from different disciplines affect and influence one another. For instance, a water expert and a weapons expert could discuss how the use of different weapons would affect the water supply in a certain area, or an environmental expert and a structural engineer could work together to predict the environmental consequences of attacking an oil refinery. RMATs would facilitate such multidisciplinary thinking and cooperation, which in turn would enhance the quality of proportionality assessments.
Last but not least, the third benefit of RMATs is that the information they collect can be used to judge whether a potential target is a military objective or not. If the target is found to be the latter, there would be no need for a proportionality assessment. It is precisely for this reason that the proposed name of the team is not “rapid multidisciplinary proportionality assessment team”, aside from the preference for terminological brevity. If a potential target is not a military objective, it is illegal to attack it, and any attempts to do so must be cancelled. An RMAT, while carrying out its work, could find that a building has no military functions or that a bridge is being used solely by civilians, and thus there would be no need for a proportionality assessment in the first place as there is no military advantage to be gained. Such analyses by RMATs could also bring down the number of civilian casualties resulting from the mischaracterization (whether knowingly or unknowingly) of civilians and civilian objects as combatants and military objectives.

Feasibility and limitations

As implied above, it is more feasible for State forces than for NSAGs to establish RMATs. NSAGs would not possess the means to recruit and coordinate a team of experts that would carry out proportionality assessments. Also, the loose-network nature of many NSAGs might make it difficult for assessment results to reach the parts of the military hierarchy that need them to make an informed decision.

Helping NSAGs to create RMATs, if they need such assistance, could be a part of the COPAF capacity-building exercise, but it is hard to pinpoint exactly what kind of assistance should be given, except maybe helping them to formulate reporting lines and structures and training them on how to use these to communicate effectively. Organizations working on capacity-building would not, for instance, be able to provide NSAGs with the actual experts that RMATs would need, or any material assistance such as GPS devices or communication equipment, as these might be used to exacerbate the very armed conflict that should be kept under control. Hence, while helping NSAGs to create RMATs as part of COPAF capacity-building is not out of the question, organizations must carefully contemplate the legal and ethical ramifications of such assistance.

Considerations when interacting with NSAGs and States

Neither NSAGs nor States are monolithic. The above proposals for strengthening proportionality compliance should be implemented with a deep understanding of the unique characteristics of each NSAG and State and their respective cultural, developmental, socio-political and historical trajectories.

Specifically, NSAGs can vary depending on their ideology, doctrine, leadership preferences, recruitment strategies, funding sources, group history, etc.
goals, military capacity, degree of territorial control\textsuperscript{56} etc. Their structures can also be shaped by external factors such as the opposing force’s strength and effectiveness, the topography of the group’s operating terrain and whether they have external political or military support.\textsuperscript{57} The characteristics of NSAGs and how they might interact with and influence COPAF capacity-building and other (feasible) activities need to be carefully considered.

The same can be said about States—generalizations will prove to be counterproductive and only tailored approaches will truly enhance proportionality compliance. One important consideration is that since States are viewed as more legitimate actors that hold legitimate authority over their claimed territories, all proposed activities in a particular area will have to take place with the consent of the State that controls it. This is true whether the activities are targeting State forces or an NSAG, or even if the NSAG has a certain degree of control over the territory in which it is located. Access to the NSAG territory would still be subject to the approval of the State that controls the State borders. And even in the most extreme case imaginable, where an NSAG has unimpeded control over who comes in and goes out, attempting to implement activities related to the three proposals put forth in this article without some sort of consent from the State(s) involved in the conflict is likely to backfire. States might forbid or clamp down on such activities under the view that they give “legitimacy” (or material support) to NSAGs. Therefore, it is crucial to assess the relationship between specific States and NSAGs assiduously and to build a solid engagement and implementation strategy centred around that understanding.

\textbf{Conclusion}

\textbf{An obligation for all}

The three proposals put forth in this article—COPAF, COPAF capacity-building and RMATs—are closely intertwined and complement each other. They work better together and are less effective when implemented separately. COPAF is a conceptual framework for capacity-building and proportionality assessments that RMATs can use. It is also a common standard for comparing the quality of various capacity-building programmes and different proportionality assessments. Capacity-building increases the use of COPAF and reinforces its understanding. RMATs can be established through capacity-building, given that there is political and military buy-in to do so.

One of the main objectives of the three proposals is to counter State-centric bias in proportionality and bring NSAGs into the fold as equal duty-bearers of IHL by not just regurgitating rules and laws that NSAGs did not consent to but instead


\textsuperscript{57} ICRC, above note 19, p. 38.
suggesting concrete ideas to assist NSAGs. COPAF provides the theoretical foundation and can be adjusted according to the respective realities of the military actors while obligating adherence to minimum standards that cannot be derogated from. Capacity-building, in particular, can benefit NSAGs that traditionally lack the capacity which States possess. States would also benefit from capacity-building directly when it is carried out by their military forces and indirectly when it is carried out for NSAGs, as both cases would contribute to the practice and dissemination of proportionality and reduce the number of disproportionate attacks on the battlefield.

When implemented, the three proposals can improve the capacity of NSAGs to comply with proportionality, minimize the use of ignorance as a pretext for non-compliance and provide better guidance in targeting dilemmas involving dual-use objects. It would be naive to believe that the three measures proposed here will magically inspire all NSAGs to take proportionality to their hearts; some may reject the applicability of IHL as a whole, as part of a broader rejection of the prevailing international order. However, the very fact that the three proposals exist and are ready to be provided to NSAGs willing to consider them is a critical starting point. COPAF and capacity-building, in particular, enable engagement based on a mutual understanding, which can be used to assess not only one’s own conduct but also the conduct of other parties.

It must be noted that COPAF capacity-building is not just for NSAGs but for State forces as well. This article singles out NSAGs for capacity-building because they need external assistance, not because NSAGs have more of an obligation to build capacity than States, nor because there is proof that NSAGs are more likely to violate proportionality than States. The number of disproportionate attacks and ensuing civilian casualties is hard to ascertain, but it is not uncommon to find conflicts in which States kill more civilians than NSAGs. In Syria, for instance, the Syrian regime and Russian forces are responsible for most of the civilian deaths, not NSAGs. And while States are said to wield the right to “legitimate violence”, this does not mean that all State violence is legitimate or proportionate in the eyes of IHL. Enforcing proportionality compliance by States and NSAGs means working toward flattening the disparity between the two by supporting NSAGs and tempering the already formidable bias that favours States. Proportionality is a yardstick for all to judge conduct in warfare, and if it is to be a yardstick at all, there should be no obstacles as to who can use it.

58 Ibid., p. 39.
59 In 2020, 432 out of 1,734 civilian deaths in Syria were caused by the Syrian regime, which includes the Syrian army, security, local militias and Shiite foreign militias. On the other hand, NSAGs killed far fewer civilians—twenty-one civilians were killed by ISIS and twenty-six by Hay’at Tahrir Al-Sham. See Syrian Network for Human Rights, Extrajudicial Killing Claims the Lives of 1,734 Civilians in Syria in 2020, 1 January 2021, p. 9.
60 For instance, the UN Human Rights Council’s report on IHL violations in Syria specifically singled out a Syrian Air Force attack on Al-Feijeh spring, which provides 70% of all of Damascus’s water, in 22 December 2016. The report stated that “[t]he attack amounts to the war crime of attacking objects indispensable for the survival of the civilian population, and further violated the principle of proportionality in attacks”. See Human Rights Council, Human Rights Abuses and International Humanitarian Law Violations in the Syrian Arab Republic, 21 July 2016–28 February 2017, UN Doc. A/HRC/34/CRP.3, 10 March 2017, paras 32, 37.
Further questions

There are further questions to be contemplated that are relevant to the arguments put forward in this article. How should the different characteristics of States and NSAGs be considered when implementing the three proposals? How does the relationship between the State(s) and NSAG(s) engaged in a conflict affect implementation? Does the implementation of the proposals influence more traditional humanitarian activities, such as aid delivery? Can COPAF capacity-building provide an opening to discuss other issues with NSAGs, such as humanitarian access? Can the concept of accountability be incorporated, and how should military actors be held accountable for actions that they have willingly undertaken? There are a myriad of questions that remain to be explored. The purpose of this article is not to devise a comprehensive strategy that covers every minute detail, but to introduce new ideas for proportionality compliance and to explain the underlying logic of those ideas. Even if one is not convinced of the merits or effectiveness of the three proposals, they will hopefully spark further conversations on how to bring NSAGs into the fold of proportionality compliance without marginalizing them by clinging onto State-centric approaches such as parroting their obligations under the Geneva Conventions without providing any real solutions.

Another way in which State-centric bias reveals itself is when discussing accountability for NSAGs. There is no shortage of literature discussing ways to make NSAGs more accountable under international law, including IHL. This is essentially States (and entities operating under the consent of States, such as independent organizations and academia) attempting to hold NSAGs more accountable. However, not many have asked why NSAGs should not, in turn, be able to hold States accountable for their actions. There are mainly two reasons why the possibility of accountability flowing in this direction has not been considered widely. Firstly, NSAGs have been viewed by many as inherently immoral, so the notion of them holding States accountable has never been given serious consideration. Secondly, and related to the arguments presented in this article, NSAGs have not had the means to hold States accountable. Traditionally, the UN, civil society organizations, independent monitors and humanitarian agencies have been the ones to point out and criticize proportionality violations by States. However, when attacks are conducted on NSAGs or in NSAG territory, NSAGs are better positioned to assess the proportionality of the attacks than outsiders. Once COPAF capacity-building is carried out for NSAGs, the window of opportunity for NSAGs to hold States accountable for proportionality violations will become wider, bringing military actors closer to true equity in proportionality. Accountability in proportionality should be a two-way street.

Not all NSAGs will be interested in holding States accountable for proportionality violations or complying with proportionality themselves. There must be a pre-existing level of voluntary will to comply for NSAGs to adapt COPAF, build capacity and then, if capacity allows, create RMATs (or tweak existing intelligence-gathering structures). Even then, they would be excluded
from certain privileges that States possess. As previously stressed, NSAGs are not
able to become parties to international treaties and their practice does not, *lex
tata*, contribute to the formation of international customary law.61 NSAGs have
also been excluded from the elaboration of good practice standards, such as the
Irish-led process on civilian protection from explosive weapons.62 While the three
proposals do not remove the limitations that exclude NSAGs from contributing
to customary international law, they can help NSAGs to comply with
proportionality and produce their own best practices that other NSAGs and even
States could learn from, which is something that has seldom been considered.
Only when NSAGs are no longer viewed as passive entities that norms must be
forced upon and are instead treated as dynamic entities that can create best
practices (which can develop into norms as they accumulate) will NSAGs and
States genuinely be on an equal footing. And by implementing the three
proposals, NSAGs can start to possess the capacity and knowledge to produce
and enforce norms, specifically with regard to proportionality.

The title of this article alludes to *For Whom the Bell Tolls*, Ernest
Hemingway’s classic 1940 novel revolving around guerrilla fighters in the Spanish
Civil War. Hemingway used a quote from metaphysical poet John Donne’s series
of meditations as the title to epitomize the book’s central theme: that all persons,
all entities, are bound to one another by a common thread, whether that be love,
humanity or the outcome of a civil war. John Donne’s mediation reads:

No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part
of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as
if a Promontorie were, as well as if a Manor of thy friends or of thine owne were;
any mans death diminishes me, because I am involved in Mankinde; And
therefore never send to know for whom the bell tolls; It tolls for thee.

What binds everyone in armed conflict is proportionality, from the uniformed
commander of State forces behind a monitor ordering surgical missile strikes to
the non-State combatant fighting with small arms. If proportionality were a bell,
there would be no need to ask for whom it tolls, except rhetorically. It tolls for
everyone in armed conflict, though not everyone can hear its call. The hope of
this article is that the ideas presented herein will give those engaged in armed
conflict the power to sound and heed the clarion call of proportionality.

---

61 Ezequiel Heffes and Jonathan Somer, *Inviting Non-State Armed Groups to the Table: Inclusive Strategies
towards a More Fit for Purpose International Humanitarian Law*, briefing note, Overseas Development
Institute, Centre for the Study of Armed Groups, December 2020, p. 2.
62 Ibid.
Liar’s war: Protecting civilians from disinformation during armed conflict

Eian Katz
Eian Katz is a Legal Adviser at the American Bar Association’s Center for Human Rights and previously served as Counsel at the Public International Law and Policy Group. He holds a JD from the University of Chicago and a BA from Yale University.

Abstract
Disinformation in armed conflict may pose several distinctive forms of harm to civilians: exposure to retaliatory violence, distortion of information vital to securing human needs, and severe mental suffering. The gravity of these harms, along with the modern nature of wartime disinformation, is out of keeping with the traditional classification of disinformation in international humanitarian law (IHL) as a permissible ruse of war. A patchwork set of protections drawn from IHL, international human rights law and international criminal law may be used to limit disinformation operations during armed conflict, but numerous gaps and ambiguities undermine the force of this legal framework, calling for further scholarly attention and clarification.

Keywords: disinformation, fake news, influence operations, international humanitarian law, international human rights law, international criminal law, ruse of war, armed conflict.

Introduction
According to the World Risk Poll, “fake news” topped the list of concerns for internet users in 2020. This finding should come as no surprise to those who have followed with growing consternation the proliferation of false or misleading
information dirtying the arenas of politics, health, finance and other sectors. Less noticed amid the handwringing have been the unique effects of fake news on civilians in armed conflict settings. Whereas belligerents have long recognized the military value of disinformation for deceiving their enemies, in the age of hybrid warfare it is increasingly produced for a civilian audience. Positioning civilians as the subject or object of disinformation or propaganda may fan the flames of violence and may further lead to three distinct and cognizable forms of civilian harm.

First, fabrications that vilify disfavoured individuals or groups may serve to encourage and legitimate foreseeable acts of violence perpetrated against them by third parties. Perhaps the most infamous such episode occurred in the prelude to the Rwandan genocide, when radio stations owned by the State or by high-ranking State officials inflamed popular sentiment against the Tutsis through fake news reports. In other conflicts, organized smear campaigns have likewise endangered minority populations or humanitarian workers.

A second unsettling application of disinformation that conflict parties have recently embraced is in distorting information vital to securing human needs. Through widespread fearmongering and deliberate obfuscation, hybrid actors aim to sow dissent, undermine the social order, aggravate crises and discredit enemy institutions, including civilian ones. Throughout the COVID-19 pandemic, for instance, various conflict actors have spread disinformation about the virus, underreported case counts or boosted conspiracy theories for political and economic gain. Disinformation in armed conflict may likewise be directed against humanitarian organizations providing relief to beleaguered civilians,

jeopardizing their operations and sullying their reputations. These rampant misrepresentations can place civilians in harm’s way by disrupting access to services or by leading them to act in ways counter to their own interests.

Finally, disinformation may directly harm the mental health of civilians by arousing extreme fear, grief or other painful emotions or unsound mental states. Disinformation geared toward civilian audiences might lead them to develop paranoia or conspiratorial thinking, doubt in their continued ability to satisfy their human needs, a belief that friends or relatives have been or will be harmed, or a reasonable apprehension of death or bodily injury. These harms are less amenable to documentation and proof, but may be no less traumatic, damaging and enduring.

Often, disinformation produced during armed conflict differs little in content from that produced in other contexts. Even so, there are salient practical and legal distinctions. Practically, conflict-affected persons may be especially vulnerable to the ill effects of disinformation due to their desperate living conditions, elevated exposure to violence and decreased access to trustworthy sources of information. Compounding the potential for harm is the fact that conflict environments have proven especially fertile incubators for disinformation, as evidenced by its recent flourishing in Israel and Palestine, Libya, South Sudan, Syria, Ukraine and Yemen. Military and civilian actors alike have made gainful use of disinformation in order to control the narrative regarding the conflict. The deep civil fragmentation characteristic of conflict settings amplifies the effect of such disinformation by creating echo chambers that heighten confirmation bias and accelerate the uncritical sharing of specious reports. Moreover, the collapse of State institutions amid conflict weakens content regulation networks and limits the availability of judicial remedies for confronting libel, leaving few restraints on the spread of disinformation.

Legally, disinformation during armed conflict is unique in being governed by international humanitarian law (IHL), which has long characterized it as an allowable “ruse of war” (provided that it complies with other applicable rules). But, it shall be argued, this permissive attitude is the product of a bygone era in which deceptive practices could be safely supposed to yield tactical or political gains without significantly impacting the condition of non-combatants. The contemporary trend of disinformation being deployed in ways that threaten civilian populations challenges that underlying assumption and begs for a re-evaluation of its treatment in IHL.

The primary enterprise of this article, therefore, is to pioneer a new legal approach to disinformation in armed conflict by mining the corpus of international law for rules that might constrain it. The first part of the article begins with a review of the traditional IHL stance towards disinformation and contends that this stance is no longer in keeping with disinformation’s modern manifestations. After discussing two preliminary issues in the second part, the remainder of the article proceeds to search for other applicable protections with respect to the three forms of harm described above: exposure to foreseeable acts of violence, distortion of information concerning vital human needs, and mental suffering. In most cases, the applicability of protections under IHL, international human rights law (IHRL) or international criminal law is speculative and incomplete at best, calling for greater clarification in the law and focused attention on addressing this problem.

The scope of this article is confined by two principal limits. First, it is concerned only with the publication of false information, not advocacy of violence. It therefore does not delve deeply into the law of incitement, which is the subject of substantial existing case law and scholarship. Incitement is only examined herein insofar as it might arguably describe incendiary falsehoods published with the intent to provoke a violent reaction, even absent an explicit call for violence. Second, this article only deals with disinformation from a jus in bello perspective. Other qualified commentators have opined on disinformation as a use of force or as a violation of sovereignty, and have examined its ordinary treatment in IHRL.

A word on terminology: “disinformation” and “misinformation” both refer to false information but are separated by an element of intentionality in the former:

disinformation is “deliberately misleading or biased”.15 “Fake news” is often a form of disinformation or misinformation but is poorly defined and therefore used sparingly here. Other related concepts, such as “propaganda”,16 “psychological operations”,17 “influence operations”,18 “information operations”,19 “information warfare”20 and “cognitive warfare”,21 may also feature some combination of disinformation, misinformation, misleading information and accurate information. For the sake of clarity, this article avoids them.

Disinformation in armed conflict

The deployment of disinformation as a military tactic is hardly a modern innovation. Writing in the fifth century BC, Sun Tzu maintained that “all warfare is based on deception”. Classical military history is replete with storied battlefield artifices, conjuring the legendary tales of the Trojan Horse, Alexander the Great’s surprise crossing of the Hydaspes River, and Hannibal’s ambush at Lake Trasimene. In the modern period, subterfuge and deceit remain critical components of military strategy, facilitated by increasingly sophisticated communications technologies.

IHL takes a remarkably lenient approach to such stratagems, with one exception. Combatants may not resort to perfidy, defined in Article 37(1) of Additional Protocol I to the Geneva Conventions (AP I) as “inviting the confidence of an adversary to lead him to believe that he is entitled to, or is

---

16 “Any form of adversary communication, especially of a biased or misleading nature, designed to influence the opinions, emotions, attitudes, or behavior of any group in order to benefit the sponsor, either directly or indirectly.” US Department of Defense, Joint Publication 3-13.2: Psychological Operations, 27 January 2010, p. GL-7.
17 “Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. The purpose of psychological operations is to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.” Ibid., p. GL-8.
18 “The coordinated, integrated, and synchronized application of national diplomatic, informational, military, economic, and other capabilities in peacetime, crisis, conflict, and postconflict to foster attitudes, behaviors, or decisions by foreign target audiences that further [partisan] interests and objectives.” Eric V. Larson et al., Foundations of Effective Influence Operations: A Framework for Enhancing Army Capabilities, RAND Arroyo Center, Santa Monica, CA, 2009, p. xii.
20 “The application of destructive force on a large scale against information assets and systems, against the computers and networks that support the four critical infrastructures (the power grid, communications, financial, and transportation).” Brian C. Lewis, “Information Warfare”, Federation of American Scientists, available at: https://fas.org/irp/eprint/snyder/infowarfare.htm.
obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” 22 Belligerents thus may not, for example, disingenuously accept a truce or announce their capitulation, feign injury or illness, or claim civilian or other protected status. 23

In the next paragraph of Article 37, however, AP I explicitly permits “ruses of war” – “acts which are intended to mislead an adversary or induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious”. 24 While this particular provision only pertains to international armed conflicts (IACs), ruses are likewise licensed in non-international armed conflicts (NIACs) under customary international law. 25

“Misinformation” is expressly classified in AP I as a type of permissible ruse in armed conflict. 26 Several other authoritative sources confirm this posture throughout IHL. The International Committee of the Red Cross (ICRC) Commentary on AP I categorizes “circulating misleading messages” as a form of ruse, 27 and numerous national military manuals likewise endorse the use of “misinformation”, “disinformation”, “false information”, “psychological operations” or “bogus dispatches and newspapers”. 28 The Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual), the leading treatise on the application of international law to cyberspace, also enumerates examples of acceptable ruses that include “psychological warfare activities” such as “dropping leaflets or making propaganda broadcasts”. 29 In customary law, as conveyed by the ICRC, ruses are defined even more expansively than in AP I – as “acts intended to confuse the enemy” 30 – such that there can be little doubt that misinformation would be included. Following this logic, many scholars have presumed that IHL constrains disinformation in armed conflict only via the rule against perfidy and other background principles such as necessity, proportionality and distinction. 31

But modern applications of misinformation – or, more accurately, disinformation – call into question its reflexive characterization in IHL as a ruse.

22 AP I, Art. 37(1).
23 Ibid., Art. 37(1).
24 Ibid., Art. 37(2).
26 AP I, Art. 37(2).
29 Tallinn Manual, above note 12, Rule 61, para. 2; Rule 31, para. 5.
for several reasons. First, while ruses are presented in source materials as being intended to mislead an “enemy” or “adversary”, disinformation campaigns during armed conflict today are instead often oriented primarily towards the civilian population. While this does not automatically render them illegal, it highlights a glaring descriptive deficiency in the traditional IHL conception.

More problematic still for the classification of disinformation as a permissible ruse under IHL is the requirement that such acts “infringe no rule of international law applicable in armed conflict”. This proviso demands a fuller analysis of the relevant aspects of IHL, IHRL and international criminal law governing the spread of disinformation during armed conflict, an inquiry that this article will take up later on. As shall be shown, certain forms of disinformation propagated during armed conflict may in fact be in breach of international law.

Finally, the inaptness of the definition of disinformation points to larger issues related to the ability of IHL to adapt to technological developments. Modern strains of disinformation differ both in degree and in kind from their progenitors. Mass media facilitates the generation and circulation of disinformation at unprecedented levels, such that sorting fact from fiction becomes exceedingly difficult. This phenomenon is sometimes referred to as an “infodemic”. Relatedly, technological advancements have made fabrications appear increasingly realistic. Thus, whereas the ICRC once supposed a ruse to be “very often the only course open to a weak combatant”, disinformation today is often employed by highly sophisticated combatants and non-combatants using complex methods. For these reasons, it no longer makes sense to label disinformation as a “ruse of war” without fuller consideration of the circumstances.

Preliminary considerations

Accepting the contention that disinformation during armed conflict should not be afforded a blanket permit under international law as a ruse of war, it must be considered how else it is to be governed. The remainder of this article explores this topic. It finds that there is no single rule, but rather a patchwork set of protections cobbled together from different branches of international law that differ substantively with respect to the aforementioned three categories of harm: exposure to foreseeable acts of violence, distortion of information concerning vital human needs, and mental suffering. But the straitjacketed application of

---

32 It is possible that the term “enemy” might encompass non-combatants—IHL sources use “enemy civilians”, “enemy nationals” and “enemy aliens” without necessarily referring to combatants. “Adversary” is more narrowly confined to a military context.
33 See Tallinn Manual, above note 12, Rule 31, para. 5.
34 AP I, Art. 37(2).
35 R. Xu, above note 8.
38 ICRC Commentary on APs, above note 27, para. 1514.
these protections leaves considerable legal blind spots through which disinformation may continue to exact a civilian toll.

Before embarking upon this legal analysis, two threshold issues must be addressed. The first is whether the protections of IHRL are applicable in this context at all, and if so, with what limitations. The second is whether persons and objects ordinarily protected by IHL surrender their privileged status by participating in disinformation operations.

**Applicability of IHRL**

Several technical considerations complicate the continued applicability of human rights law during armed conflict. The first is its relationship to IHL. During armed conflict, IHRL and IHL apply concurrently. In cases of overlap or conflict between them, however, IHL generally prevails as *lex specialis*. Alternatively, when one corpus does not address a particular issue, the other governs by default. It is asserted here that the provisions of IHL accepting ruses of war do not apply to disinformation in its modern form. The parts of the article that follow further demonstrate that, on the whole, there are few other IHL rules regulating such disinformation. This relative silence should admit of greater reliance on IHRL in this space.

The involvement of non-State actors or of States acting outside their own territories in producing disinformation during armed conflict introduces additional wrinkles to the analysis. IHRL is primarily addressed to sovereigns, and non-State actors are usually not counted among the subjects of human rights treaties. Nonetheless, non-State actors are bound at minimum to abide by *jus cogens* norms, such as the right to life. Moreover, the United Nations (UN) considers non-State actors to be subject to IHRL when they exercise governmental functions or exert control over a territory or population. But

---


40 UN Human Rights, above note 39, p. 58.

41 See the above section “Disinformation in Armed Conflict”.


there is no clear legal source for these imputed obligations, leaving the applicability of IHRL to non-State actors an unresolved question. While non-State groups that produce disinformation would therefore be required to respect the right to life everywhere as *jus cogens*, the effect of other human rights standards within their areas of control is a matter of debate.

States may also produce disinformation for consumption by civilians beyond their territorial limits. Whether IHRL limits this activity depends upon the theory of extraterritorial jurisdiction applied. International courts have mostly hewn to the “effective control” or “personal jurisdiction” models, according to which it is unlikely that human rights law would apply in these circumstances. Some scholars have instead advocated for frameworks based upon the distinction between positive and negative rights or a functional analysis. These more flexible approaches would be more accommodating of extraterritorial jurisdiction in human rights law as pertains to wartime disinformation operations, but they are merely *de lege ferenda* at present.

**Disinformation as direct participation in hostilities**

Combatants are not the only actors who have weaponized information in armed conflict. Public officials, bureaucrats and civilian branches of government may be involved in the production and dissemination of disinformation. Private citizens and other non-State actors, whether acting in the service of the conflict actors or in their individual capacities, also have a prominent role, and in some cases have been shown to be the primary drivers of disinformation in conflict. In several contemporary armed conflicts, the combatants have deputized “electronic armies”, “troll farms” or “web brigades” to spew disinformation.

---

---
Civilians and civilian objects—defined in the negative as, respectively, persons who are not members of the armed forces and objects which are not military objectives—are afforded a protected status under IHL, but it is not immutable. Civilian protections may be forfeited by direct participation in hostilities, which consists of three elements: (1) a minimum threshold of harm, including “death, injury, or destruction”; (2) “a direct causal link between the act and the harm”; and (3) the act must be undertaken in support of a party to the conflict (the so-called belligerent nexus).

Disinformation harming civilian life or civilian objects during armed conflict may satisfy the first and third elements, but it is likely to fail on the causal element, save for mental injuries inflicted directly. According to the ICRC, direct causation means involvement in the actual conduct of hostilities, not merely contributing to the war effort or to war-sustaining activities. Disrupting the supply of electricity, water or food, as disinformation concerning vital human needs might, does not qualify as direct participation in hostilities. Nor does political propaganda, which has analytical similarities to disinformation. On the other hand, publishers may become legitimate military objectives if they engage in incitement. Depending on the context, disinformation may be more akin to propaganda, incitement, or neither.

Even if publishing disinformation were in some cases treated as direct participation in hostilities, it is difficult to imagine combat action being directed against individual social media users. Civilian objects engaged in disinformation, such as broadcasting stations or government bureaus, would make for more realistic targets. However, the protected status of civilian objects would only be revoked for the period of time during which they were producing disinformation, which may be very brief in each instance. Nor is there a clear standard in IHL defining the duration of direct participation amid repeated occurrences, such as by frequent publishers of disinformation. For these reasons, it would be exceedingly difficult to legally justify military operations against civilians or civilian objects directly participating in disinformation.


52 AP I, Art. 50; ICRC Customary Law Study, above note 25, Rule 5.

56 Ibid., Part 2.B.V.2.a.
57 Ibid., Part 2.B.V.1.b.
58 International Criminal Tribunal for the former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 8 June 2000, paras 55, 76.
Exposure to foreseeable acts of violence

This article now turns to its core project: evaluating the restrictions placed by international law upon disinformation in armed conflict with respect to the various types of civilian harm that it may cause. This part of the article directs its scrutiny toward the first type: disinformation about an individual or group that is liable to inspire others to react violently against them. Few legal rules restrain this behaviour. Despite causing harm of a magnitude accordant to an “attack”, the inherent attenuation in agency makes it unlikely that this form of disinformation would be designated as such under IHL. Instead, disinformation that leads to foreseeable violations of the Geneva Conventions would be prohibited under common Article 1, but only with respect to perpetrators over whom the conflict actor “exercises authority”. Nor are disinformation operations likely to be treated as incitement unless they are accompanied by advocacy of violence. That said, it is possible that the individuals responsible for them could be charged as criminal accessories.

Violence and the problem of indirect harm

Among the most fundamental rules in IHL is that civilians “shall not be the object of attack”.61 Were disinformation deemed an “attack”, therefore, civilians and civilian objects would be legally shielded from foreseeable and non-incidental injuries, deaths, destruction or damage caused by it.62 The conflict parties would likewise be barred from employing disinformation indiscriminately, without a specific military objective in mind.63 Furthermore, civilians in armed conflict are generally protected from murder, torture or other violence to life or well-being.64 Attacks are defined in AP I as “acts of violence against the adversary, whether in offence or defence”.65 “Violence” does not only mean uses of physical force;66 possible attacks are instead commonly evaluated with reference to their expected effects. For persons, these effects must include “injury or death” in order to be considered an attack.67 As confirmed by the cases of Myanmar, Rwanda and Syria,68 disinformation in armed conflict may very well cause these sorts of harms to occur, but the inability to attribute these harms to the publisher

61 AP I, Art. 51; 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. 13.
63 AP I, Art. 51(4).
64 Ibid., Art. 75; AP II, Art. 4; common Art. 3.
65 AP I, Art. 49(1).
68 See above notes 5–6.
makes it unlikely that disinformation would be treated as an attack or other act of physical violence under IHL.

Disinformation defaming particular individuals or groups only leads to physical injury when others choose to act upon it. To say that the publisher has attacked the civilians in question would therefore be to attribute to it the violent response of third parties. There are certain circumstances in which harms may in fact be ascribed to the principal despite the involvement of intervening actors. The conduct of persons or groups acting under the instruction, direction or control of a State, for instance, legally accrues to the State. But disinformation by itself does not ordinarily entail direction or compulsion to commit an offending act; it simply supplies or reinforces the motive.

Another way to look at the relationship between disinformation and civilian harm would be through the lens of causation. As described above, in the context of direct participation in hostilities, the ICRC has construed direct causation to require that “the harm in question must be brought about in one causal step”. Merely providing the motive to effect harm, as disinformation might, is not enough. Another view that has been put forward is the notion of an “indirect attack” committed by combatants who wilfully expose civilians to danger from the otherwise lawful action of their adversaries, such as by using them as human shields. Disinformation may analogously place civilians at risk of violence exacted by third parties, though not the sort that would ever be legally authorized. It thus seems unlikely, for reasons related to attribution and causation, that disinformation would be labelled an unlawful attack or other physically violent act.

Common Article 1

In common Article 1, the parties pledge to “ensure respect” for the Geneva Conventions. The ICRC Commentary interprets this duty as applying to “the whole population over which a High Contracting Party exercises authority”, including “private persons whose conduct is not attributable to the State”. Combatants must, therefore, “take measures to ensure respect for the Conventions by private persons”. The obligation to “ensure respect” bears both positive and negative aspects. On the positive side of the equation, conflict parties must affirmatively act to prevent

---

70 The operative standard of control is a matter of debate, but is not likely to encompass disinformation even when viewed in the most generous light. See Marko Milanovic, “Special Rules of Attribution of Conduct in International Law”, International Law Studies, Vol. 96, 2020, pp. 317–324.
71 ICRC Interpretive Guidance, above note 54, Part 2.b.V.2.b.
72 Ibid.; “Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded.”
74 ICRC Commentary on GC I, above note 66, para. 150.
75 Ibid., para. 151.
foreseeable violations. This might plausibly be read to enjoin the publication of disinformation when it is foreseeable that it would lead to violations of IHL, regardless of the number of links in the causal chain. But common Article 1 is confined in scope to persons over which a party “exercises authority”, likely requiring some form of control or jurisdiction. Thus, a conflict actor may not be responsible under this rule for disinformation produced within its domain that causes third parties beyond its area of control to violate IHL.

In the negative, common Article 1 is also held to provide that the parties are to refrain from “encourag[ing]” violations of the Conventions. The ICRC derives this duty from the International Court of Justice’s (ICJ) judgment in the Nicaragua case, wherein the United States distributed manuals openly calling on the rebels to commit acts of violence. The facts of the Nicaragua case therefore suggest that the encouragement which the ICRC had in mind exhibits actual advocacy of wrongdoing, not mere disinformation.

Incitement

While human rights treaties do not directly forbid State signatories from engaging in incitement to violence, they are obligated to enact legislation outlawing it. Many States have fulfilled this duty, which is closely tied to the right to life, by passing statutes criminalizing incitement.

Incitement may be distinguished from other expressive acts by the application of a six-factor test. In the context of disinformation, the two most important factors are intent and likelihood. The element of intent differentiates actual “advocacy” of discrimination, hostility or violence from the “mere distribution or circulation of material”. Disinformation that takes the form of libellous accusations against individuals or groups likely does not reach this level, no matter how provocative, unless it specifically promotes a violent course of action. Even if it does, the publication would not be considered incitement unless there is also a “reasonable probability” that the allegations therein would directly

76 Ibid., para. 164.
77 Ibid., para. 158.
79 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 21 December 1965, Art. 4; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (ICCPR), Art. 20(2). While these provisions only address incitement to violent speech on the basis of a few protected categories, a preeminent advocacy group has argued that they should be read broadly to include “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”, as in other articles of the ICCPR. Article 19, Prohibiting Incitement to Discrimination, Hostility, or Violence, London, December 2012, pp. 19–22.
81 ICRC Customary Law Study (Practice), above note 28, Practice relating to Rule 89.
83 Ibid., para. 29(c).
lead to harm, regardless of whether or not such harm ultimately materializes. These requirements make it rather unlikely that disinformation which does not itself commend violence, even if implicitly designed to spark outrage, would be considered incitement under IHRL.

In a small subset of cases, incitement may also be a criminal matter. Specifically, the Rome Statute of the International Criminal Court (ICC) criminalizes “direct” and “public” incitement to commit genocide. Case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), whose statutes included similar provisions, reveals that “direct” means an actual invitation, whether explicit or implicit, to commit genocidal acts. It is therefore again dubious that disinformation alone would ever be prosecuted as incitement to genocide.

Accessorial liability

Even if not violating international law themselves, those propagating disinformation likely to elicit a violent response may accrue vicarious or accessorial liability for the criminal acts of others. International law recognizes several different forms of accessorial liability, which are compiled in Article 25(3) of the Rome Statute. These include solicitation and inducement, aiding and abetting, and contributions to group criminality.

Solicitation and inducement

Liability for a criminal offence may extend to the person who “orders, solicits, or induces” its commission. These acts each entail “prompting another person to commit a crime” and are referred to collectively as “instigating.” “Ordering” differs from the latter two modalities in that it implies a relationship of authority between the accessory and the principal, which likely would not exist in a case of disinformation. Inducement involves an “exertion of influence by the accessory over the physical perpetrator”, whether by rhetoric or action. Solicitation is a lower standard, whereby the accessory merely “asks for” the commission of the crime. In any case, the instigation must have a “direct effect” on the commission or attempted commission of the crime, such that the instigator is its

84 Ibid., para. 29(f).
87 Rome Statute, above note 85, Art. 25(3)(b).
89 ICC, Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, 19 October 2016, para. 77.
90 Ibid., para. 76.
91 Ibid.
“intellectual author”. The instigator must also have been aware that the resultant conduct would occur in the ordinary course of events.

In case law, solicitation and inducement often involve recruitment or instruction to commit a specific act. However, more general speech acts have also been treated at times as indicative of instigation, such as derogatory language toward a minority group, campaign activities employing violent rhetoric, and “public statements which indicate an intention to hold on to power at any cost, including by use of force against civilians”. Disinformation that tends to arouse popular animosities towards identifiable targets might be viewed similarly.

**Aiding and abetting**

A second mode of co-perpetration in international law is “aid[ing], abet[ting] or otherwise assist[ing]” in the commission or attempted commission of a crime. This is associated with a lower degree of culpability than instigation because the principal is determined to commit the crime before the intervention of the accessory. “Aid[ing]” and “otherwise assist[ing]” are given the same meaning: providing “practical or material assistance”. By contrast, connotes “moral or psychological assistance”, including “encouragement of or even sympathy for the commission of the particular offense”. While there is no “minimum threshold”, the assistance must have “furthered, advanced or facilitated” the criminal conduct. Finally, according to the Rome Statute, the perpetrator must have acted with “the purpose of facilitating the commission of [the] crime”, a stricter mens rea requirement than is found elsewhere in the Statute.

Liability for aiding and abetting has mostly been found for defendants who in some way actively take part in the criminal conduct or bolster the principal’s capacity to commit the crime. Culpable behaviour may include providing logistical or communications support, knowingly transferring illicit payments, or participating in planning, recruitment or training. Moral support may be expressed through physical presence or by failing to object when informed of the crime. Based on these precedents, a disinformation campaign would aid and...
abet offences only if it were specifically designed to embolden actors who had already been plotting criminal activity.

**Contributions to group criminality**

The final form of accessorial liability recognized by the Rome Statute is for acts which “[i]n any other way contribute[ ] to the commission or attempted commission of … a crime by a group of persons acting with common purpose”.106 This is a residual mode of secondary liability intended to capture culpable acts other than ordering, soliciting, inducing or aiding and abetting.107 It is also directed specifically toward group criminality,108 which might include the acts of States or organized armed groups involved in disinformation operations. In order for liability to attach, the contribution must be “significant”,109 intentional, and either in furtherance of the criminal purpose or with knowledge of the group’s criminal intentions.110

Charges against media officials peddling disinformation amid conflict have been brought before the ICC under this theory in at least two cases. In Kenya, charges were confirmed against the head of a radio station accused of “broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the atmosphere”.111 In the Democratic Republic of the Congo, the executive secretary of an armed group conducted an international disinformation campaign through radio communications and press releases with the goals of skirting accountability and winning political and military concessions.112 This charge was not confirmed for a number of evidentiary reasons.113 These cases indicate that individuals responsible for disinformation during armed conflict may be held criminally liable if their dispatches significantly contribute to crimes perpetrated by the belligerents and are intended or known to be likely to do so.

**Distortion of information concerning vital human needs**

Disinformation concerning health care, food and water supplies, or other essential needs represents a second form of civilian harm that may be brought about by disinformation in armed conflict. From a human rights perspective, these

---

106 Rome Statute, above note 85, Art. 25(3)(d).
108 Ibid.
109 Ibid., paras 283–284 (setting forth a set of factors for the assessment of significance).
113 Ibid., paras 311–315.
deliberate misrepresentations may violate the rights to health, food, clothing, shelter or water, or the putative right to humanitarian assistance. By discouraging civilians from availing themselves of institutions providing these necessities, such disinformation may also illegally “render [them] useless” and might furthermore be a type of collective punishment. A separate set of IHL protections would apply if the disinformation campaigns were construed as “military operations”. Finally, infodemics that effectively deprive civilians of the information required to make responsible decisions related to their well-being could conceivably constitute a crime against humanity or even the war crime of starvation.

Fundamental guarantees and human rights

Under IHL, civilians in armed conflict are entitled to respect for person and humane treatment, including medical care “to the fullest extent practicable and with the least possible delay”. At a minimum, respect for person includes all individual rights, and humane treatment is to be interpreted in its “broadest sense”. But the content of these “fundamental guarantees” is mostly supplied by other branches of international law, primarily, IHRL.

Disinformation regarding critical services may run afoul of a number of core human rights provisions. During the COVID-19 pandemic, disinformation concerning medical care and medical providers has proliferated. This impinges upon the rights to life and health, both of which impose obligations upon States to prevent and control the spread of diseases. In order to do so, States must ensure that health information is freely accessible to the public. Any deliberate “misrepresentation of information vital to health protection or treatment” is a violation of the right to health.

Misinformation concerning humanitarian operations during armed conflict, too, is commonplace. These misrepresentations may have obvious bearing on the rights to health and life, along with the rights to food, clothing, housing and water. In addition, some scholars have posited an independent,

114 AP I, Art. 75; AP II, Art. 4; common Art. 3.
115 AP I, Art. 10; AP II, Art. 7.
116 ICRC Commentary on APs, above note 27, para. 4521, 4523.
119 CESCR, above note 118, para. 12(b)(4).
120 Ibid., para. 50.
121 Viviane Lucia Fluck, Managing Misinformation in a Humanitarian Context, Internews, 2019, Part 1, pp. 7–9; M. Bunce, above note 9, p. 49.
albeit limited, right to receive humanitarian assistance.123 Disinformation regarding access to life-saving goods and services would clearly interfere with this right as well.

Access to information pervades the discourse with respect to all of these rights. In addition to its instrumental role in advancing other rights, access to information is itself substantively protected by the International Covenant on Civil and Political Rights and includes the “freedom to seek, receive, and impart information and ideas of all kinds”.124 Information covered by this right includes records retained by public bodies and personal data stored in electronic data files.125 But it is not facially apparent that this guarantee restrains the State from publishing inaccurate information or that it would require the State to validate information published by private actors.

One specific “fundamental guarantee” found in the Geneva Conventions and their Additional Protocols is the prohibition of collective punishment.126 Collective punishment is considered to consist of “penalties of any kind” and is to be understood in its “widest sense”.127 This might reasonably include disinformation designed to harm civilians, though only when undertaken with retributive intent.128

**Protections for civilian objects**

Just like attacks against civilians, attacks against civilian objects are forbidden by IHL.129 In this context, an “attack” means acts leading to “damage or destruction to objects”.130 “Damage” is not restricted to physical harm, but may also connote “impairing the functionality of an object”.131 Following this, it might be argued that certain forms of disinformation have the effect of functionally disabling objects delivering medical or humanitarian assistance in armed conflict by dissuading civilians from making use of them.132 While most of the Tallinn Manual drafters considered a loss of functionality to occur only if it “requires the replacement of physical components” to restore operability,133 some States have


124 ICCPR, Art. 19(2).

125 Human Rights Committee, General Comment No. 34, “Article 19: Freedoms of Opinion and Expression”, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 18.

126 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 33; AP I, Art. 75(2)(d); AP II, Art. 4(2)(b).

127 ICRC Commentary on APs, above note 27, paras 4535–4536.


132 See M. Milanovic and M. N. Schmitt, above note 13, p. 269, equating physical disablement of public health services with “a misinformation campaign that fatally undermines public confidence” in them.

133 Tallinn Manual, above note 12, Rule 30, para. 10.
taken a contrary position in their assessment of cyber operations. France, for example, has stated that a cyber operation constitutes an attack if the targeted object is no longer able to serve its intended purpose, regardless of physical damage. Disinformation might analogously corrode the utility of civilian objects by altering public perception towards them, albeit through a mechanism less direct than a cyber attack.

In both IACs and NIACs, it is also “prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population”. This provision, which appears alongside the prohibition against starvation as a method of warfare, was conceived as a response to “scorched earth” tactics. It is therefore primarily applicable to objects vital for sustenance, namely food and water installations. While the ICRC Commentary on the Additional Protocols notes that the assortment of verbs (“attack, destroy, remove, or render useless”) is intended to “cover all possibilities”, examples enumerated in both the Additional Protocols and their Commentary exclusively concern food and water. In application, too, the scope of “indispensable objects” has been restricted to facilities critical to the food and water supply. Disinformation that takes the form of discouraging civilians from partaking of such provisions, such as by unjustly questioning their safety, might be thought of as “render[ing] useless” the institutions delivering them, even if not qualifying as “attacks” against them.

Distinction and constant care in military operations

Instead of “attacks”, some IHL provisions purport to protect civilians during “military operations”. Specifically, IAC combatants may direct their military operations “only against military objectives” and must take “constant care” in their conduct “to spare the civilian population”. In both IACs and NIACs, civilians “enjoy general protection against the dangers arising from military

134 See, for example, Federal Republic of Germany, above note 54, p. 4.
136 AP I, Art. 54; AP II, Art. 14.
138 Article 54 of AP I is limited in scope to acts taken “for the specific purpose of denying [indispensable objects] for their sustenance value”. The protection for indispensable objects in Article 14 of AP II is linked textually to the prohibition of starvation by the word “therefore”.
139 AP I, Art. 54 (“foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works”); AP II, Art. 14.
140 ICRC Commentary on APs, above note 27, paras 2011, 4801.
141 AP I, Art. 54; AP II, Art. 14; ICRC Commentary on APs, above note 27, para. 2100.
143 AP I, Art. 48 (the ICRC Commentary instructs that “operations” in this article is to be read as “military operations”: ICRC Commentary on APs, above note 27, para. 1875); AP II, Art. 13.
144 AP I, Art. 48.
145 Ibid., Art. 57.
operations”. This requires the combatants not only to abstain from attacks against civilians and civilian objects but also to minimize “incidental losses” and to take reasonable precautions. Together, these rules would sharply restrict the use of disinformation in armed conflict to the extent that it may be considered a military operation — though it is not clear that it would be.

While “military operations” are surely broader in ambit than “attacks”, they are not defined consistently. In one section, the ICRC Commentary on the Additional Protocols distinguishes military operations from “ideological, political, or religious campaigns” based on the element of violence inherent to the former. It further characterizes military operations as “all movements and acts related to hostilities that are undertaken by armed forces”. In another section, however, the Commentary defines military operations as “movements of attack or defence by the armed forces in action”.

This erratic guidance leaves considerable ambiguity as to whether wartime disinformation might qualify as a military operation. It is possible that disinformation could be an act related to “hostilities”, which is interpreted broadly in IHL. But it is unclear how “movements of attack” would differ from outright “attacks”, or when disinformation would be adjudged “violent” rather than “ideological” or “political”. Moreover, the “armed forces” may not be the sole entity engaged in disinformation operations. Even when they are involved, can they be said to be “in action” at that time? In short, many questions remain as to whether the IHL protections for civilians during “military operations” would apply to disinformation campaigns.

Criminal liability

Several of the criminal offences that might fit disinformation are premised on the occurrence of an attack. In both IACs and NIACs, the Rome Statute designates as war crimes “[i]ntentionally directing attacks” against civilians, civilian objects, humanitarian assistance personnel and objects, and hospitals. Because war crimes are defined in reference to IHL, the meaning of “attacks” in these instances is the same as that given in AP I — i.e., “acts of violence against the adversary”. As discussed above, this would probably exclude disinformation owing to the unlikeliness of the criminal conduct being attributed to the publisher.

146 Ibid., Art. 51(1); AP II, Art. 13(1).
147 ICRC Commentary on APs, above note 27, para. 4770.
149 ICRC Commentary on APs, above note 27, para. 4769.
150 Ibid., para. 4769.
151 Ibid., para. 2070: “An act of hostility must be understood as any act arising from the conflict which has or can have a substantial detrimental effect on … protected objects.”
152 Ibid., para. 2070: “An act of hostility must be understood as any act arising from the conflict which has or can have a substantial detrimental effect on … protected objects.”
154 AP I, Art. 49.
For an act to qualify as a crime against humanity, it too must be committed in the course of a “widespread or systematic attack”.\textsuperscript{155} However, the usage of “attack” differs here and “need not constitute a military attack”.\textsuperscript{156} Instead, an attack in the context of crimes against humanity denotes “any mistreatment of the civilian population”\textsuperscript{157} that “caus[es] physical or mental injury”\textsuperscript{158} including by “exerting pressure on the population to act in a particular manner”.\textsuperscript{159} These broader glosses, drawn from the case law of international tribunals, might encompass disinformation that leads to civilian harm, including misrepresentations as to the quality or availability of essential goods and services. The disinformation in question would also have to be published in a “widespread” or “systematic” manner and “pursuant to a State or organizational policy”,\textsuperscript{160} but these conditions are common features of coordinated media operations.

To the extent that disinformation causes or contributes to a health or humanitarian crisis, it might amount to the crime against humanity of “other inhumane acts … intentionally causing great suffering, or serious injury to body or to mental or physical health”.\textsuperscript{161} Just as disinformation may interfere with the delivery of food, water or medical care, several international tribunals have found that similar deprivations in custodial settings constitute inhumane acts.\textsuperscript{162} And if disinformation in an IAC were believed to have “wilfully imped[ed] relief supplies”, it might also be charged as the war crime of “starvation of civilians as a method of warfare”,\textsuperscript{163} for which an attack is not a prerequisite.

### Mental suffering

The final type of civilian harm owing to disinformation in armed conflict is mental suffering. Disinformation at any time can produce panic and distress, but all the more so during warfare. It is possible that these harms could be an unlawful attack against civilians or even a war crime or crime against humanity. It is

\textsuperscript{155} Rome Statute, above note 85, Art. 7(1).
\textsuperscript{156} ICC, \textit{Elements of Crimes}, 2011, p. 5.
\textsuperscript{160} Rome Statute, above note 85, Arts 7(1), 7(2)(a).
\textsuperscript{161} \textit{Ibid.}, Art. 7(1)(k).
\textsuperscript{163} Rome Statute, above note 85, Art. 8(2)(b)(xxv).
indisputable that they violate the right to health, which includes mental health, though only insofar as IHRL jurisdiction applies.

Attacks and spreading terror

As noted above, acts that result in “injury or death” are “attacks” under IHL.\textsuperscript{164} Importantly, “injury” may include “severe mental suffering”.\textsuperscript{165} The meaning of “severe mental suffering” in IHL— including the level and types of harm contemplated and the evidentiary showing required—remains unsettled,\textsuperscript{166} but criminal jurisprudence has provided a number of clues. International case law establishes that great suffering and serious mental harm “need not [be] permanent and irremediable”, but must go “beyond temporary unhappiness, embarrassment, or humiliation … result[ing] in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.\textsuperscript{167} Mental injuries might be caused by death threats\textsuperscript{168} or by otherwise subjecting a person to “intense fear, terror, [or] intimidation”\textsuperscript{169} and may be proven by medical records, victim statements or circumstantial evidence.\textsuperscript{170} Some experts hold that post-traumatic stress disorder is sufficiently debilitating to be classified as severe mental suffering.\textsuperscript{171} It is possible to imagine disinformation triggering similarly detrimental psychological reactions and therefore constituting a wrongful attack against civilians.

The mental harms brought about by disinformation might also evoke the IHL prohibition on “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population”.\textsuperscript{172} The similarity of this provision to the prevailing definition of attack (“acts of violence against the adversary”) is not coincidental—it is portrayed by the ICRC as merely an application of the antecedent prohibition on attacking civilians.\textsuperscript{173} Indeed, it has in practice been primarily applied to incidents that unquestionably qualify as attacks, such as indiscriminate shelling or bombardment and physical assault or abuse.\textsuperscript{174} To characterize disinformation as spreading terror, therefore, it must first be labelled an attack, or perhaps a threat of attack. Even if it is, however, it only conflicts with IHL if spreading terror is its primary purpose.\textsuperscript{175} This may

\textsuperscript{164} Tallinn Manual, above note 12, Rule 30.
\textsuperscript{165} Ibid., para. 8.
\textsuperscript{166} ILA Study Group, above note 148, pp. 359–360.
\textsuperscript{167} ICTY, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 August 2001, para. 245.
\textsuperscript{169} Quebec Superior Court, R. v. Munyaneza, Judgment, 22 May 2009, para. 89.
\textsuperscript{171} ILA Study Group, above note 148, pp. 359–360.
\textsuperscript{172} AP I, Art. 51; AP II, Art. 13. See also ICRC Customary Law Study, above note 25, Rule 2.
\textsuperscript{173} ICRC Commentary on APs, above note 27, para. 1940 (“In the second sentence the Conference wished to indicate that the prohibition [on attacks directed against the civilian population] covers acts intended to spread terror”); Tallinn Manual, above note 12, Rule 36, para. 2.
\textsuperscript{174} ICRC Customary Law Study, above note 25, Rule 2.
\textsuperscript{175} ICRC Commentary on APs, above note 27, para. 1940.
not be the case with disinformation, in which the principal objectives may also include punishing opponents, deflating morale or breeding confusion.

Criminal liability

Recalling the causation discussion above, it would likely be inappropriate to charge the perpetrators of a disinformation operation with offences involving killing or bodily harm. However, it may be possible to hold them to account for directly inflicting great suffering or serious mental injury upon civilians. Various forms of genocide, crimes against humanity and war crimes capture this unique form of harm. Because of the unique mens rea requirement (“intent to destroy, in whole or in part, a national, ethnical, racial, or religious group”), it is unlikely that disinformation would be prosecuted as the genocidal act of “[c]ausing serious bodily or mental harm to members of the group”.176 However, disinformation might reasonably be charged as the crime against humanity of “other inhumane acts … causing great suffering, or serious injury to body or to mental or physical health”,177 the IAC war crime of “wilfully causing great suffering, or serious injury to body or health”,178 or the NIAC war crime of “cruel treatment”,179 which is the infliction of “severe physical or mental pain or suffering.”180

Right to health

Health in international law is understood in both its physical and mental dimensions. The International Covenant on Economic, Social, and Cultural Rights consecrates the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.181 Disinformation that damages mental health is a betrayal of this guarantee, though it must be considered which of the conflict actors bears this obligation with respect to the victim population.

Conclusion

Disinformation in armed conflict poses an ever-growing threat to civilians, who may be exposed to retaliatory violence, denied accurate information critical to their health or sustenance, or caused mental anguish by it. These harms have been overlooked in international law, in part due to the historical characterization of “misinformation” as a permissible ruse of war. This article has argued for the

176 Rome Statute, above note 85, Art. 6(b).
177 Ibid., Art. 7(1)(k).
178 Ibid., Art. 8(2)(a)(iii).
179 Ibid., Art. 8(2)(c)(i).
180 ICC, above note 156, Art. 8(2)(c)(i)–(3).
181 ICESCR, Art. 12.
abandonment of that approach in light of its inconsistency with the contemporary nature of disinformation.

Even if this proposition is accepted, attempts to apply other rules of international law to disinformation encounter numerous grey areas and juridical impediments. First, while disinformation can be produced from afar, the applicability of IHRL and common Article 1 are both confined, respectively, to areas under the “control” or “authority” of conflict parties. Second, because the harms wrought by disinformation are often caused by indirect means, it is not likely to be viewed as an attack or other act of violence\textsuperscript{182} under IHL. Nor would it be a form of incitement, unless it also advocated violence or hostility. Third, while disinformation can inflict direct harms to mental health, these injuries are difficult to assess and are frequently neglected in IHL.\textsuperscript{183} Fourth, disinformation may also frustrate the purpose of civilian objects, but not necessarily in a way that would amount to an attack. Finally, civilians and civilian objects directly participating in disinformation are unlikely to be deterred by the temporary stripping of their IHL protections, though they may be exposed to criminal liability.

The inadequacy of the legal response to disinformation in armed conflict, coupled with the gravity of the harms it may occasion, underscores the need for the articulation of clearer standards. In June 2021, the international community took an important first step with the release of the Oxford Statement on International Law Protections in Cyberspace,\textsuperscript{184} which sets forth ten general principles, touching on sovereignty, incitement, human rights, criminal law, common Article 1, and general rules of IHL and international criminal law. This article has presented further details as to the specific application of these principles to disinformation during armed conflict, providing a theoretical foundation for further efforts in the field.

\textsuperscript{182}See AP I, Art. 75(2); AP II, Art. 4(2); common Art. 3(1).
\textsuperscript{184}D. Akande et al., above note 19.
Humanizing siege warfare: Applying the principle of proportionality to sieges

Maxime Nijs
Maxime Nijs is an Affiliated Junior Researcher at KU Leuven. He holds an LLM in international humanitarian law and human rights from the Geneva Academy and has previously obtained an LLB and LLM from KU Leuven.

Abstract
Siege warfare and its devastating humanitarian consequences have been one of the defining features of contemporary armed conflicts. While the most apparent restriction of siege warfare appears to be provided by the prohibition against starvation of the civilian population as a method of warfare, the prevailing restrictive interpretation of this prohibition has left civilians remaining in a besieged area unprotected from the hardships they endure. This article demonstrates that shifting the focus from the prohibition against starvation to the rules regulating humanitarian relief operations does not seem helpful due to the ambiguities regarding the requirement of consent and the right of control of the besieging party. In remediing this protection gap, this article examines whether and how the principle of proportionality applies in the context of a siege. After analyzing whether the encirclement and isolation aspect of a siege can be considered an attack in the sense of Article 49(1) of Additional Protocol I (AP I), to which the proportionality principle applies, the article investigates how this principle operates in the context of a siege. It will be demonstrated that Article 57 (2)(b) of AP I requires that the proportionality of a siege must be continuously monitored.
Keywords: international humanitarian law, conduct of hostilities, siege warfare, urban warfare, starvation, principle of proportionality.

Introduction

While human suffering might be “an unfortunate and tragic, but unavoidable consequence of war”, as observed by the US Department of Defense, it has rarely been more dire than within the walls of a besieged city. Siege warfare has been employed throughout history and is therefore often deemed an “archaic” or “medieval” method of warfare. Nevertheless, contemporary armed conflicts have been characterized by a resurgence of sieges, predominantly in urban areas. The sieges laid on numerous Syrian cities, such as Aleppo, Ghouta and Homs, or the Yemeni city of Ta’izz, have again drawn the attention of the international community to the devastating humanitarian consequences of this method of warfare. Since 2013, the United Nations Security Council has regularly condemned such practices.

The urbanization of armed conflict undeniably exposes civilians to immense risks, and such risks are even more amplified in a besieged city. Indeed, civilians and particularly children are likely to be the first to suffer from

1 US Department of Defense (DoD), Law of War Manual, 2015, p. 17, para. 1.4.2.1.
5 The UN Security Council has repeatedly called upon all parties to “immediately lift the sieges of populated areas” and demanded that “all parties allow the delivery of humanitarian assistance … and enable the rapid, safe and unhindered evacuation of all civilians who wish to leave”. UNSC Res. 2139, 22 February 2014; UNSC Res. 2401, 24 February 2018.
starvation due to the complete isolation of the area. Additionally, the use of explosive weapons with a wide impact area has proven to be one of the major causes of injury and death among civilians and of damage to civilian objects. Beyond their direct impact, such explosive weapons are particularly harmful for civilians “trapped” in a besieged city given their long-term reverberating effects on infrastructure and services indispensable for sustaining life in such areas.

Sieges inevitably involve frictions with a variety of norms of international humanitarian law (IHL) when civilians are within the besieged area. While the most apparent restriction of siege warfare is provided by the prohibition against starvation of civilians as a method of warfare, under the prevailing restrictive interpretation of this prohibition sieges are considered lawful as long as their purpose is to achieve a military objective and not to starve the civilian population. Moreover, while humanitarian relief operations might prevent or alleviate the suffering of civilians within a besieged area, controversy surrounds the question of whether and under what circumstances the besieging party might withhold consent to such operations. In remedying this protection gap, this article approaches the question of the legality of sieges from another perspective – namely, from the point of view of the rules on the conduct of


10 E.-C. Gillard, above note 3, p. 2; G. Gaggioli, above note 3.


12 This position is articulated in the ICRC Customary Law Study, above note 11, p. 188. See also ICRC Commentary on the APs, above note 7, p. 653, paras 2089–2090: “This rule was laid down for the benefit of civilians. Consequently, the use of blockade and siege as methods of warfare remain[s] legitimate, provided they are directed exclusively against combatants.”

hostilities. More specifically, the article examines whether the principle of proportionality applies to sieges and how this principle would operate in a siege context to protect civilians from excessive incidental harm.

This article is structured in four sections. The first section will examine the notion of “siege warfare” together with its military imperative, while the second section will present the prevailing interpretation of the prohibition against starvation and the rules regulating humanitarian relief operations and their inadequacies in terms of providing protection to civilians within a besieged area. The third section will address an essential preliminary question before turning to the proportionality analysis as such – namely, whether a siege, and more precisely its encirclement and isolation aspect, can be considered an attack in the sense of Article 49(1) of Additional Protocol I (AP I). Three arguments will be presented to substantiate the claim that it can: first, the definition of an “attack” is sufficiently flexible to encompass sieges; second, an analogy can be made with the law of blockades; and third, there seems to be an emerging State practice of, and support among experts for, applying the principle of proportionality to sieges. The fourth section will explore how the proportionality principle would operate in times of siege warfare. It will be demonstrated that, in light of the precautionary obligation of Article 57(2)(b) of AP I, the proportionality of a siege must be continuously monitored.

**Siege warfare and its military imperative**

Characterizing sieges in legal terms is considerably complicated by the lack of a definition of this concept under IHL. Siege warfare has sometimes been termed an “operational strategy” and consists generally of a combination of two methods of warfare. The essence of a siege lies in the encirclement of a defended area and the subsequent isolation of the enemy forces by cutting of their channels of supply and reinforcement with a view of inducing the enemy into submission by means of starvation. In order to maintain pressure on the besieged forces and

---


16 Hampson asserts that sieges are like an elephant: “you know it when you see it, but you have a problem defining it”. See Steven Hill, Françoise Hampson and Sean Watts, “Can Siege Warfare Still Be Legal?”, *Proceedings of the Bruges Colloquium: Urban Warfare,* October 2015, p. 91.


to accelerate their surrender, contemporary sieges are frequently accompanied by bombardment.\textsuperscript{19} Despite their “archaic” connotations, military doctrine considers resorting to sieges essential, especially in the context of urban warfare.\textsuperscript{20} While cities are of crucial strategic importance to belligerents, conducting military operations inside such complex urban environments, where military objectives are intermingled with civilians and civilian objects, has proven particularly challenging.\textsuperscript{21} Siege operations might offer an alternative to intense street-by-street fighting against an “entrenched” enemy and consequently avoid extensive harm among both the attacking forces and the civilian population.\textsuperscript{22} In such circumstances, the laying of a siege might conform with the obligation to take all feasible precautions in the choice of means and methods of attack to avoid or in any event to minimize incidental civilian harm.\textsuperscript{23}

### The prohibition against starvation, the rules regulating humanitarian relief operations and their deficiencies

Whereas starving enemy forces is unquestionably a legitimate method of warfare,\textsuperscript{24} contemporary IHL prohibits the starvation of the civilian population as a method of warfare.\textsuperscript{25}

Although the inclusion of this principle in the Additional Protocols was considered “innovative, and a significant progress of the law”,\textsuperscript{26} the ambiguous wording of the prohibition has allowed States to adopt a permissive approach with regard to sieges that affect civilians. Moreover, while humanitarian relief

---


\textsuperscript{19} 2019 Challenges Report, above note 6, pp. 22\textendash;23; E.-C. Gillard, above note 3; A. C. Fox, above note 3, p. 2; J. Kraska, above note 17.


\textsuperscript{22} 2019 Challenges Report, above note 6, p. 23; S. Watts, above note 2, p. 14; A. C. Fox, above note 3, pp. 3\textendash;4; L. M. Beehner, B. Berti and M. T. Jackson, above note 20, pp. 80\textendash;81.

\textsuperscript{23} AP I, Art. 57(2)(ii). Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 56\textendash;58.


\textsuperscript{25} AP I, Art. 54(1); AP II, Art. 14. Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 186\textendash;189.

\textsuperscript{26} ICRC Commentary on the APs, above note 7, p. 653, para. 2091.
operations might prevent or alleviate the suffering of civilians within a besieged area, controversy surrounds the question of whether and under what circumstances the besieging party might withhold consent to such operations.

Interpreting the prohibition against starvation: A permissive approach to sieges

Although some scholars have concluded that the prohibition against starvation precludes the enforcement of a siege when civilians are affected,27 the majority interpretation of this prohibition considers sieges a lawful method of warfare as long as their purpose is to achieve a military objective and not to starve the civilian population.28 This permissive approach towards sieges is based on a restrictive reading of Article 54(1) of AP I and Article 14 of Additional Protocol II (AP II), which refer to starvation as a “method of warfare” and a “method of combat” respectively and which are considered as merely precluding conduct the purpose of which is to starve civilians.29 This interpretation finds support in the International Committee of the Red Cross (ICRC) Commentary on AP I, which provides that

[t]o use [starvation] as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies. … Starvation is referred to here as a method of warfare, i.e., a weapon to annihilate or weaken the population.30

This approach is articulated in a number of military manuals and is incorporated in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (San Remo Manual) and the HPCR Manual on International Law Applicable to Air and Missile Warfare (Harvard Manual) with regard to sea and aerial blockades.31

27 According to Fleck, “this rule completely outlaws traditional warfare methods, such as sieges of defended towns”. Dieter Fleck, The Handbook of International Humanitarian Law, Oxford University Press, Oxford, 2021, p. 226. Dinstein shares the same opinion but critically adds that “a broad injunction against sieges involving civilians is unrealistic, in view of the fact that there may be no other method of warfare to bring about the capture of a defended town with a tenacious garrison and impregnable fortifications”. According to him, “the practice of States does not confirm a sweeping abolition of siege warfare affecting civilians. Possibly, a pragmatic construction of the language of Article 54 will be arrived at, whereby siege warfare will continue to be acquiesced with—notwithstanding civilian privations—at least in those circumstances when the besieging Belligerent Party is willing to assure civilians a safe passage out.” See Yoram Dinstein, above note 18, pp. 255, 256–257, paras 695, 699; Yoram Dinstein, “Siege Warfare and the Starvation of Civilians”, in Astrid J. M. Delissen and Gerard J. Tanja (eds), Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven, Martinus Nijhoff, Dordrecht and Boston, MA, 1991, pp. 151–152.

28 See above note 12.

29 Additional support for this narrow interpretation may be found in Article 54(2) of AP I, which provides an example of a violation of the prohibition against starvation and refers to the destruction of objects indispensable to the survival of the civilian population “for the specific purpose” of denying them for their sustenance value to the civilian population. See D. Akande and E.-C. Gillard, above note 13, p. 761; E.-C. Gillard, above note 3, p. 10.

30 ICRC Commentary on the APs, above note 7, p. 653, paras 2089–2090.

31 DoD, above note 1, pp. 315–316, paras 5.20.1–5.20.2: “Starvation specifically directed against the enemy civilian population … is prohibited.” UK Ministry of Defence (MoD), The Joint Service Manual of the Law
However, it must be noted that such a restrictive interpretation has not remained without criticism. Dannenbaum has argued in particular that the requirement that starvation must be pursued “as a method of warfare” merely requires that starvation is used as a method of conducting hostilities, and that no purposive element can be inferred from such a requirement. Based on an interpretation of the prohibition against starvation in its context (namely, in light of Article 54 of AP I and Article 14 of AP II as a whole), Dannenbaum comes to the conclusion that this prohibition also extends to situations where civilians are not starved purposefully but where starvation is the foreseeable consequence of a particular course of action.

While Dannenbaum’s approach is convincing and the present author endorses it, it does not correspond with the restrictive interpretation of the prohibition against starvation which prevails at the moment. However, even when the prohibition against starvation is not triggered, the rules regulating humanitarian relief operations might play a crucial role in preventing and alleviating the effects on the civilian population in a besieged area.

Preventing and alleviating starvation: Humanitarian relief actions and evacuations

The primary responsibility for meeting the needs of civilians within a besieged area lies with the party that has effective control over them – namely, the besieged party. However, as soon as the civilian population under its control is “not

of Armed Conflict, 2004, p. 74, para. 5.27.2: “The law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example, by cutting off enemy supply routes which are also used for the transportation of food, or if civilians through fear of military operations abandon agricultural land or are not prepared to risk bringing food supplies into areas where fighting is going on.” Article 102(a) of the San Remo Manual and Article 157(a) of the Harvard Manual even refer more restrictively to, respectively, the “sole purpose” and the “sole or primary purpose” of the blockade. See Louise Doswald-Beck (ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, Cambridge, 1995 (San Remo Manual), p. 179; Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), HPCR Manual on International Law Applicable to Air and Missile Warfare, Cambridge University Press, Cambridge, 2013 (Harvard Manual), p. 50.


33 Dannenbaum proposes to amend Article 102(a) of the San Remo Manual as follows: “The declaration or establishment of a blockade is prohibited if it has the purpose or foreseeable consequence of starving the civilian population by depriving it of objects essential for its survival.” T. Dannenbaum, above note 32, pp. 364–369, 385.

34 The ICRC Commentary on AP I states: “It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately, it is a well-known fact that all too often civilians, and above all children, suffer most as a result. If the effects of the blockade lead to such results, reference should be made to Art. 70 AP I.” ICRC Commentary on the APs, above note 7, p. 654, para. 2095. As pointed out in note 13 above, the rules regulating humanitarian relief operations come into play when civilians are facing a lower level of deprivation than “starvation”. See D. Akande and E.-C. Gillard, above note 13, p. 778; E.-C. Gillard, above note 3, p. 11.

35 E.-C. Gillard, above note 3, p. 11. See also M. Sassoli, above note 24, p. 575, para. 10.201.
adequately provided” with supplies essential to their survival or suffers “undue hardship”, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken subject to the agreement of the “Parties concerned” in international armed conflicts (IACs) and the “High Contracting Party concerned” in non-international armed conflicts (NIACs).36 The ICRC Commentary on AP I provides that, alternatively, if it would be impossible to provide sufficient aid for the civilian population within the besieged area, the prohibition against starvation should dictate their evacuation.37

Despite the absolute requirement of obtaining consent for relief actions to be implemented, it is now generally accepted that this decision is not left to the discretion of the parties, which may not withhold their consent arbitrarily.38 The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict (Oxford Guidance) differentiates between three scenarios in which withholding of consent would be considered arbitrary: first, if it is withheld in circumstances that result in the violation by a State of its obligations under international law with respect to the civilian population in question; second, if the withholding of consent violates the principles of necessity and proportionality; and third, when consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or otherwise inappropriate.39 However, it must be noted that this interpretation has been rejected by Watts, who criticizes the Oxford Guidance as “unnecessarily complicating a passage that is clear and settled in its meaning”.40 According to him, States were only willing to abandon the limited scope of Article 23 of Geneva Convention IV (GC IV) in

37 ICRC Commentary on the APs, above note 7, p. 654, para. 2096. Geneva Convention IV already contained a strong recommendation to conclude agreements for the evacuation of certain vulnerable categories of civilians from besieged and encircled areas: see 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. 17.
38 The prohibition against arbitrary withholding of consent is derived from (1) the need to provide an effective interpretation of the relevant treaty texts, which gives effect to all aspects of those provisions and does not render parts of them redundant; (2) the intention of those who negotiated the Additional Protocols, as reflected in the drafting history of the provisions; and (3) practice subsequent to the adoption of the Protocols. See Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, 26 October 2016 (Oxford Guidance), pp. 21–22, paras 43–49; Dapo Akande and Emanuela-Chiara Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, International Law Studies, Vol. 92, 2016, p. 489; ICRC Customary Law Study, above note 11, pp. 196–197. The ICRC Commentary on AP I emphasizes a passage by the German delegate Professor Michael Bothe from the Official Records of the Diplomatic Conference: “[The consent reservation in Article 70 of AP I] did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.” ICRC Commentary on the APs, above note 7, p. 819, para. 2805. However, it must be noted that this interpretation has met with resistance in scholarly writings – see the main text at note 40 below.
40 S. Watts, above note 2, p. 46.
exchange for discretion to permit or reject the broader relief actions of Article 70 of AP I during sieges.41

One of the scenarios in which withholding of consent would be considered arbitrary is when doing so would violate the prohibition against starvation.42 Here it sufficient to refer to the aforementioned majority interpretation of the prohibition, which merely precludes conduct the purpose of which is to starve civilians. Such an interpretation seems to be reflected in the Oxford Guidance, which states that “[w] ithholding consent to humanitarian relief operations in situations where the civilian population is inadequately supplied and the State intends to cause, contribute to, or perpetuate starvation” is arbitrary.43 The ICRC seems to derive from the prohibition against starvation not only an obligation to allow civilians to leave the besieged area but also an obligation to consent to humanitarian relief operations to the benefit of those who remain.44 Such an approach also seems to be taken in the San Remo Manual (Article 103) and the Harvard Manual (Article 158) with regard to naval and aerial blockades. In contrast, a number of military manuals conclude that if the besieging party leaves open the offer for civilians and the wounded and sick to leave the besieged area, preventing any supplies from reaching that area would not amount to a violation of the prohibition.45

Whether or not the prohibition against starvation entails an obligation to consent to humanitarian relief operations in the context of a siege, it must be noted that consenting parties retain a right of control.46 This allows them to verify consignments, prescribe technical arrangements, require supervision by a humanitarian organization to ensure that only civilians benefit from the assistance, and even impose temporary and geographically limited restrictions as required by military necessity.47 In this respect, it has been submitted that a besieging party may temporarily deny the delivery of humanitarian relief when...

41 Ibid., p. 22.
42 Moreover, withholding consent to medical relief operations, including on the grounds that medical supplies and equipment could be used to treat wounded enemy combatants or fighters, would be arbitrary since it amounts to a violation of the fundamental rule that the wounded and sick – including enemy combatants or fighters – must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition (see, for example, AP I, Art. 10; AP II, Art. 7). See Oxford Guidance, above note 38, p. 23, para. 51; D. Akande and E.-C. Gillard, “Arbitrary Withholding of Consent”, above note 38, p. 496; M. Sassòli, above note 24, pp. 579–580, para. 10.210.
43 Oxford Guidance, above note 38, p. 23, para. 51.
45 Danish Ministry of Defence, Military Manual on International Law relevant to Danish Armed Forces in International Operations, 2020, p. 419: “Furthermore, it is important that the civilian population is not forced against its will to remain in the besieged town but has a chance to leave it. Only if the civilian population has received an offer to leave the town but nevertheless chooses to stay may the supply of vital necessities be cut off temporarily.” MoD, above note 31, p. 88, para. 5.34.3: “The military authorities of the besieged area might decide not to agree to the evacuation of civilians or the civilians themselves might decide to stay where they are. In those circumstances, so long as the besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area.” See also Y. Dinstein, above note 18, pp. 255–256; Y. Dinstein, above note 27, p. 151.
47 M. Sassòli, above note 24, p. 581, para. 10.213.
there are reasonable grounds to believe that the consignments may be diverted by the besieged party. Although the denial of consent may not go beyond what military necessity demands, this could be interpreted as allowing the besieging party to withhold consent for the entire duration of the siege if the diversion threat would be expected to persist.

The need for an additional layer of protection: The principle of proportionality

By characterizing the effect of starving the civilian population as not constituting a “method of warfare” but as merely incidental to achieving the military objective of starving the besieged enemy forces, the protection offered by Article 54(1) of AP I and Article 14 of AP II has been significantly diminished. Indeed, it might be exceptionally difficult to establish such a purpose from the side of the besieging force. Moreover, shifting the focus from the prohibition against starvation to the rules regulating humanitarian relief operations does not seem helpful due to the ambiguities regarding the requirement of consent and the right of control of the besieging party. In attempting to remedy this protection gap, the following section will demonstrate that the principle of proportionality applies in the context of siege warfare and protects the civilian population from excessive incidental civilian harm.

Does the principle of proportionality apply in the context of sieges?

A siege as an attack in the sense of Article 49(1) of AP I

The notion of “attacks” forms the heart of the rules which are traditionally referred to as “Hague law” and which aim at protecting the civilian population and, to a

much more limited extent, combatants or fighters from the effects of hostilities. These rules must be distinguished from the norms of “Geneva law”, which protect persons and objects in the power of a party to the conflict. This fundamental distinction has important practical consequences since a party may not conduct hostilities against, and thus not direct “attacks” against, persons or objects in its power. Indeed, under Geneva law, persons hors de combat or in the power of a party to the conflict must be treated humanely at all times, and objects controlled by a party are protected against “wanton” destruction.

While the fundamental principles of the law governing the conduct of hostilities apply to the wider notion of “military operations”, its more detailed rules, including the principle of proportionality, only apply to “attacks” as defined in Article 49(1) of AP I. Therefore, the crux of the matter is whether a siege can be considered an attack—that is, an act of violence against the


52 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, p. 34, para. 75. The notion of “attack” and the fundamental distinction between “Hague law” and “Geneva law” has recently attracted considerable scholarly attention in light of the Ntaganda case law of the International Criminal Court (ICC). While the Appeals Chamber rejected the prosecutor’s appeal that the notion of attack has a special meaning in relation to Articles 8(2)(e)(iv) and 8(2)(b)(ix) of the Rome Statute and is not restricted to the conduct of hostilities, three out of five judges seem to endorse the prosecution’s argument of rejecting the narrow interpretation of “attack” under IHL in favour of a broader, ordinary meaning. It has been submitted that such an interpretation severs the link between the Rome Statute and the underlying IHL rules and creates overlaps between Hague and Geneva law war crimes within the Rome Statute. ICC, The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06 A2, Judgement (Appeals Chamber), 30 March 2021, pp. 419–427, paras 1154–1168. See also Abhimanyu George Jain, “The Ntaganda Appeal Judgment and the Meaning of ‘Attack’ in Conduct of Hostilities War Crimes”, EJIL: Talk!, 2 April 2021, available at: www.ejiltalk.org/thentaganda-appeal-judgment-and-the-meaning-of-attack-in-conduct-of-hostilities-war-crimes/; Ori Pomson, “Ntaganda Appeals Chamber Judgement Divided on Meaning of ‘Attack’”, Articles of War, 12 May 2021, available at: www.lieber.westpoint.edu/category/attack-symposium/.


54 The prohibition against the destruction or seizure of the property of an adversary unless for reasons of imperative military necessity and the rule that all civilians and persons hors de combat must be treated humanely apply as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 175–177, 306–308.

adversary, whether in offence or defence.\textsuperscript{56} Although it is uncontroversial that the rules on the conduct of hostilities apply to kinetic attacks such as bombardments carried out during a siege,\textsuperscript{57} views diverge on the crucial question of whether the encirclement and isolation aspect of a siege can be considered an attack in the sense of Article 49(1).\textsuperscript{58} Various convincing arguments have been presented to substantiate the claim that it can indeed be considered thus.\textsuperscript{59}

\textit{Interpreting the notion of “attack” in light of its context and object and purpose}

The first argument that has been presented is that Article 49(1) of AP I, which defines attacks as acts of violence against the adversary whether in offence or defence, is sufficiently broad and flexible to include siege.\textsuperscript{60} Consequently, it must be determined how the elements of this definition, and in particular the notion of an “act of violence”, should be interpreted.

The centrality of violence in the definition of attacks is supported in both the ICRC Commentary on AP I, which explains that “attack means combat action”, and in the commentary by Bothe, Partsch and Solf, which clarifies that “the term ‘acts of violence’ denotes physical force”.\textsuperscript{61} However, nowadays it is well settled that the violent essence of an act must be understood in terms of consequences rather than referring to the nature of the means or method of attack.\textsuperscript{62} Indeed, it is uncontroversial that the use of chemical, biological or radiological weapons constitutes an attack even though the use of such weapons does not involve kinetic force.\textsuperscript{63}

\textsuperscript{56} An alternative argument could be made on the basis of what Kleffner has termed “a broader notion of proportionality as a general principle of the law of armed conflict”. Jann K. Kleffner, “Military Collaterals and Ius in Bello Proportionality”, \textit{Israel Yearbook on Human Rights}, Vol. 48, 2018, p. 57.


\textsuperscript{58} E.-C. Gillard, above note 3, p. 8.

\textsuperscript{59} See, in particular, G. Gaggioli, above note 3; G. Gaggioli, above note 14, p. 127.

\textsuperscript{60} G. Gaggioli, above note 3; G. Gaggioli, above note 14, p. 127.

\textsuperscript{61} ICRC Commentary on the APs, above note 7, p. 603, para. 1880; M. Bothe, K. J. Partsch and W. A. Solf, above note 48, pp. 328–329.


\textsuperscript{63} With regard to chemical weapons, see International Criminal Tribunal for the former Yugoslavia (ICTY), \textit{The 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, paras 120, 124; M. N. Schmitt, above note 51, p. 290; C. Droge, above note 62, p. 557.
This consequence-based approach has been developed particularly in the field of cyber warfare.64 According to Rule 92 of the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, “a cyber-attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”.65 The Manual further confirms that “acts of violence should not be understood as limited to activities that release kinetic force” and that “the crux of the notion lies in the effects that are caused”.66 The ICRC has taken a similar position and argues that “cyber operations expected to cause death, injury or physical damage constitute attacks under IHL”.67 In keeping with this approach, the International Criminal Court (ICC) has recently held that “in characterizing a certain conduct as an ‘attack’, what matters is the consequences of the act, and particularly whether injury, death, damage or destruction are intended or foreseeable consequences thereof”.68

Such an interpretation conforms with the customary rule that treaties shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of the treaty’s object and purpose.69 Indeed, a careful evaluation of the rules on the conduct of hostilities applicable to attacks illustrates that the concern was not so much with the nature

66 Tallinn Manual 2.0, above note 65, p. 415, para. 3.
68 ICC, The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 9 June 2014, pp. 17–18, para. 46. See also ICC, Ntaganda, Amicus Curiae Observations by Prof. Geoffrey S. Corn et al., above note 53, p. 5, para. 13: “An ‘attack’ must involve an act reasonably expected to produce physical injury or damage to a person(s) or object(s). ‘Attack’ requires the employment of force (kinetic or not) against persons or objects to produce violent consequences. Violent consequences, in turn, are understood as death or injury in the case of persons, or physical damage or destruction in the case of objects.”
of the acts, but rather with the consequences they might entail. Moreover, a restrictive understanding of the notion of attack would be hard to reconcile with the object and purpose of AP I, which is to ensure the protection of the civilian population and civilian objects against the effects of hostilities.

However, it must be noted that for an “act of violence” to amount to an attack in the sense of Article 49(1) of AP I, the act must be directed “against the adversary”. This requirement has been interpreted as requiring that the act of violence must be executed with the motivation to cause harm to the adversary or other persons or objects in the conduct of hostilities. Such an interpretation has been proposed to prevent the possibility that, for example, the provision of air-delivered supplies which inadvertently causes injury or damage, or manoeuvre damage to roads and fields, could be considered an attack. This requirement proves rather unproblematic in the context of a siege, given a siege’s objective to induce the enemy into submission by means of starvation.

In light of this consequence-based approach, a siege, or more precisely its encirclement and isolation aspect, which is not characterized by its kinetic nature as such but rather by its violent consequences (namely, the starvation of both enemy forces and civilians in the besieged area), can be considered an attack in the sense of Article 49(1).

**Reasoning by analogy to the law of blockades**

As a second argument, an analogy can be made to naval and aerial blockades, with which sieges display a number of similarities and where the principle of proportionality has become part and parcel of the applicable legal framework. Although blockades are rooted in siege warfare, they are today generally employed as a method of economic warfare aimed at disrupting the targeted

---

70 For instance, civilians enjoy general protection against dangers arising from military operations (AP I, Art. 51(1)). The principle of proportionality offers protection against attacks which might be expected to result in excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (AP I, Art. 51(5)(b)). Attackers should take all feasible precautionary measures in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects (AP I, Art. 57(2)(ii)), and when a choice is possible between several military objectives for obtaining a similar military advantage, the objective which may be expected to cause the least danger to civilian lives and to civilian objects shall be selected (AP I, Art. 57(3)). See also M. N. Schmitt, above note 51, pp. 290–291; M. N. Schmitt, above note 64, pp. 377–378.


73 DoD, above note 1, p. 312, para. 5.19.1; US Department of the Army, above note 18, paras 6.12–6.14; Yoram Dinstein, above note 18, p. 253, para. 688; S. Watts, above note 18, p. 3.

74 G. Gaggioli, above note 3; G. Gaggioli, above note 14, p. 127.
State’s economy and consequently reducing its ability to wage war. In a naval or aerial blockade, a belligerent party prevents both enemy and neutral vessels and aircraft from entering or exiting specified ports, airports or coastal areas belonging to, occupied by or under the control of the opposing party. It has been submitted that the effects of blockade in blocking all forms of commerce, whether inbound or outbound, can resemble a siege in inflicting starvation.

In closing the gap left by the restrictive interpretation of the prohibition against starvation, which only extends to blockades with respectively “the sole” or “the sole or primary” purpose of starving the civilian population, both the San Remo Manual and the Harvard Manual require that the blockading party adheres to the principle of proportionality. This progressive development has widely resonated and influenced not only the practice of States, as reflected in their military manuals, but also the findings of Commissions of Inquiry. Although both the San Remo and Harvard Manuals remain silent on the question of whether a blockade can be considered an attack in the sense of Article 49(1) of AP I, this development provides a strong argument for applying the proportionality principle to siege warfare, which is characterized by similar harmful consequences.

**Emerging State practice and support among experts**

Finally, there appears to be growing support, not only in State practice but also among experts and legal scholars, that the proportionality principle constrains the

---


77 D. Fleck, above note 27, p. 234; Y. Dinstein, above note 18, p. 258, para. 704.


possibility of enforcing a siege. Such a position was, for example, adopted by the Group of Eminent International and Regional Experts on Yemen in their 2019 report addressed to the Human Rights Council. Moreover, reference can be made to the US Law of War Manual, which provides that “[m]ilitary action intended to starve enemy forces … must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained.”

**How does the principle of proportionality operate in the context of a siege?**

The principle of proportionality is perhaps one of the most apparent manifestations of the delicate balance between the competing principles of military necessity and humanity that characterizes all norms of IHL. It recognizes that causing incidental civilian harm in the conduct of hostilities is often unavoidable, but it limits the extent of incidental civilian harm that is permissible by spelling out how these two fundamental principles must be balanced. In this respect, the proportionality principle prohibits “attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

---

83 Yemen Report, above note 4, pp. 178–179, para. 746. See also Report of the United Nations High Commissioner for Human Rights Containing the Findings of the Group of Independent Eminent International and Regional Experts and a Summary of Technical Assistance Provided by the Office of the High Commissioner to the National Commission of Inquiry, A/HRC/39/43, 17 August 2018, p. 9, para. 58: “Given the severe humanitarian impact that the de facto blockades have had on the civilian population and in the absence of any verifiable military impact, they constitute a violation of the proportionality rule of international humanitarian law.” This approach has been endorsed by Schmitt, Tinkler and Johnson, who hold that “sieges are lawful so long as directed at enemy forces (and not intended to starve the civilian population), compliant with the rule of proportionality, and consistent with the requirement to take precautions in attack”. M. N. Schmitt, K. Tinkler and D. Johnson, above note 48. Benvenisti recently made a similar argument with regard to the prolonged siege and blockade of Gaza; according to him, “the laws of siege and blockade, especially in the long run, must weigh against the military purpose of the blockade the full scope of damage – whether direct or collateral – suffered by the civilian population”. See Eyal Benvenisti, “The International Law of Prolonged Sieges and Blockades: Gaza as a Case Study”, *International Law Studies*, Vol. 97, 2021, p. 981.

84 DoD, above note 1, pp. 315–316, paras 5.20.1–5.20.2.

85 According to the ICRC Commentary on AP I, “the entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements. There is no implicit clause in the [Geneva] Conventions which would give priority to military requirements. The principles of the Conventions are precisely aimed at determining where the limits lie; the principle of proportionality contributes to this.” ICRC Commentary on the APs, above note 7, p. 683, para. 2206. See also E.-C. Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House, December 2018, p. 3, para. 1; 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, p. 804.


87 AP I, Art. 51(3)(b). Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 46–51.
While Article 51(5)(b) of AP I qualifies a violation of the principle of proportionality as an indiscriminate attack, the principle also appears in Article 57(2) of AP I as one of the precautionary measures that an attacker must take. According to Article 57(2)(a)(iii), an attacker must refrain from deciding to launch any attack which would violate the proportionality principle. This entails an obligation to do everything feasible to assess whether an attack would violate this principle.\(^8\) Finally, Article 57(2)(b) obliges an attacker to do everything feasible to cancel or suspend an attack when it becomes apparent that the proportionality principle would be violated.\(^9\) This section will investigate how these interconnected and mutually reinforcing obligations operate in the context of siege warfare.\(^10\)

**Challenges in applying the principle of proportionality to sieges**

The existence of the principle of proportionality as a norm is undisputed, and States and their armed forces consider it a serious limitation on their military activity.\(^11\) However, it has been observed that “[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied”.\(^12\) Indeed, determining what must be included within the two sides of the assessment and how these are to be balanced is a challenging endeavour.\(^13\) Perhaps the most challenging aspect of the proportionality analysis lies in the fact that it requires an *ex ante* evaluation of whether the “expected” incidental civilian harm would be excessive in relation to the concrete and direct military advantage “anticipated”.\(^14\) Moreover, what has to be balanced are not the respective values of the military advantage and incidental harm *in abstracto*, but these values and their respective certainty and likelihood based on the information reasonably available to the military commander at the time of the attack.\(^15\)

---

\(^8\) Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 58–60.

\(^9\) Applicable as CIHL in both IACs and NIACs. See *ibid.*, pp. 60–62.

\(^10\) DoD, above note 1, p. 249, para. 5.10.5.


\(^12\) Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13 June 2000 (Yugoslavia Report), para. 48.

\(^13\) E.-C. Gillard, *ibid.*, p. 3, para. 2. According to Dinstein, “these difficulties are disquieting. Still, it would be wrong to believe that weighing the expected collateral damage as against the anticipated military advantage is not doable.” Y. Dinstein, above note 18, p. 159, para. 426.


\(^15\) ICTY, *The Prosecutor v. Ante Gotovine et al.*, Case No. IT-06-90-T, Prosecution’s Public Redacted Final Trial Brief (Trial Chamber), 2 August 2010, para. 549. See also ICTY, *The Prosecutor v. Stanislav Galič*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para. 58: “In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.” M. Sassoli, above note 24, p. 362, para. 8.322; Laurent Gisel, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, report of the International Expert Meeting, ICRC and Université Laval, 22 June 2016, p. 57.
In this respect, a number of scholars have expressed reservations concerning the viability of applying the principle of proportionality in the context of blockades, which are of equal relevance with regard to sieges. Dannenbaum has submitted that the principle of proportionality’s ordinary weaknesses, and particularly its \textit{ex ante} nature, are exacerbated by the nature of blockades and sieges.\textsuperscript{96} First, he argues that in contrast to targeting operations, which are generally short in duration and limited in scope, blockades or sieges may affect the entire civilian population of a city or even a country for a longer period of time. Moreover, their effects might intersect with numerous other contextual factors which will only become clear over time.\textsuperscript{97} Similarly, Drew has held that

\[\text{[w]hile in a kinetic attack it is generally relatively easy to determine the damage that will likely be caused within a certain radius of a weapon’s detonation point, there is truly no way to approximate the effects of an operation that may last several years, particularly in situations where the harm to civilians becomes exponentially worse with time.}\textsuperscript{98}

Second and more fundamentally, Dannenbaum questions how, if at all, incidental civilian harm already caused by the encirclement should be incorporated in the proportionality assessment of the continuation of a siege.\textsuperscript{99} This question is inspired by the currently ongoing debate on the continuous application of the principle of proportionality under \textit{jus ad bellum}.\textsuperscript{100} Although the precise content of the proportionality principle under \textit{jus ad bellum} is unclear,\textsuperscript{101} the majority of scholars seems to reject “a static approach”\textsuperscript{102} of \textit{ad bellum} proportionality in favour of some form of continuous application of this principle.\textsuperscript{103} If proportionality under \textit{jus ad bellum} is considered as subjecting the use of

\textsuperscript{96} T. Dannenbaum, above note 32, p. 339.
\textsuperscript{97} Ibid., pp. 339–340;
\textsuperscript{100} Eliav Lieblich, “On the Continuous and Concurrent Application of \textit{Ad Bellum} and \textit{In Bello} Proportionality”, in Claus Kreß and Robert Lawless (eds), \textit{Necessity and Proportionality in International Peace and Security Law}, Oxford University Press, Oxford, 2021, pp. 69–70. This question also features in what Lubell and Cohen have termed “strategic proportionality” as \textit{lex ferenda} and which requires an ongoing assessment of the use of force throughout the conflict, balancing the overall harm against the strategic objectives. See Noam Lubell and Amichai Cohen, “Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts”, \textit{International Law Studies}, Vol. 96, 2020, p. 162.
defensive force to a continuous harm–benefit analysis, the question arises as to how the already inflicted harm should be integrated into the proportionality assessment. Different approaches exist in this regard. The “quota view” requires an initial proportionality assessment, and the subsequent continuous assessment of whether the accumulated harm throughout the conflict has exceeded the benefit of achieving the just cause. The “prospective view”, on the other hand, considers past harms as “sunk costs” which are irrelevant to the continuous forward-looking proportionality assessment. In what follows, these two interrelated challenges with regard to the application of the principle of proportionality under *jus in bello* in the context of siege warfare will be addressed. In doing so, the focus will lie on what Cohen and Zlotogorski have termed the “procedural aspects of the principle of proportionality” – namely, the precautionary measures which should be taken before and during a siege in order to monitor its proportionality.

From an *ex ante* assessment to the continuous monitoring of a siege

Article 57(2)(b) of AP I provides that an attacking party must do everything feasible to cancel or “suspend” an attack if it becomes “apparent” that it would violate the principle of proportionality. It follows from this provision that the proportionality of an attack should be assessed not only in the planning phase but also in the successive phase when the decision to launch the attack has already been taken and, more importantly, when the attack is being carried out and can still be stopped. In the context of sieges, which consist of the encirclement and isolation of an area for a certain period of time, this provision thus requires not only an analysis of the proportionality of the siege prior to its

104 E. Lieblich, above note 100, p. 69.
106 A. Cohen and D. Zlotogorski, above note 91, p. 177.
107 Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 60–62.
108 Gillard argues that “the frequency with which a proportionality assessment must be conducted in the course of an attack depends on the context and nature of the attack”. E.-C. Gillard, above note 85, p. 46, para. 164. According to Cannizzaro, Article 57(2)(a)(iii) of AP I entails “an obligation to consider proportionality also in the successive phase in which the decision has already been taken or the attack has already been launched”. Enzo Cannizzaro, “Proportionality in the Law of Armed Conflict”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 335. Also see Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, June 2000, p. 33: “Yet, even if the pilot was, for some reason, unable to ascertain that no train was travelling towards the bridge at the time of the first attack, he was fully aware that the train was on the bridge when he dropped the second bomb, whether smoke obscured its exact whereabouts or not. This decision to proceed with the second attack appears to have violated Article 57 of Protocol I which requires an attack to be cancelled or suspended if it becomes clear that the objective is a not a military one … or that the attack may be expected to cause incidental loss of civilian life … which would be excessive in relation to the concrete and direct military advantage anticipated.”
initiation but also the continuous monitoring of its proportionality throughout the duration of the siege.\textsuperscript{109}

The continuous monitoring of the proportionality of a siege should be guided by the precautionary obligation of Article 57(2)(a)(iii) of AP I, which requires those who plan and decide upon an attack to do everything feasible to obtain information that will allow for a meaningful assessment of “the reasonably foreseeable incidental effects” on the civilian population.\textsuperscript{110} It has been submitted that belligerents should have a system in place to effectively gather and analyze relevant information.\textsuperscript{111} This should include “lessons learned” from past experiences, information in the public domain, and information that can be acquired by the belligerents’ intelligence-gathering systems.\textsuperscript{112} Moreover, if expert resources are reasonably available, they must be consulted.\textsuperscript{113}

To institutionalize a system of continuous monitoring, an analogy can be made to the battle damage assessments that some States’ armed forces already conduct after an attack in order to determine its military impact and, increasingly, its civilian impact.\textsuperscript{114} Such assessments can reveal the accuracy of the party’s estimations and consequently refine future proportionality assessments.\textsuperscript{115} It must be noted that contrary to the proportionality principle under \textit{jus ad bellum}, the proportionality assessment under \textit{jus in bello} is essentially anticipatory and therefore precludes that information on the civilian harm actually caused and the actual military impact of an attack will result in the conclusion that the attack was disproportional.\textsuperscript{116}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{110} Applicable as CIHL in both IACs and NIACs. See ICRC Customary Law Study, above note 11, pp. 58–60.
\item\textsuperscript{111} Yugoslavia Report, above note 92, para. 29. According to Gillard, “[t]he report was probably referring to the first part of Art. 57(2)(a)(i) AP I, which requires belligerents to verify that the objectives to be attacked are not civilian. However, the obligation to verify also requires them to ensure the attack would not violate the rule of proportionality.” E.-C. Gillard, above note 85, p. 47, para. 168.
\item\textsuperscript{113} L. Gisel, above note 95, p. 48.
\item\textsuperscript{115} E.-C. Gillard, above note 85, pp. 48–49, paras 171–173.
\end{enumerate}
\end{footnotesize}
Similarly, in the context of a siege, continuously monitoring the incidental civilian harm caused by the siege and its impact on the besieged forces cannot lead to the conclusion that the siege has violated the principle of proportionality but merely informs the commander of the besieging party in his or her proportionality assessment regarding the continuation of the siege.\footnote{I. Robinson and Ellen Nohle, above note 9, pp. 124–125.} For example, if the commander of the besieging force is confronted with a sudden increase of civilian death and illness due to starvation, this might inform him or her that continuing the siege would be disproportionate due to the fact that the civilian harm might be expected to rise if the siege continues.

The “circumstances ruling at the time” of the proportionality assessment will impact what kind of incidental effects may be objectively foreseeable. Therefore, it becomes possible to account for various contextual factors, such as previous hostilities, the protracted nature of the conflict, or economic sanctions or blockades which might intersect with the effects of the siege, provided they are “reasonably known”.\footnote{118 For an analysis of the impact of protracted armed conflict on essential urban services, see ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015, pp. 21–28; I. Robinson and E. Nohle, above note 9.} For example, if the commander knows that previous bombardments have severely damaged the electricity network of the besieged area and thereby disrupted the functioning of the city’s only water treatment plant, the number of civilians expected to starve during the siege or by continuing the siege will rise. During protracted conflicts such as those in Syria and Yemen, it is reasonably known that essential services and infrastructure have seriously deteriorated over the years, thereby making the civilian population more vulnerable to starvation when siege is laid.\footnote{119 See also 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 (with Protocols I, II and III), 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983), Protocol II, Art. 3(4), and Protocol III, Art. 1(5); Jean-François Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 810.}

It must be noted that a besieging party must only comply with these precautionary obligations “to the extent feasible”. In a declaration submitted upon ratification of AP I, several States expressed their position that “feasible” is to be understood as “that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations”.\footnote{120 See the nearly identical interpretive declarations of Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, the UK, and the United States upon ratification of AP I. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: Practice, Cambridge University Press, Cambridge, 2005, pp. 357–358, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2. See also 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 (with Protocols I, II and III), 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983), Protocol II, Art. 3(4), and Protocol III, Art. 1(5); Jean-François Quéguiner, “Precautions under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 810.}

However, it has been argued that “[a]s sieges are by nature relatively ‘static’, more significant precautions may be considered feasible for
besieging forces than during more dynamic operations.”

Nevertheless, the lack of “boots on the ground” by the besieging force in the besieged area poses difficulties with regard to intelligence-gathering.

**Conclusion**

Siege warfare and its devastating humanitarian consequences have been one of the defining features of contemporary armed conflicts. While the most apparent restriction of siege warfare is provided by the prohibition against starvation of civilians as a method of warfare, States’ restrictive interpretation of this prohibition has resulted in a permissive approach towards sieges which affect civilians “incidentally”. This article has demonstrated that shifting the focus from the prohibition against starvation to the rules regulating humanitarian relief operations does not seem helpful due to the ambiguities regarding the requirement of consent and the right of control of the besieging party.

However, this article has also demonstrated that civilians who remain within a besieged city are not without legal protection from the hardships they endure. In this respect, this article has submitted that civilians who remain within a besieged area are protected against excessive incidental civilian harm under the proportionality principle. Three arguments have been presented to substantiate the claim that a siege can be considered an attack in the sense of Article 49(1) of AP I, which is constrained by the principle of proportionality. First, it has been demonstrated that under the consequence-based interpretation of an “act of violence”, a siege can be considered such an attack. Second, an analogy can be made with the law of blockades, with which sieges display a number of similarities and where the proportionality principle has become part and parcel of the applicable legal framework. Third, there seems to be an emerging State practice of, and support among experts for, applying the principle of proportionality to sieges.

Although the anticipatory nature of the principle of proportionality poses distinct challenges when applied in the context of siege warfare, this article has attempted to clarify how the principle can be operationalized during sieges. It has been demonstrated that Article 57(2)(b) of AP I requires not only an analysis of the proportionality of a siege prior to its initiation but also the continuous monitoring of the proportionality throughout the duration of the siege.

121 E.-C. Gillard, above note 3, p. 6. See also I. Robinson and E. Nohle, above note 9, p. 139: “An issue related to the quantity and quality of information that a commander can feasibly be expected to take into account when analyzing the expected incidental damage of an attack is the relevance of the operational context.”

122 According to Durhin, “[t]he quality of intelligence is enhanced by the physical presence of human gatherers (conventional or special forces) in the theatre of operations. In the case of ‘no boots on the ground’ operations, this human intelligence is lacking, and it is unrealistic to think that technology alone can resolve this deficiency.” N. Durhin, above note 21, p. 190.
The role of international humanitarian law in the search for peace: Lessons from Colombia

César Rojas-Orozco

César Rojas-Orozco is a Legal Officer at the Special Jurisdiction for Peace, Colombia. He holds a PhD from the Graduate Institute of International and Development Studies in Geneva.

Abstract

International humanitarian law (IHL) has traditionally been seen as a legal framework regulating armed hostilities, having little to do with peace. However, recent peacemaking and peacebuilding practice has consistently relied on IHL to frame peace efforts, mainly in non-international armed conflicts. This article explores the relationship between IHL and peace, looking at practice in Colombia, where IHL has been used in a creative way as a means to build trust, facilitate peace negotiations and enforce the resulting peace agreement. Looking at this case, the article offers general insights on how IHL can facilitate the end of conflict and reintegration, frame accountability and reparation, and shield peace deals under a framework in which both State and non-State actors can find a common bargaining zone in their search for peace.

Keywords: international humanitarian law, peace, reconciliation, Colombia, special agreements.
Introduction

In 2019, the president of the International Committee of the Red Cross (ICRC) addressed the Stockholm Forum on Peace and Development, noting how some of the attendants “could be asking why a representative of a humanitarian organisation is offering introductory remarks to a conference in which the focus is on peace”.¹ This statement reflects how international humanitarian law (IHL), the promotion of which is led by the ICRC, has traditionally been seen as just a legal regime for regulating armed conflict, having little or nothing to do with peace.

Nevertheless, recent peacemaking and peacebuilding practice has consistently relied on IHL to frame peace efforts, particularly in non-international armed conflicts (NIACs), which have become the most common form of armed conflict in recent decades.² Additionally, and despite the lack of significant empirical evidence,³ literature suggests that compliance or non-compliance with IHL can have an impact on the success of peace negotiations and agreements, as well as on the chances for post-conflict reconciliation.⁴ Based on these elements, this paper aims to analyze the extent to which IHL can contribute in the search for peace, both in terms of looking to put an end to armed conflict and building conditions for sustainable reconciliation and respect for the rule of law,⁵ by looking at the Colombian case.

Colombia has not only faced one of the most protracted and complex armed conflicts in the world, but is also considered as one of the countries that has “contributed the most to the development and practical implementation of IHL”.⁶ The country has faced more than six decades of armed conflict, involving different rebel and paramilitary actors and its own armed forces, and has seen debates on the very existence of armed conflict and compliance with IHL, as well as several transitional mechanisms and peace efforts over the years. Additionally, Colombia has consistently relied on international law to understand and deal with its own conflict,⁷ in part because IHL and international human rights law (IHRL) treaties duly ratified by the State have the same normative level as the

---

Colombian Constitution itself. In such a context, on 24 November 2016 the Colombian government and the guerrillas of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) – at that time the largest and oldest armed group in the country – concluded an unprecedented peace agreement which is deeply grounded in international law.

Having this background, the Colombian case offers various insightful elements for exploring the role of IHL in the search for peace. In particular, the role of the FARC in more than fifty years of armed conflict and the comprehensiveness of the 2016 Peace Agreement convey debates and mechanisms on how IHL can facilitate, shape and secure peace efforts.

This paper will be developed through four sections. First, it will discuss how the observance of IHL during hostilities can facilitate transitions to peace, reintegration and reconciliation at the end of armed conflict, and how reconciliation can be harder when, as happened in Colombia, IHL has been seriously and massively violated. Second, the paper will explore the role of humanitarian gestures of peace in building trust and advancing the discussion and conclusion of peace negotiations. Here, the paper will analyze how IHL usually frames those gestures and why compliance with IHL is more likely to occur when there is hope for peace in sight. Third, the paper will discuss the role of IHL within the normative framework for accountability and reparation for violations committed during the conflict, which are mandatory conditions for achieving sustainable peace. And fourth, the paper will assess how IHL was used by the parties to the 2016 Peace Agreement in Colombia as a framework to shield the peace deal, through the mechanism of special agreements enshrined by Article 3 common to the four Geneva Conventions. Finally, some general conclusions will be provided, looking for lessons from the Colombian case that could illustrate the still unexplored role of IHL in the search for peace.

**IHL application can facilitate transition and reconciliation**

As noted by Salmón, “[w]hile reconciliation is not a specific objective of IHL, it is an indirect result of [its] effective enforcement”. Indeed, if the warring parties recognize themselves as parties to an armed conflict and conduct themselves in accordance with IHL, their cause will be fought within humanized limits, and abuses that then lead to further resentment can be avoided. It will also pave the

---

8 Political Constitution of Colombia, Arts 93, 214.2. On this point, see also Constitutional Court of Colombia, Judgment C-255, 1995.
way for a transition to peace in which amnesties for criminal offences under domestic law can be applied, facilitating agreements and reintegration.\textsuperscript{12} However, the mere existence of IHL “is not enough to ensure that it is applied”.\textsuperscript{13} There are political, humanitarian and legal factors influencing its acceptance and respect by actors involved in an armed conflict,\textsuperscript{14} and the way in which IHL is accepted and observed will influence the chances of agreeing on peace or on how to reach a successful transition and reconciliation. Colombia offers mixed views on this matter.

While accepting the existence of an armed conflict or adhering to IHL is not a condition for its application, such an acceptance is a critical factor for increasing the possibilities for its effective respect and for improving the chances of reaching peace. The FARC, as the major armed group in Colombia, argued most of the time that IHL was an instrument adopted by States for their own convenience and that rather than humanizing war, the guerrillas’ goal was to end it.\textsuperscript{15} Additionally, this group “affirmed that although it was not specifically committed to all related IHL norms and did not use ‘the technical terms of IHL’, its own internal rules were adjusted to this legal framework”.\textsuperscript{16}

On the other hand, and despite several decades of armed conflict, the 2002–10 Colombian government tried to deny the existence of a NIAC.\textsuperscript{17} Instead, rebel groups were considered as just a terrorist threat, to be dealt with under domestic criminal law.\textsuperscript{18} This governmental position made any effort to search for peace with rebel groups almost impossible because of their denial as actors in an armed conflict, even though this period recorded the highest number of victims.\textsuperscript{19}

In 2011, a new government promoted a Law on Victims and Land Restitution, which departed from the previous administration by recognizing the existence of a NIAC in the country, invoking IHL as a framework to define the condition of millions of victims.\textsuperscript{20} At the signing of the Law, the Colombian president described this step as a condition for building peace and called on


\textsuperscript{13} Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, \textit{International Review of the Red Cross}, Vol. 93, No. 882, 2011, p. 357.

\textsuperscript{14} M. Sassòli, A. Bouvier and A. Quintin, above note 4, p. 89; Geneva Academy, above note 4, pp. 22–24.


\textsuperscript{16} \textit{Ibid.}, p. 14.

\textsuperscript{17} M. Giraldo Muñoz and J. Serralvo, above note 6, pp. 1121–1122.


\textsuperscript{19} See the Single Registry of Victims website, available at: www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394.

\textsuperscript{20} Congress of the Republic of Colombia, Law No. 1448, 2011 (Law on Victims and Land Restitution), Art. 3.
armed groups to act accordingly at such a pivotal moment in history.\textsuperscript{21} This recognition of the armed conflict and its victims is considered to have played a facilitative role in opening the doors for the peace negotiations with the FARC that started in 2012.\textsuperscript{22}

In November 2012, just after the official debut of the peace talks, the FARC sent a letter to the ICRC expressing that although it did not subscribe to any IHL instrument, it had been committed to respecting IHL principles aimed at protecting civilians, as long as such principles were in accordance with the group’s “precarious possibilities of resistance under the asymmetry of armed conflict”.\textsuperscript{23} In particular, the letter expressed the FARC’s acknowledgment of the importance of the 1949 Geneva Conventions and their 1977 Additional Protocols. Then, the FARC asked the ICRC in this letter to serve as a channel to consider the very negotiation agenda as a special agreement under common Article 3.

Beyond the purpose of these statements, and the fact that the guerrillas’ request did not have any clear effect at that point, recognizing armed conflict and expressing a specific commitment to IHL play a role in the way parties behave during their confrontations and regarding their chances of seeking peace. Labelling armed actors as terrorists or regular criminals can encourage their violation of IHL\textsuperscript{24} and exclude them from peace negotiations.\textsuperscript{25} Conversely, calling them actors in an armed conflict can increase the chances for them to commit to and respect IHL and to be open to peace dialogues.

A 2011 report by the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) on the rules of engagement by non-State armed groups suggests at least three kinds of motivations behind compliance with IHL by those actors, based on research focused on their own practice.\textsuperscript{26} First, a legal motivation to respect IHL is given by the possibility of receiving amnesties at the end of the conflict for domestic crimes, eliminating the risk of being prosecuted for war crimes and other international crimes. Second, two humanitarian motivations can be found: reducing the humanitarian costs of armed conflict, and the hope of reciprocity in the expectation that respect of IHL norms by one party may encourage respect by the other. And third, there are political motivations based on broad interests such as recognition of the legitimacy of the group’s cause, gaining public support, or the idea that better respect of IHL can facilitate peace efforts.\textsuperscript{27}

\textsuperscript{24} O. Bangerter, above note 13, p. 377.
\textsuperscript{25} Geneva Academy, above note 4, pp. 15–16.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid., pp. 22–23.
All these elements reveal a preventive role of IHL\textsuperscript{28} in avoiding damages that could later make peace and reconciliation very difficult to achieve. In other words, “peace is much more readily restored if it is not also necessary to overcome the hatred between peoples invariably spawned and most certainly exacerbated by violations of IHL”\textsuperscript{29}. Here, experience in Colombia shows how grave violations of IHL during the conflict are among the main factors challenging reconciliation after the 2016 Peace Agreement.

The high number of victims of armed conflict in Colombia—more than 9 million\textsuperscript{30} people, representing around 18% of the total Colombian population\textsuperscript{31}—reveals the scale of the violations of IHL in the country, by all actors in the conflict. Building reconciliation in such an unfortunate scenario is a huge challenge.

As a result, one of the main reasons behind the rejection in a plebiscite of the first peace agreement reached by the Colombian government and the FARC in August 2016 was people’s belief that the sanctions included in the agreement were insufficient for the grave crimes committed during the conflict. The new agreement reached in November 2016 was more exigent in delimiting sanctions. However, in the development of cases before the Special Jurisdiction for Peace, the seriousness of violations committed by all actors during the conflict poses significant challenges for reconciliation.

For instance, regarding the war crime of hostage-taking by the FARC, which is tried before the Special Jurisdiction for Peace, evidence brought to the case showed how the guerrillas were aware of the suffering they were causing and the reputational costs that this practice incurred for them.\textsuperscript{32} They knew that taking civilians and demanding money for their release as a mean to finance their rebellion was a violation of IHL, amounting to a war crime, as they have already accepted.\textsuperscript{33} Additionally, they acknowledged how such a practice affected their relationships with local communities and was repudiated by society as a whole. Accepting that at this point is, of course, a big step towards revealing the truth, serving justice and providing reparation. However, the images and stories of horror around hostage-taking, with people who were deprived of their liberty for periods up to fourteen years, under inhumane conditions, and who were subjected to various forms of violence during their captivity, will remain in the memory of victims and society for decades. This situation shows how violating IHL has long-term impacts regarding the chances of reaching peace and

\textsuperscript{28} E. Salmón, above note 4, p. 328
\textsuperscript{29} M. Sassòli, A. Bouvier and A. Quintin, above note 4, p. 90.
\textsuperscript{30} See above note 19.
\textsuperscript{31} The total population of Colombia is estimated at around 48.3 million people, according to the National Department of Statistics website, available at: \url{www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivienda-2018/cuantos-somos}.
\textsuperscript{32} Special Jurisdiction for Peace, Chamber for the Acknowledgment of Truth and Responsibility, Auto No. 019 of 2021, 26 January 2021, paras 273, 282.
\textsuperscript{33} “JEP: Exsecretariado de las Farc acepta cargos por secuestro y otros crímenes de lesa humanidad”, \textit{El Espectador}, 30 April 2021, available at: \url{www.elespectador.com/colombia-20/jep-y-desaparecidos/jep-exsecretariado-de-las-farc-acepta-cargos-por-secuestro-y-otros-crimenes-de-lesa-humanidad-article/}.
reconciliation after armed conflict, even with a peace agreement and the submission of perpetrators to a system of criminal justice. Here, the quality of the judicial processes and the imposition of appropriate sanctions will play a decisive role in whether victims and society consider the damages caused to have been adequately redressed.

Conversely, observing IHL not only can avoid the horrific memories that affect the reconciliation goal, but it also facilitates the transitional process itself. For such a purpose, Article 6.5 of Additional Protocol II (AP II) provides that authorities in power shall endeavour to grant the broadest possible amnesty for conducts related to the conflict that despite being criminal offences under domestic law do not constitute violations of IHL amounting to war crimes. Here, amnesties play a role in facilitating reconciliation and reintegration, and their application helps both the conclusion and the implementation of a peace agreement.

In Colombia, the 2016 Peace Agreement explicitly invoked Article 6.5 of AP II, which provides for the granting of “the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict”. The Agreement explicitly states that this amnesty should be granted for politically motivated crimes, provided that they do not constitute war crimes or crimes against humanity.

To this end, a Law on Amnesty was adopted in December 2016 defining the conditions for granting amnesty to former FARC rebels. For the first time in the history of transitional processes, this is being decided through a judicial procedure before the Amnesty Chamber at the Special Jurisdiction for Peace. Nevertheless, here it is worth mentioning that at the conclusion of the Peace Agreement, the Colombian president granted an administrative amnesty for those former fighters who, at that moment, did not have a conviction or a judicial process under way before the ordinary justice system for acts related to the armed conflict. Also, ordinary judges granted amnesty to former fighters who were convicted or tried for rebellion and politically related crimes listed in the Law on Amnesty. Out of more than 13,000 FARC members who subscribed to the Peace Agreement, about 7,000 received amnesty through one of these two channels. Regarding people convicted or tried for other crimes who have applied for amnesty before the Special Jurisdiction for Peace, as of May 2021, 2,222 requests had been denied and only 377 amnesties had been granted.

All these figures show how amnesty remains a key component in the path to peace. They are a real incentive behind armed groups’ decision to agree on peace, because it is clear that fighters who know that they will unavoidably face criminal
retribution “will often consider that they have nothing to lose and fight to the end”. It is doubtful to say that expecting to receive amnesty and not to be prosecuted for war crimes was among the considerations for former rebels in Colombia in their decision on whether to conform to IHL. Nevertheless, it is certain that ensuring the broadest possible amnesty played a role in facilitating the conclusion of the 2016 Peace Agreement and the subsequent process of reintegration of former fighters. Additionally, people are more open to accepting amnesties for political offences that do not constitute serious abuses, meaning that they were acts that respected IHL.

Finally, an additional point regarding the example of hostage-taking as a war crime is provided by the fact that it was only when the FARC explicitly committed to IHL at the beginning of the peace talks in 2012 that the practice started to decrease. In January 2021, the Special Jurisdiction for Peace issued its first indictment against top members of the FARC for this crime, where it was established that the group had renounced its policy of taking civilian hostages as a means to finance war since 2012. It is true that the decision to renounce this practice was due to several reasons, including the FARC’s loss of military capacity. However, the indictment also refers to how many voices inside the FARC considered this practice to be unpopular. Here, it can be concluded that reputational costs, the idea of gaining some recognition of their cause and the purpose of facilitating peace negotiations could have played a role in the FARC’s decision. In other words, better respect for IHL was observed once this armed group truly understood that this could have an effect on their ongoing peace efforts.

IHL can frame gestures of peace

Even though respect for humanitarian principles is an end in itself, discussions and agreements over humanitarian issues are often an entry point for opening dialogue for peace negotiations. They can also be seen as gestures of goodwill and trust-building to facilitate the starting, development or conclusion of peace talks.

Three examples illustrate this role of IHL and humanitarian action as a way to frame gestures of peace in Colombia. First, in the course of the peace talks

41 On this point, even the opponents of the peace agreement who participated in the renegotiation that followed the plebiscite in which the first agreement was rejected on 2 October 2016 included among their proposals a general amnesty for former FARC members who were not involved in international crimes or drug trafficking. See “Propuestas renegociación Acuerdo de Paz”, Dejusticia, available at: www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_872.pdf.
42 FARC, above note 23.
43 Special Jurisdiction for Peace, above note 32, paras 283–284.
44 Ibid., paras 273, 282.
between the government and the FARC in Havana, the parties issued a joint communiqué on March 2015 announcing a pilot project on demining, as a gesture of de-escalation and as a way to “move forward in building trust” and to “create [better] security conditions for the inhabitants of risk zones”.46 This project was named “Gestos de Paz” (“Gestures of Peace”), and it allowed for the removal of landmines from more than 19,000 square metres of land in order to protect more than 560 civilians living in that rural area, and for the implementation of other development projects.47 This measure was adopted after three years of negotiation; later, the 2016 Peace Agreement included specific measures on demining. It was even included within the set of restorative sanctions that can be imposed on former guerrillas tried before the Special Jurisdiction for Peace.48 In addition to its contribution to de-escalating the armed confrontation, this initiative also responded to the obligation envisaged by customary IHL Rule 83, according to which, “[a]t the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal”.

The second example is related to the search for people reported missing as a result of armed conflict. On this matter, during the peace talks in Havana, the parties issued a joint communiqué on 17 October 2015 announcing two agreements. The first was

The second involved “the creation of a special Unit to search for persons deemed as missing within the context and due to the armed conflict”.49 This agreement was referred to by the parties as being adopted within “the framework of the trust-building measures” that were taking place during the negotiation process. In addition, this communiqué explicitly asked for the ICRC’s support in the design and implementation of special humanitarian plans related to the measures to be adopted before the signature of the final Peace Agreement.

Even though this communiqué did not explicitly invoke IHL, it clearly responded to humanitarian obligations on the part of both the State and the guerrillas. Conventional and customary IHL protects people from the risk of going missing, as well as providing for the search for those who do.50 Most explicitly, customary IHL Rule 117, applicable to both international armed

---

conflicts (IACs) and NIACs, establishes that “[e]ach 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”. In this sense, the joint communiqué reflects the content of this IHL obligation, for which the parties requested the ICRC’s support in order to move forward with the Peace Agreement that was finally signed in 2016. The search unit announced in the communiqué was also created under the Peace Agreement.

The third example also took place during the peace negotiations. In May 2016, when the government and the FARC were close to reaching a final agreement, they announced an accord to release children under 15 years of age from the camps of the FARC, through the ICRC, as well as the guerrillas’ commitment to no longer recruit persons under 18 years of age. This was specifically referred to as a trust-building measure aimed at restoring children’s rights and as having “a strictly humanitarian nature”. This measure was described by UNICEF as a “historic accord that contributes significantly to peace in Colombia”. Here, even if it is not mentioned in the communiqué, it is clear that the decision to release children under 15 years of age responds to the IHL prohibition on recruiting people under that age, as enshrined in Article 4(3)(c) of AP II.

All these humanitarian gestures were ultimately implementing the IHL duties of both parties to the conflict as a means to build trust in the ongoing peace negotiations. Although the implementation of these duties is a permanent obligation of the parties to the conflict, assuming an express commitment of this kind in the wake of a peace agreement reflects a consideration for the victims and contributes to the transition to peace. In turn, it could be said that non-State armed groups could potentially be more aware of and willing to comply with their obligations under IHL when they can see peace on the horizon than during a protracted armed conflict.

IHL provides a framework for accountability and reparation

In addition to the preventive dimension of the role of IHL in facilitating the search for peace, as seen in the first section of this paper, there is also a punitive dimension, involving the duty to prosecute violations of IHL amounting to war crimes, as well as the duty for reparation. These duties also play a role in the transition to peace.

51 ICRC Customary Law Study, above note 12, Rule 117.
Kant affirmed that “the very concept of peace entails the idea of amnesty”. Based on this reasoning, amnesties have been the most common formula for negotiated ends of armed conflict around the world. As previously seen, however, IHL enshrines both amnesty and prosecution as normative parameters to be observed at the end of armed conflict, and these, in turn, are conditions to facilitate and ensure an effective transition to peace.

Indeed, according to the 1987 ICRC Commentary on AP II, the provision on amnesty contained in its Article 6.5 is aimed at encouraging “gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided”. This provision is considered a customary rule of IHL. At the same time, however, IHL establishes the duty to bring to justice people responsible for war crimes, making explicit that the customary rule on amnesty must be interpreted “with the exception of persons suspected of, accused of or sentenced for war crimes”. Prosecution of people responsible for those crimes is also considered a customary rule of IHL.

The 2016 Peace Agreement in Colombia developed provisions on both matters under IHL. As discussed above, amnesties were adopted invoking Article 6.5 of AP II for political crimes, excluding international crimes. Amnesty for crimes other than domestic politically related crimes is submitted to judicial decision at the Special Jurisdiction for Peace, where IHL has served as the main parameter to determine whether a conduct can receive amnesty or not. Up to May 2021, out of 2,222 amnesty requests denied by the Amnesty Chamber of the Special Jurisdiction for Peace, 515 correspond to conducts that have been qualified as war crimes or other international crimes that are excluded from such a benefit.

In turn, regarding crimes for which amnesty is not possible, the Peace Agreement adopted a framework on criminal responsibility based on IHL, IHRL and international criminal law. On this matter, the Special Jurisdiction for Peace is working under a mechanism of macro cases, prosecuting those most responsible for the most serious crimes, and prioritizing certain types of crimes or the territories where they have occurred. Up to now, seven macro cases are ongoing. The most advanced one is the so-called Case 01 on hostage-taking and other serious deprivations of liberty by the FARC. The first indictment on this
case was made for war crimes and crimes against humanity, and the grave violations
of the FARC’s IHL duties were largely proven and reproached in this regard.63

In addition to prosecution and punishment, reparations are a fundamental
condition for ensuring conditions for redress and reconciliation.64 Even though the
right to reparation has been mainly developed under IHRL, since the 1907 Hague
Convention IV, IHL has enshrined a right to compensation.65 This provision is
contained in Article 91 of Additional Protocol I and is implicit in the four
Geneva Conventions, which establish that no Contracting Party shall be allowed
to absolve itself or any other party of any liability incurred in relation to grave
breaches of the Conventions.66 All those norms are referred to as compensation
and are addressed to IACs. However, the ICRC Customary Law Study considers
reparations (in general, not just compensation) as a customary rule in both IACs
and NIACs.67

Based on human rights treaties and international practice, in 2005 the
United Nations General Assembly adopted the 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,68 which identified the existing legal obligations on the
matter.69 According to these Basic Principles, “victims are persons who
individually or collectively suffered harm …, through acts or omissions that
constitute gross violations of international human rights law, or serious violations
of international humanitarian law”.70 The same year, the Updated Set of
Principles to Combat Impunity considered the right to reparation for serious
crimes under international law as part of the global commitment to combating
impunity.71

63 Special Jurisdiction for Peace, above note 32.
64 E. Salmón, above note 4, p. 340.
65 Hague Convention (IV) with Respect to the Laws and Customs of War on Land, 18 October 1907, Art. 3.
66 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), Art. 51; 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), Art. 52;
Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS
135 (entered into force 21 October 1950), Art. 131; 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), Art. 148.
67 ICRC Customary Law Study, above note 12, Rule 150.
68 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 (Basic Principles on Reparation).
69 In their preamble, the Basic Principles on Reparation stress that they “do not entail new international or
domestic legal obligations but identify mechanisms, modalities, procedures and methods for the
implementation of existing legal obligations under international human rights law and international
humanitarian law which are complementary though different as to their norms”. It is also important to
mention the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted
by the International Law Commission, which embody the obligation of reparation and its modalities
and conditions (see Articles 30–31 and 34–36).
70 Basic Principles on Reparation, above note 68, para. 8.
71 UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human
Following this approach, the 2011 Law on Victims and Land Restitution established a comprehensive system of administrative reparation addressed to all victims of armed conflict since 1985. The Law is largely inspired by international law. Its Article 3 defines victims as people who individually or collectively have suffered damage as a consequence of a violation of IHL or IHRL within the armed conflict. Then, a set of comprehensive measures of reparations involving restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence were adopted. On this point, the 2016 Peace Agreement did not create a new system on reparations but called for the 2011 Law on Victims to be reinforced in a participatory manner and envisaged other reparation measures to be carried out by persons who are tried before the Special Jurisdiction for Peace and as part of the restorative component of the sanctions imposed on them.

In this way, practice in Colombia shows how IHL has served as a legal regime for framing transitional efforts on criminal accountability and reparation, even before the Peace Agreement was negotiated. Those formulas for redressing victims, granting amnesties and ensuring effective prosecution and sanction for war crimes and other international crimes are fundamental steps to make the transition to peace possible and sustainable. In addition, framing the discussion on IHL, combining both amnesties and criminal accountability through judicial mechanisms before a tribunal created within the Agreement, offered to the parties a bargaining zone in which they were able to find common ground and to ensure a formula conciliating the practical needs of peace with the legal standards required by international law.

**IHL can help to legally shield peace agreements**

Perhaps the most ambitious use of IHL in the search for peace in Colombia relates to the appeal to the mechanism of special agreements enshrined in common Article 3 as a way to legally shield and enforce the 2016 Peace Agreement. This idea came from the FARC since the beginning of the negotiations, when it expressed through a letter to the ICRC its intention to consider the very agenda of negotiation as a special agreement under common Article 3, as mentioned above in the first section of this paper.

Peace agreements are fundamentally political documents to be enforced through domestic legal instruments. In the Colombian case, however, both the guerrillas and the government were concerned about the risks that the final agreement could face if a new government that was opposed to it should come to power, amid an environment of strong political hostility towards the peace

---

72 Law on Victims and Land Restitution, above note 20. The implementation period of this law, initially foreseen as ten years, was extended for ten more years by Law No. 2078 of 2021.

73 For a detailed analysis on the international legal status of the 2016 Peace Agreement, see C. Rojas-Orozco, above note 10, Chap. 2.1.

74 FARC, above note 23.

negotiations. After refusing the option of translating the Peace Agreement into a new Constitution, the parties relied on IHL to give a sort of international legal status to the agreement, envisaging that this would be a way to avoid eventual modifications in the process of its domestic development and implementation.

To this end, the final Peace Agreement included a formula according to which it was signed “as a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions, as per its international standing”.76 As such, after its signing, the Agreement was sent to the Swiss Federal Council in Bern,77 as depositary of the Geneva Conventions. To support this formula, the text explicitly invoked and quoted the 2016 ICRC Commentary on Geneva Convention I, stating that the Agreement was given

the scope defined by the ICRC in its commentary …, which is reproduced below:

A peace agreement, ceasefire or other accord may also constitute a special agreement for the purposes of common Article 3, or a means to implement common Article 3, if it contains clauses that bring into existence further obligations drawn from the Geneva Conventions and/or their Additional Protocols. In this respect, it should be recalled that “peace agreements” concluded with a view to bringing an end to hostilities may contain provisions drawn from other humanitarian law treaties, such as the granting of an amnesty for fighters who have carried out their operations in accordance with the laws and customs of war, the release of all captured persons, or a commitment to search for the missing. If they contain provisions drawn from humanitarian law, or if they implement humanitarian law obligations already incumbent on the Parties, such agreements, or the relevant provisions as the case may be, may constitute special agreements under common Article 3. This is particularly important given that hostilities do not always come to an end with the conclusion of a peace agreement.78

The concrete effects of this formula are contested. Even though the ICRC Commentary opened the door for considering peace agreements as special agreements under common Article 3 because of the IHL provisions contained therein, it is not clear if all the political and socio-economic provisions included in a peace agreement could reach the same status as the humanitarian ones, in terms of such an article. In addition, the constitutional norms adopted to implement the Peace Agreement in Colombia relied basically on domestic law to provide the legal security pursued by the parties. In particular, a constitutional amendment stated that all the provisions of the Peace Agreement related to IHL and IHRL should be used as a parameter for the interpretation of all the norms

76 2016 Peace Agreement, above note 9, p. 5.
77 Ibid., p. 213.
adopted to develop the Agreement, and that the Agreement could not be modified in any way during the three presidential terms following its adoption.

Nevertheless, this formula shows the deep faith that the parties placed in IHL to secure their peace effort. Despite the reluctance of the FARC to explicitly recognize their commitment to IHL during their fight, the function attributed to the mechanism of special agreements was a key factor in their decision to express their commitment to IHL from the beginning of the Peace Agreement negotiations. At the time, IHL offered to the parties a framework that they could both trust, building confidence around their mutual respect for what was agreed upon. Here, the shielding function attributed by the parties to IHL helped to build confidence, mainly on the part of the guerrilla group, which, as a non-State actor, was inclined to be more sceptical towards a formula exclusively based on the domestic legal order that it was fighting against for decades.

Additionally, the parties’ aim of having a peace deal grounded in international law influenced the quality of the Agreement both in procedural and substantial terms. First, as long as IHL offers a neutral language, beyond the qualification of conducts and actors under domestic law, it can be considered as a condition facilitating negotiations. This is connected to the element discussed in the first section of this paper, related to the very acceptance of the existence of an armed conflict. Using IHL as a main legal framework during the peace talks helped the parties to reach a common bargaining zone in which agreements were easier to achieve.

Second, for the Agreement to be accepted as an international deal under IHL, it was not enough to include a statement declaring itself a special agreement under common Article 3. The substantive terms of the Agreement had to be in accordance with international legal standards, mainly regarding the limitation of amnesties and effective accountability mechanisms for war crimes and other international crimes. Provisions on both matters were included and developed under IHL, IHRL and international criminal law, as discussed in the third section of this paper.

In this way, this case shows a creative use of IHL in Colombia that truly contributed to facilitating the conclusion of the Peace Agreement, as well as its substantial conformity to applicable international legal standards. Even though it is clear that parties to conflict cannot make peace efforts a condition of their compliance with IHL, this case shows that the guerrillas came to express their specific commitment to IHL only when they were involved in a peace process and used IHL as a way to frame both the negotiations and the resulting agreement.

79 The FARC largely maintained that IHL was an instrument created by States for their own benefit, and thus never took part in it. However, the group considered its own internal rules as embodying the same humanitarian principles, without labelling them as IHL rules. Geneva Academy, above note 15, p. 13.
Conclusions

The use given to IHL in the Colombian path to peace has opened new venues for exploring the potential of this normative framework to facilitate and enforce peace efforts, even though it was not originally seen as having such a purpose. The literature has not explored in an empirical way how observing IHL or not during armed conflict influences the chances of achieving peace. However, as seen in this paper, when IHL is observed, it is easier to conclude and implement peace agreements through the mechanism of amnesty. Violations of IHL demand more sophisticated mechanisms of transition, ensuring effective accountability and reparations but implying harder challenges for peace and reconciliation.

The Colombian case shows how compliance with IHL is less likely to be ensured during a protracted armed conflict than when peace is in sight. In particular, the statements and trust-building gestures by the FARC at the beginning of the peace negotiations and during the process, when it specifically recognized and expressed commitment to IHL, show how the idea that such compliance will have an impact on the success or failure of the peace efforts plays a role in engaging non-State armed groups with IHL. It is clear that IHL is an end in itself and must be respected anyway, but it is interesting to see how the prospects of peace can influence armed actors’ commitment to IHL.

Finally, the use of IHL as a regime for framing peace talks and the role attributed to it in Colombia as a means to legally enforce the final Peace Agreement suggest a promising role for this framework in facilitating peace negotiations and the conclusion and implementation of peace agreements. It seems that the ICRC’s interpretation of the mechanism of special agreements as including peace agreements helped the negotiating parties in Colombia to see this instrument as a way to legally shield their peace result. As discussed in this paper, it is not clear what the concrete effects of this formula are in terms of protecting the 2016 Peace Agreement from domestic modifications through its claimed international legal status. However, the faith in IHL shown by the parties on this matter influenced the Agreement in both procedural and substantial terms, offering a language and a common frame of reference in which both parties felt confident, and pushing them to build a peace agreement whose content was compatible with applicable international legal standards.
Behind the legal curtain: Social, cultural and religious practices and their impact on missing persons and the dead in Colombia

Mayra Nuñez Pastor*

Mayra Nuñez Pastor is a Lawyer at the University of Buenos Aires and a PhD candidate at the University of Deusto, Spain.

Abstract

This paper examines social, cultural and religious factors that affect the implementation of international humanitarian law concerning dead and missing persons in non-international armed conflicts. To this end, the behaviour of both armed groups and civil society is studied. The argument made in the paper is that in some cases endogenous and exogenous systems of value (social, religious and cultural understandings), operating within the logic of armed non-State actors and within local communities, should be considered by policies concerning the search for missing persons. The Colombian armed conflict is used as case study; the social,

* This work was conducted as part of the DeCyT Research Project “Towards a Sociology of International Humanitarian Law: Values, Beliefs and Perceptions as Informal Normative Conditioning in Times of Armed Conflict” (DCT1807), School of Law of the University of Buenos Aires, under the direction of Dr Emiliano Buis. The University of Deusto has funded the Open Access publication of this article under the Read and Publish agreement with Cambridge University Press

© The Author(s), 2021. Published by Cambridge University Press on behalf of the ICRC. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.
cultural and religious practices of the National Liberation Army and the Revolutionary Armed Forces of Colombia—People’s Army are analyzed as examples. Likewise, social and cultural values within affected populations can impact on post-conflict mechanisms agreed upon by the parties concerning the search for missing persons, and vice versa. Consequently, customs and traditions such as the “adoption” of unidentified buried people by local communities (social resignification of the dead) and the practices of indigenous communities are reviewed in order to establish a holistic framework.

Keywords: armed groups, Colombia, social practices, culture, missing persons, the dead.

Introduction

This article will explore social and cultural aspects regarding the treatment of the dead in the non-international armed conflict in Colombia. Since its creation in 2016, the Missing Persons Search Unit has received 9,482 search requests. Activities concerning the management of bodies provide numerous explanations that transcend the legal and political sphere and are extremely relevant to (1) understanding the observance of humanitarian norms by the different parties to the conflict from a social and cultural perspective, and (2) refining mechanisms to search for missing persons in jus post bellum contexts. In this sense, corporeality as one of the territories of armed conflict is a relevant factor concerning the establishment of mechanisms designed to search for missing persons in the aftermath of conflict.

The temporal scope of the study covers the period from 1964 onwards, considering that this is the year in which the guerrilla groups analyzed in this work were first formed. The first part of the study describes the normative context governing the treatment of bodies in armed conflict and the normative system applicable to Colombia, while the second part briefly explains the Colombian armed conflict. The third part explores the practices carried out by two of the armed groups under study in relation to the deceased in light of their system of values. The fourth section describes the dynamics between the Integral System of Truth, Justice, Reparation and Non-Repetition and armed groups concerning the search for the missing, while the fifth part describes how the cultural and social practices of civilians also impact on the search for missing persons.

On IHL obligations

IHL rules concerning the treatment of dead bodies and the search for missing persons

There are limited references in international humanitarian law (IHL) to the treatment of those killed in non-international armed conflicts and the search for missing persons. Article 8 of Additional Protocol II (AP II) states that it is the obligation of the parties to the conflict—especially after the cessation of hostilities—to take all measures within their means to recover the bodies of deceased persons and to give them a decent burial.² Article 8 does not have the scope and detail observed in the Geneva Conventions and in Additional Protocol I (AP I).³ The International Committee of the Red Cross (ICRC) Commentary on AP II notes this difference, pointing out that it would be unrealistic to require the same type of obligation from non-State armed groups as from States. However, it stresses the importance of establishing measures in post-hostilities contexts to trace the whereabouts of those persons who are missing and the location of burial sites where appropriate.⁴

Furthermore, the ICRC has established that regardless of the nature of the armed conflict, there is a customary obligation to keep records of the whereabouts of persons killed or missing during the conflict, as well as to implement tracing systems and share information obtained about their fate with their relatives.⁵ It is worth noting that the ICRC understands that obtaining information on the fate of missing persons constitutes an obligation of means, while providing such records to relatives of missing persons is an obligation of result.⁶ Likewise, despite the absence of specific norms concerning the identification of the dead in non-international armed conflicts, there is a consistent practice—in military manuals, judgments, and ICRC resolutions, among others—that consolidates this obligation of armed non-State actors.⁷

In the case of the International Criminal Court, Article 8(2)(c)(ii) of the Rome Statute recognizes that it is a serious violation of Article 3 common to the

² 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 12 July 1978) (AP II), Art. 8.
³ Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 120, 121; 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), Arts 26, 129, 130, 131, 133; 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 12 July 1978), Arts 33, 34.
⁶ Ibid., pp. 482–483.
four Geneva Conventions to commit outrages upon personal dignity. The *Elements of Crimes* recognizes in a footnote that this includes dead persons, clarifying that “this element takes into account relevant aspects of the cultural background of the victim”.9

It is also important to highlight soft-law instruments on this issue, such as United Nations General Assembly Resolution 3320 on “Assistance and Cooperation in Accounting for Persons who are Missing or Dead in Armed Conflicts”. It requests belligerent parties in armed conflicts, “regardless of the nature of the conflict”, to take all measures within their power to locate and identify graves, facilitate the return of remains to their families, and provide information to families on the fate of missing persons.10

Implementing IHL in Colombia

In the Colombian case, the armed conflicts between the State and the National Liberation Army (Ejército de Liberación Nacional, ELN) and between the State and the Revolutionary Armed Forces of Colombia–People’s Army (Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo, FARC-EP) has been classified as a non-international armed conflict. Due to the intensity of the hostilities and the particular characteristics of the armed groups, the applicable rules of IHL are common Article 3 and AP II.11

For the application of AP II, certain requirements set out in the Protocol must be met, including that one of the parties to the conflict be a State and that the non-State armed group be strongly organized in a hierarchical structure, capable of carrying out sustained military operations over time and able to control part of the territory.12 In Colombia, the ELN and FARC-EP’s level of organization, their capacity to manage large portions of territory (especially in the regions of Antioquia and Santander), the collection of taxes from local communities and the administration of justice in these areas, as well as the hierarchy of their structure, fulfil the requirements set by AP II.

In *Case C-225* of 1995, the Constitutional Court of Colombia ruled specifically on the scope of AP II. As part of the national legislative process for the ratification of the Protocol, the National Congress requested the Court to analyze the instrument in light of Colombian constitutional provisions.13 The Court stated that international humanitarian norms are guaranteed by the Constitution (Article 214(2)) and that not only the Armed Forces are bound by

---

10 UNGA Res. 3220 (XXIX), 6 November 1974, para. 2.
11 Colombia ratified AP II on 14 August 1995.
12 AP II, Art. 1.
13 Congress of Colombia, Law 171, 1994, Final Dispositions.
IHL, but also members of irregular armed groups. It also made it clear that non-State armed groups “do not become, by the sole application of humanitarian law, subjects of public international law”.

In the same vein, the Court determined that under the Constitution, the rules of IHL must be applied in all cases, with no need to assess the level of intensity of the conflict after it has been classified as such, as required by Article 1 of AP II. This provision establishes that these norms “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”.

On the armed conflict in Colombia

During the civil war known as La Violencia (1948–57), the opposing parties belonged to two elite economic groups. In 1957, these two groups signed a peace agreement through which they would share power alternately for sixteen years.

The alternation of power between concentrated economic groups gave rise to peasant resistance movements, who saw an opportunity to put an end to oligarchic domination in Colombia. Although these rural groups originated during La Violencia, it was not until a few years later that confrontations between the peasant groups and government forces gave rise to the creation of several guerrilla groups and the beginning of a new armed conflict in 1964.

One of the main causes of the current conflict is the great inequality in land distribution and the concentration of agricultural activity in a minority and conservative sector. This, together with the lack of legitimacy in the land titles that had been granted since 1944 and the unclear methods and criteria for the appropriation of abandoned lands, led to the conflict.

Notably, there is no presence of State institutions in 60% of the Colombian territory. At the same time, in 75% of these municipalities there are guerrilla bases, where it is believed that the guerrillas control the administration of justice.

The FARC-EP

In 1958, rural communities founded the independent and self-governed republic of Marquetalia in the territory of southern Tolima. In response, the government

---

14 Constitutional Court of Colombia, Case C-225/95, Case No. C-225–95, 18 May 1995, para. 10.
15 Ibid., para. 14.
16 Ibid., para. 25.
17 AP II, Art. 1.
19 Comisión Histórica del Conflicto y sus Víctimas, Contribución al entendimiento del conflicto armado en Colombia, Ediciones Desde Abajo, Bogotá, 2015, p. 13.
21 Ibid.
carried out Operation Sovereignty on 18 May 1964. During the confrontation between the two sides, the Guerrilla Agrarian Programme was created, which laid the foundations for the FARC-EP, founded during the same year. From that moment on, the peasant self-defence groups began a process of transition to guerrilla warfare. The number of FARC-EP members oscillated between 3,600 in 1986, 17,000 in 2000 and 7,000 (under the demobilization process) in 2018.

The FARC-EP operated in rural territories where the State had little or no presence. In line with its historical beliefs, the group advocated for the rights of farmers, who had been systematically deprived of their fundamental rights. The main objective of the FACR-EP was the transformation of the management of farmland in Colombia. Hence, the group established a close relationship with peasant communities. By the mid-1990s, the FARC-EP had come to control approximately 40–50% of Colombia’s 1,071 municipalities.

At an internal level, the guerrilla group maintained a strong top-down structure with a clear line of command. Members were not supposed to commit looting against the civilian population, and internal codes of conduct were strict regarding infractions committed for individual gain. If abuses against civilians were committed, these actions were generally approved by the squad or platoon authority. According to the FARC-EP, disrespect for local communities was a serious crime. Nevertheless, considering the ambiguous wording of this principle and the numerous IHL violations committed by this guerrilla group, it is questionable under what conditions this maxim was applied.

The ELN

The ELN dates back to the 1960s in the Arauca region of Colombia. It is a decentralized guerrilla group, characterized by the autonomy that many of its subgroups maintain in relation to the Central Command.

The ELN was born as a student movement that, in light of the inequality experienced in Colombia and the regional context, especially the Cuban Revolution, decided to form a revolutionary guerrilla group with the aim of founding a socialist State. According to the ELN Official Programme, it is a military and political organization whose main objective is to seize power for the
people and to create a democratic and transparent system composed of workers, peasants, intellectuals and students.\(^{30}\)

Between 1973 and the early 1980s, the ELN was reorganized and expanded to Cesar, north of Santander and Arauca, on the border with Venezuela.\(^{31}\) From 1983 onwards, the group decided to expand its military operations in the Arauca region in order to increase its influence, especially on mining areas. Oil exploitation allowed the organization to dominate numerous regions over other armed groups, including the FARC-EP.\(^{32}\) The expansion of the ELN can be attributed to a number of factors, particularly the group’s historical relationship with local communities, social movements and groups that sought recognition for the agricultural sector, and the influx of economic resources provided by oil exploitation.\(^{33}\)

From 1998 onwards, with the rise of the FARC-EP, the ELN’s dominance in the Cordillera region started to decline.\(^{34}\) In addition, the increase in activities by paramilitary groups in the Arauca region in 2000 led to a more complex scenario for the ELN’s territorial control.\(^{35}\) This situation did not de-escalate after the demobilization of paramilitary groups in 2005, but rather triggered a confrontation between the FARC-EP and the ELN over territorial control of Arauca.\(^{36}\) In order to support its military operations financially, the ELN had to resort to cooperation with drug cartels, though this option had initially been rejected as contrary to the organization’s principles.\(^{37}\)

From its very beginning, the ELN imposed internal rules of conduct and guerrilla codes that governed the daily life of the organization and also provided for sanctions in case of infractions.\(^{38}\)

The hostilities went on for decades, and the strong interference of drug trafficking organizations marked the complexity of a context that worsened with the formation of paramilitary (counter-insurgency) groups, supported by the Armed Forces and the government. The origin of paramilitarism dates back to 1968, when Congress legislatively validated the creation of private self-defence groups. This regime was in force until 1989, when its legal status was eliminated during peace negotiations. However, the growing presence of the guerrillas from 1990 onwards introduced new legislation, called Convivir, under which paramilitary groups came under the Private Security and Surveillance Statute.\(^{39}\)

The Unit for Comprehensive Attention and Reparation of Victims (Unidad para la Atención y Reparación Integral a las Víctimas, UARIV) has established that

\(^{30}\) Carlos Medina Gallego, Ejército de Liberación Nacional: Notas para una historia de las ideas políticas, Universidad Nacional de Colombia, Bogotá, 2019, p. 78.

\(^{31}\) C. Echandía Castilla, above note 28, p. 11.

\(^{32}\) Ibid., p. 4.

\(^{33}\) Ibid., p. 7.

\(^{34}\) Ibid.

\(^{35}\) Ibid., p. 8.

\(^{36}\) Ibid., p. 9.

\(^{37}\) Ibid., p. 10.

\(^{38}\) C. Medina Gallego, above note 30, pp. 62–63.

\(^{39}\) J. Garcia-Godos, above note 18, p. 221.
between 1985 and July 2021, 151,521 persons were missing as a result of the conflict in Colombia.\footnote{UARIV, “Registro Único de Víctimas (RUV)”, available at: www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394.}

On 24 November 2016, the \textit{Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace} (2016 Peace Agreement) was signed in Havana between the government and the FARC-EP, bringing an end to more than five decades of armed conflict.\footnote{Government of Colombia and FARC-EP, \textit{Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace}, 24 November 2016 (2016 Peace Agreement), available at: www.peaceagreements.org/viewmasterdocument/1845.} The ELN did not sign the Agreement and still carries out military activities.

The 2016 Peace Agreement established mechanisms for the reintegration of former guerrilla members into society, comprehensive reparations for victims of the conflict, the prosecution of those responsible for serious violations of IHL and human rights, and the transition of the FARC-EP to a political party. The ELN has recognized its responsibility in many of the international crimes committed during the armed conflict, but unlike the FARC-EP, it has not signed the peace accords. Nonetheless, it has participated in rounds of negotiations with the Colombian government in Havana to reach an agreement. The group has stated:

\begin{quote}
In the ELN, we assume our part of the responsibility over 50 years of confrontation with the State. In this sense, our organisation adheres to the universal doctrine of treating victims of conflict with truth, justice and reparation and a commitment to non-repetition.\footnote{Luis I. Sandoval Moreno and Felipe Pineda Ruiz, “El ELN y la salida política del conflicto armado”, in Víctor de Currea-Lugo (ed.), \textit{¿Por qué negociar con el ELN?}, Editorial Pontífica Universidad Javeriana, Bogotá, 2014, p. 208.}
\end{quote}

In 2007, the ELN highlighted the issue of enforced disappearances and the search for the missing in the context of exploratory meetings for a peace agreement. Despite the progress made, the country’s political situation and the disagreements between the government and ELN proposals led to the suspension of the negotiations, and proposals for a joint search did not succeed. The first phase of the dialogue between the government of Juan Manuel Santos and the ELN took place between 2014 and 2016. That same year, six working priorities were announced: these were participation of society, democracy for peace, transformations for peace, victims, end of the conflict, and implementation of the agreement. With the arrival of Iván Duque to the Colombian presidency in 2018, the dialogue came to a dead end.\footnote{Erika M. Rodríguez Pinzón, “Colombia: El desafío de implementar una paz imperfecta”, \textit{Documentos de Trabajo Fundación Carolina}, No. 4, 2019, p. 21; Jerónimo Ríos, “El Ejército de Liberación Nacional, el gobierno de Iván Duque y la encrucijada de la paz en Colombia”, \textit{Canadian Journal of Latin American and Caribbean Studies}, Vol. 46, No. 2, 2021, pp. 230–231.}
The buried and the missing

It is necessary to point out that the search for missing persons seeks three objectives: to determine if the person is alive, and his or her location if so; if not, to determine his or her fate (whether he or she was killed, tortured, died of an illness while in captivity, died during combat, etc.); and to determine the fate of the person after death (treatment of the victim’s body or remains).44 These determinations are relevant to the social, historical and political narrative of the armed conflict and, in particular, to the parties involved. The behaviour of each party regarding the treatment of the dead speaks not only to their compliance with humanitarian norms, but also to their social and cultural practices (which can fluctuate over time). Conversely, their socio-cultural values and ethics, as well as their religious beliefs, could be useful for predicting the behaviour of the groups regarding the dead and for establishing differentiated search mechanisms.

It is worth noting that the fate of those who have died has not always been a result of the socio-cultural practices or tactical logics of the different actors involved in the conflict. In many cases, the dynamics of armed conflict prevent the parties from making decisions about the victims’ bodies. For instance, the immediate need to evacuate settlements in one part of the territory because of an enemy attack may make it impossible to bury and identify those killed in the fighting. However, when decisions about the bodies do come from socio-cultural practices or military decisions, it is possible to observe different attitudes depending on the different parties to the conflict.

The undignified treatment of the dead by the different parties to the conflict may be motivated by different objectives: to punish, to humiliate, to set an example to the enemy, to intimidate people not to collaborate with the guerrillas, and so forth. In this sense, Foucault’s notion of biopower becomes relevant, as the treatment of the bodies reveals a physical approach to armed conflict: war is embodied in the decisions made regarding the fate of the remains of those who have died. And these choices are not a minor aspect of the conflict—the dead are eminently political objects because of their capacity to test the legitimacy of all kinds of power.45 In this sense, as Olarte-Sierra and Castro Bermúdez argue, forensic knowledge provides an understanding of the body as a “territory of war”.46

In the case of the ELN, despite the scarce resources and hunger faced by the group, one of its guiding principles was to maintain a comradely relationship with the peasant communities. Consequently, ELN members worked the farmers’ land on a daily basis, not only to persuade them to join the revolutionary cause, but

46 María Fernanda Olarte-Sierra and Jaime Enrique Castro Bermúdez, “Notas forenses: Conocimiento que materializa a los cuerpos del enemigo en fosas paramilitares y falsos positivos”, Revista de Antropología y Arqueología, No. 34, 2019, p. 136.
also to earn food.\textsuperscript{47} Solidarity was the main pillar in the group’s relationship with local communities.\textsuperscript{48} There was empathy between these communities and the ELN, a product of a common past, shared cultural traditions and practices and, in many cases, common experiences of misery and inequality.

The emergence of the so-called “Church of the Poor”, a social movement within the Catholic Church marked by the Second Vatican Council (1962–65) and the Second Latin American Episcopal Conference in 1968 that sought to make the needs of the poor and marginalized visible, significantly influenced the guerrilla groups.\textsuperscript{49} It highlighted a “humanistic” vision in the conduct of the guerrillas, where the use of practices such as the desecration of the dead was strictly forbidden. In the case of the ELN, the commitment to the social transformation of the poor through sacrifice and Christian faith was established as a maxim by the former priest and guerrilla Camilo Torres Restrepo.\textsuperscript{50}

In this sense, the ELN called for a “humanization of war” and compliance with IHL as an “expression of its revolutionary ethics and humanism”, denouncing at the same time a State practice of enforced disappearances and proposing the intervention of the ICRC.\textsuperscript{51} At the same time, the ELN’s social and cultural narrative was pervaded with religious connotations, especially with notions of sacrifice and the quest for a virtuous life: “[W]e developed this spirit of solidarity through sacrifice, because the conditions were extremely difficult, incredibly precarious. At that time, it was just that: a heroic campaign of limitations and sacrifice.”\textsuperscript{52}

Guided by Restrepo’s path, many priests and nuns joined the guerrillas, seeing a parallel between the organization’s objectives and their own altruistic calling. They shared a culture of sacrifice in order to reach the liberation of the people and the salvation of their souls.\textsuperscript{53} Interestingly, some authors have described the ELN as being symbolically composed of an army of the living and an army of the dead, as the commitment to those who have died in the name of a common and just cause is one of the most important reasons for which one can sacrifice oneself.\textsuperscript{54}

The ELN’s treatment of the bodies of its own members included burial and ceremony. Burial was carried out with military honours in cases where the person had led an exemplary militant life. The ELN describes as an affront a situation in which the body of one of its main commanders, Luis José Solano Sepúlveda, who had been buried, was disinterred by an army patrol and exhibited to local

\textsuperscript{47} C. Medina Gallego, above note 30, p. 66.
\textsuperscript{48} A. L. Pérez Fonseca, above note 29, p. 85.
\textsuperscript{50} \textit{Ibid.}, p. 89.
\textsuperscript{51} C. Medina Gallego, above note 30, p. 493.
\textsuperscript{52} \textit{Ibid.}, p. 64 (author’s translation).
\textsuperscript{53} \textit{Ibid.}, p. 108.
\textsuperscript{54} Geraldine Bustos Zamora, “Unión entre marxismo y cristianismo en el Ejército de Liberación Nacional”, \textit{Izquierdas}, No. 49, 2020, p. 1381.
communities with a sign declaring him “killed in combat”. It is no coincidence that the ELN’s references to its most important deceased leaders describe a “physical disappearance”, but not a spiritual one.

In most of the statements on military actions published by the ELN, however, there is no indication of how the bodies of enemies killed in combat are treated. When a person is captured and subjected to revolutionary prosecution, he or she is described only as “having been executed”, without any further reference to the fate of the body or the location of the grave. In the cases of those killed in combat, there are also ambiguous descriptions such as “March 20: we attacked the narco-paramilitaries in La Veta, Montecristo municipality, South Bolivar, where one narco-paramilitary was killed and another wounded”.

In this sense, the differentiated symbolic value of death depending on whether or not it is associated with the armed group is a determining factor in understanding the subsequent treatment of the bodies. In the case of the ELN, and especially through the historical and epic narrative of the hero and the martyr, the death of a member in combat symbolizes the triumphant end of the fighter and perpetuates the revolutionary myth. Such a death is thus a reaffirmation of the purity and integrity of the deceased and his or her commitment to the cause. It is, according to an epic narrative, a “beautiful death”. Consequently, it is a priority to recover the body in order to provide the fighter with an honourable burial. In this sense, the body of an ELN fighter is at the service of a collective cause and becomes relevant as a means for the social construction and projection of that cause.

In a narrative describing the daily life of ELN members, Rodríguez Bautista and García describe the death of a comrade and the procedure that was followed. As they were not at the camp, the body had to be left at the side of the road, but not before checking the deceased’s belongings for valuables that could be of use to the unit.

“—Go—Carlos orders me—, take everything you have out of his pockets, check if he’s dead, if he’s only wounded let me know immediately.” I run to Parmenio and lie down next to his body, check his pulse, I don’t feel anything. I put my head on his chest looking for his heartbeat, I hear nothing. I do the pupil test, there is no doubt, Parmenio is dead. Two colleagues tell me to hurry up, so I

take out the things he has in his pockets and although I don’t want to separate from him, I have to leave him.\textsuperscript{61}

The importance of burying comrades is described in different publications of the organization, many of them written by the commanders themselves. Regarding the death of Camilo Torres Restrepo, one of them writes:

The situation was very difficult during the shooting and they had to leave the body there. The location of the body is a mystery, it’s a national secret. But they [the Armed Forces] have it, like a trophy. … They stole his body, because they know they are hurting us by doing that.\textsuperscript{62}

In contrast, the death of the enemy lacks this social symbolism of dedication and sacrifice. The courage and ideals of the Other are not comparable, and their death becomes something less impressive, even an “administrative” act, as Carnovale describes it.\textsuperscript{63} This leads to a different treatment of the bodies. Consequently, despite the strong influence of its religious and moral roots, the ELN has on numerous occasions failed to comply with IHL provisions relating to the treatment of the bodies of deceased persons.

In the case of the FARC-EP, its conduct was characterized by a partial compliance with IHL norms. In most cases, compliance was the result of a convergence point between the organization’s ideology and the content of some specific norms. For instance, the Disciplinary Rules and Regulations of the FARC-EP stipulate that disciplinary measures are understood as a necessity that the member accepts as a voluntary and serious commitment.\textsuperscript{64} He or she is guided by the need to fight against an oligarchic regime and the pursuit of “a proletarian national liberation government”.\textsuperscript{65}

In many cases, armed groups move from non-compliance to compliance with international norms based purely on a cost–benefit analysis.\textsuperscript{66} However, in the case of the FARC-EP, the organization’s ethos and values cannot be disregarded as key factors contributing to compliance. In this sense, there was a social and political interest in representing the peasant sector that is consistent with part of the IHL normative repertoire.

The so-called “Farian morality” (social and cultural values within the FARC-EP, moralidad fariana) and its adherence by the members of the organization was the basis of daily life, where the conceptions that sustained the organization were reinforced, thus reaffirming the bonds of identity and belonging among the individuals. These practices also functioned as a justification for the non-observance

\textsuperscript{61} Nicolás Rodríguez Bautista and Antonio García, “Papá, ¡son los muchachos!”, La Fogata, Bogotá, 2017, pp. 60–61 (author’s translation).


\textsuperscript{63} V. Carnovale, above note 59, p. 99.

\textsuperscript{64} FARC-EP, above note 25, Introduction.

\textsuperscript{65} Ibid.

of certain IHL norms, with members considering them to be foreign and therefore inapplicable to their way of life.\textsuperscript{67}

The FARC-EP was the most prolific producer of regulations in the guerrilla movement in Colombia. Its rules of conduct were drawn up before 1952, in many cases by people who were not aware of the existence of IHL. In essence, they were influenced by Marxist values, the emerging “Farian morality” and the armed group’s superior interest.\textsuperscript{68} The Statute, Regulations and Norms and Principles on clandestine operations were adopted by the armed group between 1999 and 2001 and served to rebuild aspects concerning solidarity.\textsuperscript{69} Surprisingly, none of the group’s instruments—such as operation manuals, internal regulations, the Statute or the ten National Conferences—makes any reference to the methodology to be followed concerning the remains of the dead in its custody.\textsuperscript{70} Its Statute only stipulates the obligation “to respect prisoners of war as to their physical integrity and convictions”.\textsuperscript{71}

The major source of information on the modus operandi of the FARC-EP’s companies, columns and units are the testimonies written by the group’s leaders. In this regard, one of its most prominent leaders observed:

A high percentage of the deaths in the guerrilla remained unknown. If the troops did not take their bodies to bury them in mass graves, they were buried in lost graves in the middle of the jungle. One day I suggested that we should try to calculate the number of fighters who had died, extending the definition of fighter to Colombians who had at one time or another been members of the FARC. How many people were part of the guerrilla, how many died? Such figures are impossible to estimate.\textsuperscript{72}

Within the framework of the FARC-EP’s activities, there were different scenarios of disappearance. In the case of soldiers and policemen killed in military operations, the bodies were thrown over cliffs or buried in mass graves without any topographical record of the locations used for this purpose or lists indicating the identity of the persons buried.

A second scenario for disappearances is disciplinary measures within the armed group. In 2010, a media report stated that the FARC-EP had killed more of its own members through internal trials than members of the Armed Forces or


\textsuperscript{68} Mario Aguilera Peña, “Las guerrillas marxistas y la pena de muerte a combatientes: Un examen de los delitos capitales y del ‘juicio revolucionario’”, \textit{Anuario Colombiano de Historia Social y de la Cultura}, Vol. 41, No. 1, 2014, p. 209.


\textsuperscript{70} The FARC-EP’s Open Order Charter, the Closed Order Regulations, the FARC-EP Statute and the ten National Conferences were analyzed without finding any reference on this issue.

\textsuperscript{71} FARC-EP Statute, above note 27, Art. 7(k).

\textsuperscript{72} Ángel Gabriel, “De la larga guerra al nuevo partido”, Fuerza Alternativa Revolucionaria del Común, 19 August 2017 (author’s translation), available at: \url{https://partidofarc.com.co/farc/2017/08/19/de-la-larga-guerra-al-nuevo-partido/}.
paramilitaries. In practice, most of the executions committed by the armed group were justified as disciplinary measures for those who had behaved in a manner incompatible with its principles. After the trials, called “revolutionary war councils”, those found guilty were forced to dig their own graves, where they were buried without any identification and without notifying their families. The bodies were not handed over to the authorities for legal identification, and no record was kept of their whereabouts. They were either thrown into the river or buried in unmarked graves. It has been argued that the constant concern of having infiltrators from the government among the group’s members was the main cause for such a severe and rigorous justice system.

Another modality of disappearance under the FARC-EP regime is related to the practice of extortive kidnapping of civilians. According to the Observatory on Memory and Conflict of the National Centre of Historical Memory (Centro Nacional de Memoria Histórica, CHMH), 35,888 kidnappings were identified as having taken place since 1964. Guerrilla groups were responsible for 85.4% of these cases. In the cases registered between 1970 and 2010 where the perpetrators of these crimes could be determined (9,082), 37% were attributed to the FARC-EP, whereas in cases of presumed responsibility (29,085), 33% of them were attributed to this group. The FARC-EP, for its part, justified this modus operandi by the need to finance its operations under the legal figure of military necessity. Deaths while in captivity account for 7% of cases. Causes of death include illness, escape attempts and rescue operations attempted by law enforcement agencies. In many of the cases attributed to the FARC-EP, the location of the bodies was never revealed to their families and their graves were never found.

In addition to the disappearance of civilians in cases of kidnapping, a fourth scenario involves the disappearance of civilians as a result of conflict between local communities and the armed group. One of the main reasons for confrontation was the resistance of many communities to territorial, judicial and administrative control by the armed group. This situation was particularly evident in the case of

76 C. Acosta Olaya, above note 69, p. 547.
78 Ibid.
80 By understanding the armed conflict in terms of class conflict, activities such as the kidnapping of civilians to finance military operations were justified by the FARC-EP in order to end the conflict and because these victims represented a segment of the population that did not share their ideals. See ICRC, above note 67, pp. 43–44.
81 Observatory on Memory and Conflict, above note 77, p. 23.
82 G. M. Gallego García, above note 74, p. 132.
the indigenous populations of the Cauca region during the 1980s, giving rise to self-
defence groups in small villages.\textsuperscript{83} 

The last of the scenarios of disappearances at the hands of the FARC-EP involves cases of police and soldiers captured during military operations and confrontations, as well as the intentional kidnapping of members of the Armed Forces who were on leave or on holiday, for the purposes of prisoner exchanges. In these cases, Gallego García indicates that there are at least 135 persons who were never released and whose whereabouts are unknown.\textsuperscript{84} 

Cataño has postulated that the revolutionary justice of the FARC-EP was not guided by a formal rational system whereby conduct may or may not be in line with fixed normative precepts.\textsuperscript{85} On the contrary, acts of justice were guided by the system of values and ethical principles on which the armed group bases its raison d’être. Thus, it operated through a kind of “irrational justice”.

Within the value system of the FARC-EP, the death of a person marked an end to that person’s entity. The armed group, characterized as Marxist-Leninist, did not subscribe to religious concepts. In fact, no records were kept of the deaths of the organization’s own members. In the context of the revolutionary cause, there was no valuing of life after death, which is why there was a tacit irrelevance of the corporeality of any person—a member of the armed group, a civilian or a prisoner of war—after his or her death. This certainly does not imply that no attempt was made to create graves for the deceased, but rather that it was not a matter of priority in light of the organization’s objectives. This premise is also supported by Cataño, who notes:

The pride of their Marxism-Leninism (an irreligious, “scientific” and “objective” philosophy) has enabled some combatants to differentiate themselves from their colleagues in the ELN, who are very prone to following the orientations of former members of the Church and the teachings of the Theology of Liberation.\textsuperscript{86} 

From the above, it is important to note how the foundations of the armed groups determine their line of conduct. The FARC-EP justified violence against civilians when military advantage was at stake, and internal rules did not entail any disposition regarding proper burials for guerrillas. While both the FARC-EP and the ELN shared goals concerning the recognition of the demands of the marginalized and the poor, especially within the peasant communities, the ELN also had a spiritual and religious approach that differentiated it from the systematic FARC-EP practices related to the treatment of the dead.

\textsuperscript{83} Mario Aguilera Peña, “Claves y distorsiones del régimen disciplinario guerrillero”, \textit{Análisis Político}, No. 78, 2013, p. 267.
\textsuperscript{84} G. M. Gallego García, above note 74, pp. 133–136.
\textsuperscript{86} \textit{Ibid.}, p. 130 (author’s translation).
Mechanisms of search: Cooperation between civil society, armed non-State actors and public institutions

The UBPD

Joint Communication No. 62 between the Colombian government and the FARC-EP in October 2015 established a specific agreement on immediate measures prior to the signing of the 2016 Peace Agreement for the purpose of finding the remains of missing persons who had died as a result of the conflict and returning them to their families. It established the creation of the Missing Persons Search Unit (Unidad de Búsqueda de Personas Dadas por Desaparecidas, UBPD) to articulate mechanisms designed to register the whereabouts of missing persons under the control of the different parties to the conflict, up to 2016. The FARC-EP agreed to share available information on the fate of persons who had died under its custody and whose whereabouts were unknown.

This communication also established the creation of a tripartite working group between the FARC-EP, the national government and the ICRC, which would facilitate search operations on the field. With the information provided by the FARC-EP and the government, the ICRC, together with the National Institute of Legal Medicine and Forensic Sciences, would design and implement humanitarian programmes.

The UBPD coordinates and directs activities aimed at searching for and locating persons who have disappeared in the context and as a result of the armed conflict, taking all possible measures to locate and identify their remains and to hand them over to their families in a dignified manner. Significantly, the 2016 Peace Agreement stresses the need to respect different ethnic and cultural traditions during the process of returning the remains of deceased persons.

In terms of complementarity, it is specified that “the activities of the UBPD can neither replace nor impede the judicial investigations that may be carried out in compliance with the State’s obligations”. In this sense, the activities of the UBPD do not affect the investigations and proceedings of the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) regarding individual responsibility for the crimes related to cases of disappearances that the Unit is investigating.

On 20 August 2019, the FARC-EP submitted information on the whereabouts of 276 missing persons. Of these, 64% are former members of non-State armed groups, 28% are civilians and 1% are members of the Armed Forces.

88 Ibid., section II.
89 Ibid., section I.
90 Ibid.
91 2016 Peace Agreement, above note 41, section 5.1.1.2.
92 Ibid.
93 Ibid.
94 Ibid.
Forces. Between 2018 and 2020, the UBPD received 132 offers of information from former members of this guerrilla group. The FARC-EP, according to the provisions of the 2016 Peace Agreement, created the FARC Search Commission for Missing Persons, a body that has received requests for information since the publication of Joint Communication No. 62.

Part of the UBPD’s agenda is to disseminate its role to former members of armed groups in order to facilitate the exchange of information for the location and identification of victims. Throughout 2019, the UBPD trained many of these former members on the gathering of cartographic information so that they could provide details on the whereabouts of missing persons. Furthermore, in 2019 a working group was established between the UBPD, the ICRC and the FARC political party (Comunes) to accelerate the exchange of information in order to elaborate search strategies.

The role of the JEP

The UBPD works in coordination with the JEP. For instance, in Case 01: Hostage-Taking and Other Serious Deprivations of Liberty, the UBPD submits regular reports on missing persons included in the case. The JEP provides an opportunity for former members of the FARC-EP to share information that would facilitate the location of missing persons who had been illegally retained by the group. In this regard, the order dated 10 January 2020 of the Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conducts established that thirty-one former high-ranking members of the FARC-EP and sixteen ex-fighters would be notified so that they could provide information.

The Absence of Acknowledgment of Truth and Responsibility for Facts and Conduct Section is a relevant agency of the JEP, which works in collaboration with the UBPD. This Section dictates provisional measures to safeguard territories where it is believed that there are remains of persons who are being searched for. For instance, on 30 July 2020 a provisional measure was ordered to protect the Universal Garden Cemetery in Medellín, where it is believed there are remains of persons who were victims of enforced disappearance, in order to conduct exhumations. This was decided on the basis of information provided by the UBPD, which compiled and compared information submitted by victims’ relatives, FARC-EP members and witnesses.

95 UBPD, Informe de gestión y rendición de cuentas 2019, 2019, p. 21, available at: https://tinyurl.com/wja8af5s.
96 UBPD, above note 1, p. 19.
97 UBPD, above note 95, p. 21.
98 Ibid.
99 Ibid.
100 JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Caso 01: Toma de rehenes y otras privaciones graves de la libertad, Case No. 20203250005183, 10 January 2020.
In the case of the ELN, a recent statement of the JEP has determined that military operations and hostilities are obstructing efforts to find missing persons. The current clashes between the ELN and other armed groups in the region of Antioquia are preventing progress in the exhumation of mass graves, especially in the Urabá region.\(^{102}\)

**The resignification of bodies as an obstacle to the search for missing persons**

**The case of Puerto Berrío**

The Magdalena River in Colombia is considered the largest cemetery in the country.\(^{103}\) Many of the bodies of people who were killed during the armed conflict were disposed of there to make them disappear.

Due to its strategic location, the shore of this river has always been a disputed territory between guerrilla and paramilitary groups. The town of Puerto Berrío, with approximately 40,000 inhabitants, was, along with other neighbouring villages, controlled by the FARC-EP and ELN during the 1960s and 1970s, and later by paramilitary groups.\(^{104}\) Between twenty and twenty-five bodies per week were recovered from the river by this community. These figures were additional to the town’s own figures: 1,172 selective killings and 589 enforced disappearances have occurred there to date.\(^{105}\) Due to the large number of bodies, the Prosecutor’s Office and the local morgue were overloaded and the bodies were piled up waiting for space in the vaults of the local cemetery. In response to this situation, graves with the inscription “N. N.” (nomen nescio, name unknown) began to be dug by gravediggers, as most of the bodies in the morgue were found without any kind of identification.\(^{106}\)

The inhabitants of Puerto Berrío felt the need to give a sense of identity to the bodies that were recovered from the river. They began to forge a religious practice that consisted of replacing the letters “N. N.” with names chosen by the residents themselves, giving them a new identity, praying for them and even bringing them gifts as a way of requesting favours from the dead.\(^{107}\) In other words, the community started a practice of “adopting” unidentified dead persons.

---

102 JEP, “JEP alerta sobre acciones del ELN que atentan contra el derecho a la verdad y a la no repetición de las víctimas”, 14 February 2021, available at: https://tinyurl.com/2mxy6bjt.
103 María Victoria Uribe Alarcón, “Mata que Dios perdona: Gestos de humanización en medio de la inhumanidad que circunda a Colombia”, in Francisco A. Ortega and Veena Das (eds), Veena Das: Sujetos del dolor, agentes de dignidad, Pontificia Universidad Javeriana, Universidad Nacional de Colombia, Centro de Estudios Sociales, Medellín, 2008, p. 177.
104 Comisión Histórica del Conflicto y sus Víctimas, above note 19, pp. 606–609.
105 UARIV, above note 40.
107 Claudia Lorena Gómez-Sepúlveda and Helwar Hernando Figueroa-Salamanca, “‘No olvidemos a los muertos’: Animero y violencia en Puerto Berrío, Antioquia”, Revista CS, No. 28, 2019, p. 129.
so as to give them an identity and a spiritual existence. In Alarcón Uribe’s view, to make the bodies disappear is to dehumanize the victims.\footnote{M. V. Uribe Alarcón, above note 103, p. 177.} To give them a new identity is to restore a part of their dignity.

One of the testimonies collected by the organization Routes of Conflict (Rutas del Conflicto) describes the case of a woman whose son is still missing from the conflict. She “adopted” one of the bodies that came via the river and baptized it with her son’s name.\footnote{Rutas del Conflicto, “Ningún nombre”, available at: \url{http://rutasdelconflicto.com/rios-vida-muerte/especial/rio-magdalena/ningun-nombre.html}.} Through this process, a bond is created between local people and the remains of the missing persons: the disappeared person returns through another body.

Another testimony states:

It became difficult; in the past many “bodies from the river” arrived, so it was easy to choose, but now you talk to the gravedigger and tell him to let you know when there is a new “nameless person” …. As soon as you choose one, you mark the vault so that people know it has already been taken. When the favour is granted, you do what you have promised to the dead, whether it is to provide a tombstone or the maintenance of their grave; only then can someone else choose them again.\footnote{C. L. Gómez-Sepúlveda and H. H. Figueroa-Salamanca, above note 107, pp. 134–135 (author’s translation).}

The emergence of these traditional practices is not unusual considering that religious practices function as systems of memorialization and reinforcement of collective identity, especially in contexts of conflict.\footnote{Ibid., p. 129.} Religion, in these cases, works as “atonement for violence”.\footnote{Ibid., p. 130.}

It is worth mentioning that this practice was not always allowed. During the 1990s, when the community was under paramilitary control, rescuing bodies from the river was strictly forbidden.\footnote{Ibid., p. 5.} This is explained by the symbolic meaning of the bodies thrown in the river: intimidation and horror were key to obtaining obedience from civilians.

In this sense, memory, as a vehicle to forgiveness for collective trauma, is used to resignify religious practices and give the “N. N.”s an identity.\footnote{Ibid., p. 2.} The adoption of bodies is intended to restore a cultural order that has been violated by conflict. There is indeed a close relationship between violence and religiosity in Colombia, which, if approached from a cultural and social perspective, can provide important insights into the search for the missing. Therefore, understanding the traditions of very religious communities that have had a history of forced coexistence with violence for decades provides key insights in determining the possible location of the unidentified bodies that arrive to these populations through the river.

\footnotetext{108}{M. V. Uribe Alarcón, above note 103, p. 177.}
\footnotetext{110}{C. L. Gómez-Sepúlveda and H. H. Figueroa-Salamanca, above note 107, pp. 134–135 (author’s translation).}
\footnotetext{111}{Ibid., p. 129.}
\footnotetext{112}{Ibid., p. 130.}
\footnotetext{113}{Ibid., p. 5.}
\footnotetext{114}{Ibid., p. 2.}
It is clear that, in line with the notion explained above regarding the “army of the living and the dead” in the collective narrative of the ELN, the inhabitants of Puerto Berrío have also found a way to build a bridge between a sacred and a profane space, between themselves and the dead.

Practices such as the one in Puerto Berrío constitute one of the main obstacles to the joint work of the UBDP. Many of the bodies are moved from one place to another, which results in the loss of the identification codes provided by the morgue with the date that they were recovered from the river. Faced with this obstacle, the local Prosecutor’s Office has placed a sign on the wall of the cemetery in Puerto Berrío that stipulates: “Please do not erase, paint or change the information of the N. N.s.” Some of the gravestones read: “N. N. Do not touch. Do not pick. Do not paint.”

Consequently, the UBPD’s latest approaches focus on conducting trainings in rural villages to ask inhabitants not to move the bodies or baptize them with other names, as this practice interferes with the victims’ correct legal identification. This situation illustrates two problematic aspects of the armed conflict: the missing persons, and the unidentified victims buried in cemeteries and clandestine graves.

Recently, the UBPD published a report describing its efforts in Puerto Berrío concerning the identification of bodies “adopted” by local inhabitants. During its initial visit to La Dolorosa Cemetery in Puerto Berrío, the Unit had found and recovered 416 bodies. On the second visit, the UBDP and the Forensic Technical Support Group of the Investigation and Prosecution Unit of the JEP recovered forty-three more bodies and transferred them to the Legal Medicine Department in order to identify them and hand them over to their families. This was possible thanks to the villagers who approached the Unit and confirmed that they had “taken” the abandoned bodies in order to care for them and give them an identity. In this case, the FARC-EP’s collaboration in the search for disappeared persons, partly based on the organization’s own ideology, encounters a barrier posed by the social beliefs of the rural inhabitants.

**Indigenous communities and the “bad death”**

Violent deaths and the impossibility of burying the dead according to their ancestral traditions have a profound impact on indigenous communities. Life is not assumed.


117 UBPD, “‘Siempre supe que no era de mi propiedad. Él tiene una familia que lo está buscando’: Habitante de Puerto Berrío que adoptó un cuerpo”, 24 May 2021, available at: www.ubpdbusquedadesaparecidos.co/actualidad/siempre-supe-que-no-era-de-mi-propiedad-el-tiene-una-familia-que-lo-esta-buscando-habitante-de-puerto-berrio-que-adopto-un-cuerpo/

118 UBPD, above note 106.
to be finished after a person passes away; rather, his or her relationship with the world merely changes as a new stage in the cycle of life, and people are transformed into spirits that can communicate with those who are alive.\textsuperscript{119} For many communities, their feeling of belonging is deeply connected to the places where their ancestors and close family are buried.\textsuperscript{120}

In the Wayuu community, death is understood as part of life, and the rituals performed when a person dies ensure the transformation of that organic life into a spiritual stage of life.\textsuperscript{121} Therefore, when someone in the community dies in a violent context, there is an urge to bury him or her immediately according to the community’s traditions.\textsuperscript{122} Otherwise, violence contaminates the community. Violent deaths and the disappearance of people gave rise to the concept of the “bad death” (\textit{mala muerte}), in which the dialogue between the different stages of life (including life after death) is interrupted.\textsuperscript{123}

In a similar vein, members of the Iku community have expressed that unidentified people buried on their sacred territories are affecting the natural balance of their cosmovision of the world and, as a consequence, illnesses have been spread within the community.\textsuperscript{124} Therefore, the existence of mass graves negatively affects the socio-cultural practices on which their community life and bonds of solidarity are based.

One unexplored issue concerning missing persons is the shortage of indigenous leaders as a result of the conflict. The disappearances of leaders by armed groups have led to the disarticulation of the community itself. In the indigenous community of Saundó, it can take up to fifteen years to train a person as a leader.\textsuperscript{125} Many of these leaders have been victims of enforced disappearance, and consequently, the community has been deprived of the ability to honour its leaders through traditional funeral rituals. Moreover, there are no long-term successors for this role because of the fear instilled in the community.\textsuperscript{126}

In this sense, one of the UBPD’s priorities is the exhumation of these bodies not only for their identification, burial and return to their families, but also to repair the damage caused to the indigenous communities. On the one hand, returning the bodies of people from these communities restores the life after death that each person has pending, and on the other, it heals the land they inhabit, erasing the passage of the “bad death” in the cases of outsiders buried in their territories.

These aspects have been addressed by the UBPD, which in 2019 elaborated the \textit{Protocol of Relationship and Coordination between the Missing Persons Search Unit and the Indigenous Peoples of Colombia}. This document was designed in

\begin{footnotes}
\item[119] Centro Nacional de Memoria Histórica and Organización Nacional Indígena de Colombia, \textit{Tiempos de vida y muerte: memorias y luchas de los pueblos indígenas en Colombia}, Bogotá, 2019, p. 184.
\item[120] Ibid.
\item[121] Ibid., pp. 187–188.
\item[122] Ibid.
\item[123] Ibid., p. 187.
\item[124] Ibid., p. 189.
\item[125] Hacemos Memoria, “Las dificultades para buscar indígenas desaparecidos en Urabá”, 5 March 2021, available at: \url{http://hacemosmemoria.org/2021/03/05/las-dificultades-para-buscar-indigenas-desaparecidos-en-uraba/}.
\item[126] Ibid.
\end{footnotes}
cooperation with indigenous leaders to articulate the search for missing persons in their ancestral territories through an indigenous ethnic approach and attending to the particular needs of each community. The Protocol highlights the multiple dimensions of the damage caused by enforced disappearances against indigenous communities, especially the transgression of their relationship with Mother Earth, “affecting their spiritual equilibrium, social organization and self-government, autonomy, and the strengthening and continuity of their administrative processes.”

Furthermore, before starting intrusive procedures such as excavation, the Protocol recommends exhausting extrusive prospection measures, such as probes and satellite photographs. Alongside these methodologies, search systems developed by indigenous communities based on their own knowledge and experience will be employed.

Conversely, there are previous cases where exhumations of mass burials carried out by the Public Prosecutor’s Office have not been conducted in a manner considering the needs of victims and the cultural aspects of local communities. For instance, the Prosecutor’s Office exhumed bodies in Bojayá, which civilians themselves had buried in mass graves due to the urgency of the conflict. When the authorities reburied them, they only identified them with a number and placed them in the lowest part of the cemetery, which is prone to flooding, putting at risk both the permanence of the graves and the health of the community itself. After several claims to regional and national authorities, in 2019 the Legal Medicine Unit in Medellín exhumed 100 bodies. By the end of 2019, each family had received the technical-scientific details of the causes of death of their loved ones. In the evenings, collective prayers were held, led by traditional leaders. There are still many missing persons from Bojayá, and the villagers stress that the impossibility of providing a dignified burial according to local traditions has caused great harm and suffering to the victims’ families and the community as a whole.

The success of search mechanisms does not only depend on the number of bodies recovered and their identification. In the case of Bojayá, only the regional origin of the victims had initially been established, and not their individual identities. As a result, the possible delegitimization of these mechanisms could lead to a lack of cooperation between public institutions and local communities. Respect for local traditions as well as the way in which searches are conducted impact on the efforts and results obtained by search mechanisms, and therefore, on the fulfilment of their mandate.

128 Ibid., p. 8 (author’s translation).
129 Ibid., Art. 19.
130 Ibid., Art. 14.
132 Ibid., p. 227.
133 Ibid., p. 223.
Forensic anthropology and legal processes should also include an ethnicity-based approach.\textsuperscript{134} It becomes necessary to combine technical knowledge with the traditional knowledge of the communities so that prayers and rituals can be performed, gravediggers can conduct the appropriate treatment of the corpses, and so on.\textsuperscript{135}

**Conclusions**

The ICRC has stated that the legal approach is not as effective in influencing behaviour as is the combination of the law and the values that support it.\textsuperscript{136} Linking legislative norms to local values and traditions reinforces the likelihood of compliance with those norms and facilitates the efforts of search mechanisms.

On the one hand, the analysis presented in this paper suggests that the structure of values and traditions governing an armed group has a significant impact on the group’s behaviour towards IHL norms regarding the treatment of bodies. Although the moral constructs of each group do not guarantee full compliance with IHL, they do allow us to identify a pattern of behaviour with respect to these norms. On the other hand, it can be observed that certain social and cultural practices have arisen as a result of the armed conflict within affected communities. These rites of spirituality and memorialization seek, through resignification, to confront dehumanizing acts. As a feedback process, the observance of differentiated approaches according to ethnic and cultural aspects of the victims and affected communities has a great impact on the level of cooperation with the search mechanisms. Until today, many communities have not been able to bring information to the UBPD because they have not been aware of this mechanism as they do not speak Spanish. In its last report, the UBPD noted that it had produced documentation in twelve different languages to expand its outreach to indigenous communities.\textsuperscript{137}

The search for missing persons is a dynamic, multidirectional process, where cultural, religious and social dimensions from different groups (including ex-guerrillas, indigenous populations, farming communities, search mechanisms and civil society) interact with each other. In the cases examined here, understanding the social, cultural and religious dynamics of the treatment of the dead operating both within armed groups and in local communities brings humanitarian law and search operations in post-conflict contexts closer to more comprehensive responses in the aftermath of violence. This approach could facilitate an understanding of the armed groups’ relationship to humanitarian norms and the promotion of compliance, as well as the design of effective search mechanisms that emphasize local needs.

\textsuperscript{134} Ibid., p. 225.
\textsuperscript{135} Ibid.
\textsuperscript{136} ICRC, above note 67, p. 71.
\textsuperscript{137} UBPD, above note 1, p. 28.
The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?

Fernanda García Pinto*

Fernanda García Pinto (LLM) is a former intern of the Appeals Chamber of the International Criminal Court.

Abstract

The International Committee of the Red Cross and the International Criminal Court are two very different entities that simultaneously apply international humanitarian law but do so after their own perspectives. This article proposes a cautious yet critical approach to some of their divergent interpretations (conflict classification, the difference between direct and active participation in hostilities, intra-party sexual and gender-based violence, and the notion of attack) and examines how the broader legal system copes with these points of divergence. The analysis considers the institutional characteristics of these two organizations and the pluralistic nature of international humanitarian law as well as its dynamic rapport with international criminal law in order to highlight the versatility needed to face the challenges posed by contemporary armed conflicts.

* This article was written in a personal capacity and does not necessarily reflect the views of the International Criminal Court.
Keywords: international humanitarian law, international criminal law, International Committee of the Red Cross, International Criminal Court, fragmentation.

Introduction

Geneva and The Hague are two cities that have been at the centre of international humanitarian law (IHL) since its early stages. Besides giving their names to a couple of treaties, these cities are the seat of two of the most important institutions for the international law of armed conflicts: the International Committee of the Red Cross (ICRC) in Geneva, and the International Criminal Court (ICC) in The Hague. These two entities interpret and apply IHL after their own perspectives. This article analyzes this phenomenon by considering the following question: what are the implications for IHL of its simultaneous application by the ICRC and the ICC? A special emphasis will be put on cases of apparently contradictory legal positions, thus evoking the postmodern anxiety of fragmentation in international law.¹

In order to understand this state of affairs, this article will first go back to basics and explain the relationship between IHL and international criminal law (ICL). Secondly, it will highlight the intrinsic differences between the ICRC and the ICC. Thirdly, it will analyze some particularly innovative IHL positions adopted by the ICC and compare them to the position of the ICRC, notably in relation to conflict classification, the (not so) subtle difference between “direct” and “active” participation in hostilities, intra-party sexual and gender-based crimes as war crimes, and the notion of attack. Fourthly, it will present some elements for the reading of this situation and its implications for IHL.

IHL and ICL: A fruitful arranged marriage

IHL and ICL ended up in a situation similar to a marriage in the aftermath of the Second World War. Nonetheless, the former can be traced back to ancient times, and perhaps without it (and a very specific context), the latter would not have consolidated. Even if IHL is rooted in the rules of ancient civilizations and religions, universal codification started with Henry Dunant’s effort to humanize wars, the creation of the ICRC (1863) and the adoption of the First Geneva Convention (1864). IHL continued a gradual development, so that by the outbreak of the Second World War, a vast body of laws and customs of war was already codified and arguably enjoyed customary status.

¹ “Fragmentation” here refers to “the splitting up of the law into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law”. International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, para. 13, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (all internet references were accessed in September 2021).
Unfortunately, the existence of a specific normative framework was insufficient to prevent the atrocities committed during the Second World War, on and off the battlefield. Hence, in the aftermath, the Allies decided to find a way to prosecute the main perpetrators among the ranks of their counterparts. After fierce discussions, the London Agreement was signed and the International Military Tribunal was established in Nuremberg, followed by the less known International Military Tribunal for the Far East in Tokyo. Notably, this was not the first attempt to establish an international jurisdiction—as early as 1872, Gustave Moynier (co-founder and former president of the ICRC) had unsuccessfully called for the creation of a court to prosecute violations of the 1864 Geneva Convention. In any case, the International Military Tribunals allowed IHL to take a quantum leap and expand its domains from inter-State and municipal rapports (including the grave breaches system) to individuals through the notion of international individual criminal responsibility.

Once settled, the most significant challenge for the Nuremberg Tribunal was framing its jurisdiction. Its Charter granted competence over crimes against peace, war crimes and crimes against humanity. Interestingly, out of these, war crimes received the least backlash (despite relying heavily on the customary law argument), whereas the others were strongly scrutinized, this being the first time they were applied. Even for war crimes, the Tribunal had to clarify that despite the fact that the 1907 Hague Regulations did not foresee criminal responsibility, some of their provisions reflected customary law and their violation amounted to criminal offences.

After delivering several judgments and providing international law with some iconic moments and phrases, the Nuremberg Tribunal was dissolved, and with it, ICL went into a long hibernation—though not before creating the cardinal instrument of the Genocide Convention. On the other hand, IHL managed to turn the post-war momentum into the 1949 Geneva Conventions, one of the few international instruments with universal ratification.

As States held to their notion of sovereignty, they did not yet feel comfortable fully enabling international criminal prosecution—hence the adoption of the “grave breaches” formula when negotiating the Geneva Conventions and local or universal prosecution of IHL violations besides maintaining the State responsibility regime that prevailed at the time. Almost

8 See Art. 1 common to the four Geneva Conventions.
three decades later, Additional Protocol I (AP I) introduced the International Humanitarian Fact-Finding Commission (a non-judicial body intended to facilitate non-confrontational solutions)\(^9\) and specified that grave breaches shall be regarded as war crimes.\(^10\)

Unfortunately, none of these enforcement mechanisms provided the expected results. Until the 1990s, there was scarce case law specifying IHL details and the law was mainly applied through soft-law processes, like diplomacy and military training, rather than the legal practice of adjudication.\(^11\) During the 1990s, however, the international legal landscape was disrupted by two tragic situations: those of the Balkans and Rwanda. In order to face these atrocities, the international community rapidly mobilized and revived the long-forgotten idea of international criminal justice.

In 1993, the United Nations (UN) Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY),\(^12\) followed by the International Criminal Tribunal for Rwanda (ICTR),\(^13\) commonly known as the *ad hoc* tribunals. Fortunately, at that time, war crimes and genocide were entirely recognized, while crimes against humanity momentarily retained the requirement of a link to an armed conflict.\(^14\) Meanwhile, the ICRC engaged in an extremely ambitious compilation project that materialized into another cornerstone of our legal toolbox: the ICRC Customary Law Study.\(^15\)

Given the subject matter that the ICTY was dealing with, its jurisprudence had a tremendous impact on IHL. *Tadić* is perhaps one of the most relevant cases of the century, even though Duško Tadić was nothing close to being one of the most influential or relevant actors of the conflict. *Tadić* was followed by numerous cases that shocked international legal practitioners and academics with their progressive approach, which some might call judicial activism.

Several of the ICTY’s boldest contributions were done through the concept of accelerated formation of customary international law.\(^16\) These included the definition of international armed conflicts (IACs) and non-international armed conflicts (NIACs), the classification criteria, and the existence of war crimes in

\(^9\) 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. 90.

\(^10\) Ibid., Art. 85.


\(^14\) This requirement was not included in the ICTR Statute.


NIACs (through the notion of serious violations of Article 3 common to the four Geneva Conventions), to name a few. This broad judicial discretion was partly attributable to the open-ended phrasing of Article 3 of the ICTY Statute.

However, the international community didn’t see ad hoc tribunals as a feasible solution for international criminal justice, hence the momentum for a permanent and universal international criminal court that would lean not on customary international law but on treaty law, putting States back in control. Thus, the Statute for the new ICC (later known as the Rome Statute) was equally influenced by and reactive to the ad hoc legacy. It included safeguards against judicial activism—i.e., very explicit and extensive definitions of crimes, particularly war crimes, expanded through the Elements of Crimes; an exhaustive list of the applicable law; and the imposition of a very strict principle of legality. This was without prejudice to formally accepting some of the ad hoc tribunals’ innovations, such as war crimes in NIACs and an expansion of sexual and gender-based crimes.

This demonstrates that the relationship between ICL and IHL is complicated, to say the least. A good starting point for examining this relationship could be considering ICL as an IHL enforcement mechanism, though this is quite constraining from an ICL perspective. A second level would be that of development—i.e., ICL treaties as a means of IHL codification, and thus an IHL source. And finally, ICL may offer clarification by law-making or application as many judgments provide helpful interpretation of substantive IHL norms or even concepts. However, the line between clarifying and creating can at times be difficult to discern. Would war crimes in NIACs be enshrined in IHL as they are today had not it been for the ICTY?

The ICRC and the ICC: The yin and yang of IHL

After portraying the dynamic between IHL and ICL, it is time to contrast the former’s two main representatives: the ICRC and the ICC. The sole inflection point of these two institutions seems to be acting in favour of the victims of

---

17 Actually, on the eve of the ICTY’s establishment, the ICRC “underline[d] the fact that according to international humanitarian law as it stands today [1993], the notion of war crimes is limited to situations of international armed conflict.” ICRC, “Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia”, DDM/JUR/442b, 25 March 1993, para. 4.
18 See M. Sterio and M. P. Scharf (eds), above note 16, p. 313.
19 Ibid., pp. 318–319.
21 Ibid., Art. 22.
armed conflict through the application of IHL, but there is more to this than meets the eye.

The ICRC is an “impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance”.25 Founded in 1863 as a private association of Swiss nationals, it eventually gained a *sui generis* status under international law,26 and it currently has 20,000 staff members in 100 countries.27 The ICRC is part of the International Red Cross and Red Crescent Movement (the Movement), the largest humanitarian network in the world, and thus, its work has a twofold mandate: (1) to develop and promote IHL and humanitarian principles as the guardian of IHL,28 and (2) to deploy field operations in contexts of armed conflict and other situations of violence in order to help victims.29 These two elements are inextricably linked.30

The ICC, on the other hand, is a “permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression”.31 Established by the Rome Statute in 1998, it has 123 States Parties.32 Its mission is primarily judicial and there have thus far been thirty cases before the Court. Besides its headquarters in The Hague, it has a liaison office to the UN in New York and country offices in the Democratic Republic of the Congo, Uganda, the Central African Republic, the Ivory Coast, Georgia and Mali.33

The interaction between these two institutions started early on, as the ICRC contributed to the creation of the ICC; it took part as an expert in the Rome Conference and provided its inputs for the *Elements of Crimes* and the Rules of Procedure and Evidence.34 Nonetheless, the ICRC has a well-established position when it comes to international criminal justice: it has no involvement in proceedings whatsoever, due to its strict adherence to the principle of neutrality.35

28 ICRC Statutes, above note 25, Preamble: “The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.”
29 Protection activities include restoring family links, forensics and visits to detainees, while assistance activities include economic security, water and habitat, health and physical rehabilitation.
This would seem strange considering that criminal procedures intend to provide justice and reparation for victims (of armed conflict, among others) as a means to alleviate some of their suffering, which echoes the ICRC mandate. But the ICRC is a humanitarian organization above all, and it acts in accordance with the Fundamental Principles of the Movement, including neutrality,\(^{36}\) which is key for establishing an open dialogue with all parties to a conflict and getting access to those most affected. In the words of Jean Pictet: “One cannot at the same time serve justice and charity. It is necessary to choose. The Red Cross, for a long time, has chosen charity.”\(^{37}\)

This reasoning was officially embodied in Rule 73(4) of the ICC Rules of Procedure and Evidence referring to privileged communication of ICRC staff, which nonetheless leaves the door for cooperation ajar at its paragraph 6. To no one’s surprise, these provisions have never been applied by the Court, not because they do not work, but because they work perfectly. Thus, the relationship between the ICRC and the ICC is intended to be non-existent when it comes to practical and substantive matters; however, there is some room for cordial theoretical encounters.\(^{38}\) In short, the two institutions are on good terms but are not meant to cross paths, especially when adjudication is in the middle.

Now, are these entities comparable? Ideally not—international legal discussions rarely take place within ideal standards. Hence, what follows is an attempt to contrast them as much as possible, mainly through their legal positions, trying to understand them in their context, since only an analysis in light of their differences will provide a fair picture. Unique entities have unique legal readings, after all.

The ICC approaches IHL through the lens of ICL\(^{39}\) and in terms of the Rome Statute. As mentioned, after all the liberties the ad hoc tribunals took, States created a more restraining framework. This setting was expected to reduce to a minimum the phenomenon of judicial activism. Another relevant consideration is that the ICC works mainly through adjudication, meaning that it works from a case-based approach and on a rather limited selection of case law, given the Court’s relatively young age. Importantly, it applies IHL solely for the purpose of prosecuting and judging war crimes. Moreover, the Court deals not only with war crimes, but with crimes against humanity, genocide and aggression, which requires a broad range of expertise.

The ICRC, in contrast, completes a wide variety of legal tasks (such as drafting the Commentaries to the Geneva Conventions and Additional Protocols, providing States with advice on national implementation, classifying conflicts,

---

\(^{36}\) In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.


and dialoguing with States and non-State armed groups), relying mainly on the
Geneva Conventions but on other international instruments as well, as part of its
comprehensive effort to alleviate the suffering of victims of armed conflicts. Additionally, since the ICRC has been involved with IHL for more than 150 years
and has a worldwide physical presence, its archives and institutional memory
enable it to contrast practically any situation with another similar one, either
present or past. In practice, the ICRC deals with IHL on a comprehensive basis.

It comes as no surprise that the ICC and the ICRC have divergent legal
positions on certain issues; the following section provides a brief analysis of some
of these differences.

**Points of divergence**

**The art of conflict classification**

For IHL to apply, there needs to be an armed conflict, and this can only be
determined by classifying a situation as such. This is easier said than done, as
classification is a very technical exercise that requires knowledge of the legal
criteria and a very accurate reading of the factual situation.

Notably, the ICRC and the ICC classify for different purposes. In order to
fulfil its humanitarian mandate in a given situation of violence, the ICRC assesses
whether or not the situation should be classified as an armed conflict; this allows
it to refer to the applicable rules in its dialogue with those involved in the
violence. Within the ICC, on the other hand, classification is necessarily to prove
the existence of an armed conflict as a constitutive element of any war crime.40

On a technical level, the point of departure between the ICC and the ICRC
might start at the applicable law itself. For the ICRC, the legal framework comprises
the Geneva Conventions and their Additional Protocols, whereas for the ICC it is
the Rome Statute. At first sight, both seem to follow the classic IAC/NIAC
dichotomy. The rule of thumb is that whenever there is an armed conflict in
which one of the parties is not a State, it will be considered a NIAC regardless of
its parties, its duration or its territorial scope; 41 only the applicable legal
framework may vary. A NIAC is a NIAC.

On the other hand, Article 8(2) of the Rome Statute encompasses war
crimes and provides a confusing definition of NIACs. Both paragraphs (c) and
(e) refer to “an armed conflict not of an international character”, yet paragraph
(f) clarifies that

> [p]aragraph 2(e) applies to armed conflicts not of an international character …
> It applies to armed conflicts that take place in the territory of a State when there

40 Every section of Article 8 of the *Elements of Crimes* requires that the conduct must have taken place in the
context of, and was associated with, an armed conflict.

41 See ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of
is protracted armed conflict between governmental authorities and organized armed groups or between such groups [emphasis added].

Most likely, this wording is an attempt to adapt the Tadić definition\(^{42}\) after some debate;\(^{43}\) nonetheless, it reads “protracted armed conflict” instead of “protracted armed violence”. It must be noted that according to ICTY jurisprudence, the term “protracted” refers to intensity rather than duration.\(^{44}\)

The academic debate focuses on whether Article 8(2)(f), by explicitly adding the “protracted” criterion, creates a new (sub)category of NIACs (and thus a third possibility) or simply clarifies the terms of paragraph (e).\(^{45}\) The former would not be aligned with the ICRC’s position, according to which all sorts of NIACs are encompassed in one single legal category, regardless of the actors involved or the duration, only differentiating in the applicable law (common Article 3 and/or AP II), even if the ICRC employs diverse terms for descriptive purposes.

The ICC has interpreted Article 8(2)(f) in several cases. In the Lubanga and Al Bashir cases, the Pre-Trial Chamber established that Article 8(2)(f) “focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time”.\(^{46}\) This interpretation would be in accordance with the elements of intensity and organization established by the ICTY and employed by the ICRC.\(^{47}\) In the Bemba case, the Pre-Trial Chamber mentioned the possibility of two applicable temporary thresholds but considered that it did not need to analyze this since the period in question (five months) was protracted.\(^{48}\)

Later, trial chambers appeared to follow the “protracted armed violence” approach.\(^{49}\) In Katanga, there seem to be some references to duration, but the

\(^{42}\) “[A]n 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.” ICTY, Prosecutor v Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70, available at: www.icty.org/x/cases/tadic/acdec/en/51002.htm.


\(^{47}\) ICRC Commentary on GC III, above note 41, paras 456–471.

\(^{48}\) ICC, Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), 15 June 2009, para. 235, available at: www.legal-tools.org/doc/079656/pdf/.

\(^{49}\) See ICC, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 536, available at: www.legal-tools.org/doc/677866/pdf/;
conclusion simply states that there was “a protracted armed conflict between organised armed groups” and that the conflict “therefore fully meets the criteria of a non-international armed conflict”.\(^{50}\) Notably, in *Bemba*, the Trial Chamber addressed the two-threshold possibility; yet, it only acknowledged that the protracted requirement was considered as an element of intensity and decided to follow such jurisprudence.\(^{51}\) It added that “the intensity and ‘protracted armed conflict’ criteria do not require the violence to be continuous and uninterrupted. Rather … the essential criterion is that it goes beyond ‘isolated or sporadic acts of violence’”.\(^{52}\) In any case, it still considered that four and a half months fulfilled the “protracted” criterion.\(^{53}\)

According to the above, the jurisprudence seems to favour the one-threshold interpretation, meaning that the classical IAC/NIAC dichotomy is safe, for the moment. There remains the issue of classification methodology, which highlights perfectly the factual differences between the ICRC and the ICC. Whereas the ICRC classifies conflicts as they take place, the ICC normally looks back and can assess the facts with a degree of certainty, knowing how things ended up. Still, thanks to its extensive field presence, the ICRC can have direct, live inputs; this is something that the ICC is striving to achieve, but it is far from feasible for the Court. To begin with, it would be impossible for the Office of the Prosecutor to be present in every ongoing armed conflict, let alone from the start of the conflict.

Nonetheless, this state of affairs does not have any real impact on the law. Hence, as far as classification goes, the legal framework remains unified thanks to the judicial interpretation of the term “protracted armed conflict”.

**Active versus direct participation in hostilities**

The crime of using children under the age of 15 to participate actively in hostilities foreseen in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute has been fundamental to the jurisprudence of the ICC, as Lubanga, Katanga, Ntaganda and Ongwen have all been convicted for it. This crime is especially relevant for the present discussion because the Court resorted to the notion of “active” in contrast to “direct” participation in hostilities.

The ICRC shared its particular understanding in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Interpretive Guidance).\(^{54}\) Firstly, it clarified that even if the

---


\(^{52}\) *Ibid.*, para. 140.


terms “active”\(^55\) and “direct”\(^56\) are employed throughout common Article 3 and the Additional Protocols, they are synonyms and are thus interchangeable.\(^57\) It even considered this to be so for the Rome Statute.\(^58\) Secondly, it provided the criteria of threshold of harm, direct causation and belligerent nexus as constitutive elements of direct participation in hostilities.\(^59\)

The ICC does not share this approach. Beginning in *Lubanga*, the Pre-Trial Chamber established that

“[a]ctive participation” in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.\(^60\)

Accordingly, it determined that articles 8(2)(b)(xxvi) and 8(2)(e)(vii) apply if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards).\(^61\)

The Pre-Trial Chamber relied heavily on the ICRC’s Commentary on AP I, specifically on Article 77(2), for its analysis. The discrepancy between the ICRC and the ICC may be easily explained by looking at the dates—the decision was adopted in 2007, whereas the Interpretive Guidance was issued in 2009.

Nonetheless, in the subsequent trial judgment the ICC did not take into account the Interpretive Guidance, even if it was raised by the defence.\(^62\) Instead, following the Pre-Trial Chamber and the Special Court for Sierra Leone, the Trial Chamber determined that “active” was broader than “direct”,\(^63\) specifying that “(a)ll of these activities, which cover either direct or indirect participation, have

\(^55\) Art. 3 common to the four Geneva Conventions.
\(^56\) AP I, Arts 43(2), 51(3), 67(1)(e); 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. 13(3).
\(^57\) Interpretive Guidance, above note 54, p. 43.
\(^58\) “[I]t may appear that the Preparatory Committee for the Establishment of an International Criminal Court (ICC) implied a distinction between the terms ‘active’ and ‘direct’ in the context of the recruitment of children when it explained that: ‘The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat’. Strictly speaking, however, the Committee made a distinction between ‘combat’ and ‘military activities linked to combat’, not between ‘active’ and ‘direct’ participation.” *Ibid.*, fn. 84.
\(^60\) ICC, *Lubanga*, above note 46, para. 261.
\(^61\) *Ibid.*, para. 263.
\(^63\) *Ibid.*, para. 627.
an underlying common feature: the child concerned is, at the very least, a potential target. Curiously, it did not employ the words “potential collateral damage”, instead using “potential target”; this could have opened the door for considering that active participation in hostilities implies targetability.

The Appeals Chamber took things further by explicitly declaring that the term “active participation” in Article 8 of the Rome Statute does not need to be given the same interpretation as common Article 3, because despite their similar terminology, they have different purposes:

The latter provision establishes, inter alia, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities. On the other hand, article 8(2)(e)(vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to ‘participate actively in armed hostilities’ and the concomitant risks to their lives and well-being.

Moreover, the Appeals Chamber considered that the Trial Chamber had erred in its criterion of potential target, but was correct in including a wide range of activities considered in the potential target’s link to combat. The Ntaganda and Ongwen trial judgments follow this latter interpretation.

Hence, for the matter of active versus direct participation in hostilities, there seem to be some discrepancies between the ICRC and the ICC; these could have been more significant if not for the Appeals Chamber’s decision to abandon the target criterion. In any case, the standard set by the Court is notably lower than the one adopted by the ICRC, which is relevant for prosecution and judgment purposes but concerning for actual military operations and the conduct of hostilities. Despite IHL’s tendency towards categorization and dichotomies, perhaps both standards can be applied simultaneously without major legal implications. Of course, this is not ideal, but it is feasible.

**Extension du domaine de la lutte: Intra-party sexual and gender-based violence**

Sexual and gender-based violence (SGBV) has been at the centre of ICL since the establishment of the ad hoc tribunals. International criminal tribunals have torn down one wall after another when it comes to SGBV.
Initially, rape and other forms of indecent assault were only briefly mentioned in Geneva Convention IV (GC IV)\(^{68}\) and AP I\(^{69}\) they were not included as grave breaches. AP II does consider them as outrages upon personal dignity, and thus as prohibited acts.\(^{70}\) Even though in 1992 the ICRC had declared that the phrase common to the Geneva Conventions and their Additional Protocols, “wilfully causing great suffering or serious injury to body or health”, obviously covered not only rape but also any other attack on a woman’s dignity,\(^{71}\) these acts were not included explicitly in the ICTY Statute. If not for the disruptive effect of the ICTY’s Tadić decisions, rape and other forms of SGBV would perhaps have remained under a sort of war crime non liquet for much longer. Not only did the interlocutory appeal on jurisdiction pave the way for the prosecution of war crimes in NIACs, but Duško Tadić was convicted for sexual violence against men.\(^{72}\)

This momentum was captured in the Rome Statute, which categorizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence as war crimes in both types of armed conflicts.\(^{73}\) This is very significant as it codifies such acts as independent crimes, not as implicit forms of torture or inhuman acts. Perhaps the issue of SGBV is one of the few where ICL has a technical advantage over IHL, as the former has greatly developed the latter in this regard.

So far, the ICC has addressed this type of war crime in the cases of Bemba, Katanga (both acquitted for those charges), Ntaganda and Ongwen. The most groundbreaking case has been Ntaganda, where the Court endorsed the notion of intra-party SGBV. This was a daring statement, since the traditional system of grave breaches under the Geneva Conventions is intended to encompass protected persons (i.e., civilians and persons hors de combat).\(^{74}\) Even if the notion of war crime has expanded to include violations if they endanger protected

---

\(^{68}\) “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” 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. 27.

\(^{69}\) “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” AP I, Art. 76(1).

\(^{70}\) AP II, Art. 4(2)(e).


\(^{73}\) Rome Statute, Arts 8(2)(b)(xviii), 8(2)(e)(vi). Notably, in 1997 the ICRC proposed that the war crimes of rape and enforced prostitution, as serious violations of IHL applicable in international and non-international armed conflicts, be subject to the jurisdiction of the ICC. ICRC, Working Paper on War Crimes Submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997.

\(^{74}\) 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), Art. 50; 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), Art. 51; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 150; GC IV, Art. 147; AP I, Arts 11, 85.
persons or objects or if they breach important values, the criterion of protected persons remained essential for the war crimes conversation. For instance, even if the ICTY adopted a broad approach to the concept, it remained a relevant component of the Tribunal’s legal analysis.

Basically, the prevailing position has been that IHL binds “members of armed forces and armed groups vis-à-vis their opponents”, as “the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces”. Accordingly, “crimes committed by combatants of one party to the conflict against members of their own armed force do not constitute war crimes”. Under this reasoning, intra-party violence is a matter of human rights or domestic law—a sound logic for States, but not for non-State armed groups.

Notably, as early as 1952, the ICRC had already said that “when faced with suffering no distinction should be drawn between brothers-in-arms, the enemy and allies”. The ICC started to consider the idea of intra-party SGBV in the Lubanga case. In her separate and dissenting opinion, Judge Odio Benito considered that the objective of Article 8(2)(e)(vii) was to protect children from any aggressor:

Children are protected from child recruitment not only because they can be at risk for being a potential target to the “enemy” but also because they will be at risk from their “own” armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children’s fundamental rights. The risk for children who are enlisted, conscripted or used by an armed group inevitably also comes from within the same armed group.

Still, this idea was not fully endorsed until the Ntaganda case, even if each chamber addressed it in its own manner. In Ntaganda, the Pre-Trial Chamber started by stating that child soldiers could not be considered to be actively participating in hostilities while being subject to rape and/or sexual violence, hence they were persons who did not take part in hostilities and were therefore protected under

75 See ICRC Customary Law Study, above note 15, Rule 156.
76 When interpreting Article 4 of GC IV, the ICTY relied on allegiance and diplomatic protection rather than nationality, making it possible for victim and perpetrator to have the same nationality. ICTY, Tadić, above note 42, paras 168–169.
78 Special Court for Sierra Leone, Prosecutor v. Sesay et al., Case No. SCSL-04-15, Judgment (Trial Chamber), 2 March 2009, paras 1451–1457.
81 ICRC Commentary on GC I, above note 7, p. 55.
82 ICC, Lubanga, above note 49, Separate and Dissenting Opinion of Judge Odio Benito, para. 19 (emphasis added).
AP II Article 4. This could have implications for the notion of direct participation in hostilities, but leaves the protected persons logic untouched. Still, it dismissed the continued nature of some crimes; for instance, a person could be subject to sexual slavery and also directly participate in hostilities at some point.

When the defence challenged the jurisdiction, the Trial Chamber specified that the existence of a crime under customary law is irrelevant for the Court since the crimes under its jurisdiction are listed in the Rome Statute. It clarified that Article 8(2)(e)(vi) “does not specify who can be victims of the war crimes listed therein, and that the corresponding Elements of Crimes refer only to ‘person’ and ‘persons’”, and that whereas certain crimes require a certain type of victim, this is not the case for rape and sexual slavery.

This position was reinforced in a second decision, in which the Trial Chamber made a distinction between the crimes contained in Article 8(2) of the Rome Statute, based on the Geneva Conventions, and the other serious violations, and noted that while the chapeaux of paragraphs (2)(a) and (2)(c) contain reference to specific victim status criteria, the chapeaux of paragraphs (2)(b) and (2)(e) do not. When assessing the current state of IHL, it further referred to the Martens Clause and alleged that the rationale of IHL is to mitigate the suffering resulted from armed conflict besides the fact that even if IHL allows the use of force through the conduct of hostilities, it is “never a justification to engage in sexual violence against any person, irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”.

The decision invokes the jus cogens status of the prohibition of (sexual) slavery and (rape as an underlying act of) torture, making such provisions applicable at all times and against all persons. Consequently, the Trial Chamber concluded that members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of IHL, or international law more generally.

---

83 ICC, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Pre-Trial Chamber II), 9 June 2014, paras 76–80, available at: www.legal-tools.org/doc/5686c6/.
84 M. Longobardo, above note 80, pp. 622–623.
87 Ibid., paras 47–48.
88 Ibid., para. 49.
89 Ibid., para. 51.
90 Ibid., para. 54.
The issue was confirmed by the Appeals Chamber, which endorsed the paragraph differentiation of Article 8(2)(a) and (c) versus (b) and (e). It even concluded that IHL “does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group”. Eventually, Bosco Ntaganda was convicted for rape and sexual slavery of child soldiers as a war crime. The conviction was confirmed by the Appeals Chamber.

Notably, the ICRC has endorsed the intra-party possibility without second thoughts since the early stages of the Ntaganda case. In the ICRC’s 2016 Commentary on GC I, it quoted the decision on the confirmation of charges to support its argument that the “armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party”. In the 2020 Commentary on GC III, it quoted the 2017 Ntaganda appeals judgment. On this occasion, not only were the positions of the ICC and ICRC aligned, but the ICC jurisprudence provided a solid base for the ICRC to propose its interpretation.

**Attack under attack?**

The notion of attack is straightforward. Under AP I Article 49, “attacks” mean acts of violence against the adversary, whether in offence or in defence. The 1987 Commentary on the Additional Protocols states that “the meaning given here is not exactly the same as the usual meaning of the word” and that “attack” means “combat action”. Yet, when it comes to the application of Article 8(2)(e) (iv) of the Rome Statute regarding attacks against hospitals or buildings dedicated to religion, the ICC has interpreted this notion in an ambivalent manner.

In *Al Mahdi*, a very notorious case involving the destruction of a UNESCO World Heritage Site in the context of a NIAC in Mali, the ICC Trial Chamber made a daring statement and expanded the concept of “attack” in the following terms:

> [T]he element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Statute makes no such distinction. This

---

92 Ibid., para. 63.
96 ICRC Commentary on GC III, above note 41, paras 581–583.
98 Ibid., para. 1880.
reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.\footnote{ICC, \textit{Prosecutor v. Al Mahdi}, Case No. ICC-01/12-01/15, Judgment and Sentence (Trial Chamber VIII), 27 September 2016, para. 15, available at: www.legal-tools.org/doc/042397/pdf.}

Subsequently, when dealing with assaults on a hospital and a church, the \textit{Ntaganda} trial judgment returned to a traditional approach and declared that the notion of “attack” was to be understood in terms of AP I Article 49(1),\footnote{ICC, \textit{Ntaganda}, above note 67, para. 916.} linking it to the conduct of hostilities and excluding acts of pillage. The prosecutor’s appeal was met with rejection by four out of the five judges. Still, every single judge issued an opinion on the matter, leaving the issue unresolved.

Two judges found that “attack” as defined in Article 8(2)(e)(iv) of the Rome Statute means “combat action”, and that the Trial Chamber did not err.\footnote{See ICC, \textit{Prosecutor v. Ntaganda}, Case No. ICC-01/04-02/06, Separate Opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s Appeal, 30 March 2021, available at: www.legal-tools.org/doc/jkrk4e/pdf.} The other three adopted a broad interpretation, dissociating attacks from the conduct of hostilities. The judges provided a variety of arguments: framing all actions taken during a \textit{ratissage} operation within the term “attack” regardless of the weapons employed (i.e., heavy weapons for attack and machetes for \textit{ratissage}),\footnote{See ICC, \textit{Prosecutor v. Ntaganda}, Case No. ICC-01/04-02/06, Separate Opinion of Judge Solomy Balungi Bossa on the Prosecutor’s Appeal, 30 March 2021, available at: www.legal-tools.org/doc/59vx1f//.} applying the ordinary meaning of the term, equating it to “attacks directed” against the civilian population under crimes against humanity, making the law assessable for “the average soldier”,\footnote{See ICC, \textit{Prosecutor v. Ntaganda}, Case No. ICC-01/04-02/06, Partly Concurring Opinion of Judge Chile Eboe-Osuji, 30 March 2021, available at: www.legal-tools.org/doc/eqtq7g/.} and interpreting the term in light of the object and purpose of the provision (protection of certain objects) and the Rome Statute more broadly (putting an end to impunity).\footnote{See ICC, \textit{Ntaganda}, above note 94, Dissenting Opinion of Judge Ibáñez Carranza, paras 1165–1168.}

Accordingly, the stance on the notion of attack is ambivalent and perhaps undetermined under the practice of the ICC. It represents one of the most evident divergences between the ICRC and the ICC, especially considering the relevance of the notion of attack under IHL, as this is a core concept not only for war crimes but for the conduct of hostilities and IHL in general. Future cases will tell.

The two-headed snake?

When it comes to comparing the ICRC and the ICC, it is possible to say that their work constitutes alternative but complementary approaches to preventing IHL violations. Whilst the ultimate goals are similar, the approaches are completely different. The ICC prosecutes and judges, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion. Accordingly, in practice, these
institutions have no reason whatsoever to collide, as their paths are not meant to cross and even their legal frameworks mark clear boundaries.

Nonetheless, from a theoretical perspective, the simultaneous application of IHL by these two institutions is indeed fragmenting the law – this fragmentation is less than expected, but it is still present. This divergence started with the adoption of the Rome Statute, but when seen from another perspective, what happened in 1998 was not fragmentation but development (the Rome Statute is considered to codify and/or create IHL norms). Perhaps this is the key concept of the dynamics between the two; growth can be a painful process and is rarely linear.

What we are witnessing nowadays is simply a diluted version of what IHL experienced more than twenty-five years ago with the creation of the ad hoc tribunals and their jurisprudence. Yet, this disruption framed the essential norms of IHL today. Evidently, the ICC phenomenon could not be considered to be as radical considering the institutional restraints adopted by States; yet, contrary to its predecessors, the ICC is here to stay.

Law-making fragmentation can be followed by law-application fragmentation. Hence, jurisprudence constitutes the second phase. Nevertheless, the ICC tends to avoid such occurrences by considering its rulings as part of the larger legal system. In the words of the Appeals Chamber:

\[
\text{[T]he expression “the established framework of international law” in the}\n\text{chapeaux of article 8(2)(b) and (2)(e) as well as in the Introduction to the}\n\text{Elements of Crimes for article 8 of the Statute, when read together with}\n\text{article 21 of the Statute, requires the former to be interpreted in a manner}\n\text{that is “consistent with international law, and international humanitarian law}\n\text{in particular”. Thus, the specific reference to the “established framework of}\n\text{international law” within article 8(2)(b) and (e) of the Statute permits}\n\text{recourse to customary and conventional international law regardless of}\n\text{whether any lacuna exists, to ensure an interpretation of article 8 of the}\n\text{Statute that is fully consistent with, in particular, international humanitarian}\n\text{law.}}\]

Nonetheless, on rare occasions the ICC has gone against the generally accepted state of IHL (and perhaps ICRC positions) under the argument that the Rome Statute is a “self-contained” regime; it appears more likely to do so when dealing with cases that involve very sensitive topics such as child soldiers or cultural heritage. However, these divergences might not be altogether negative as such fragmentation incidents can carry beneficial competitive pressure, promote productive experimentation and creativity, allow for mistake correction, reduce the risk of failure of one single institution, and lead to improved performance.

106 ICC, Ntaganda, above note 91, para. 53 (emphasis added).
this process may even occur within the ICC, considering the checks and balances system created by the plurality of chambers and judges.

Therefore, the ICRC and ICC are indeed a two-headed snake, though this is an interim conclusion. If we zoom out a bit more and see the whole picture, we realize that IHL is not just a two-headed snake but actually the Medusa! The ICRC and ICC are just two stakeholders in the IHL universe, meaning that this body of law is additionally applied by a plurality of actors such as States (every single one of them), other international courts (the International Court of Justice, the regional human rights courts and the mixed international tribunals), international organizations, and according to some, even non-State armed groups. This state of affairs makes IHL an extremely diverse, decentralized and rich body of law wherein every actor contributes to its creation, application and development in their own fashion.

**Conclusion**

The analysis provided in this article illustrates that the ICRC and ICC agree in certain aspects (such as the IAC/NIAC dichotomy and the concept of intra-party SGBV) but disagree in others (direct/active participation in hostilities and the notion of attack). This is a perfect reflection of the broader picture.

When it comes to IHL and ICL, it is possible to say that the latter enforces, clarifies and develops the former in certain aspects. As for the ICRC and ICC, it is worth noting that they are two completely different entities whose inflection points are found in their work in favour of people affected by armed conflicts and the application of IHL.

This setting implies the possibility of the two institutions having divergent legal positions – yet this is a triviality. First, even if both apply IHL, they do so from different perspectives and, moreover, through different mechanisms. Second, these legal discrepancies are cumbersome in the short term but beneficial in the long term. Third, these institutions are challenging the State-centred approach of international law and playing a leading role in the international arena. Fourth, in their own peculiar ways, they are humanizing the conversation by shifting the focus from States to individuals (either victims or perpetrators).

Most importantly, contemporary armed conflicts are constantly evolving, and in order to keep up with such raw realities, so should IHL – whether at ICRC Headquarters in Geneva or a courtroom in The Hague.
“Or any other similar criteria”: Towards advancing the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict

Vaughn Rossouw

Vaughn Rossouw is an admitted Advocate of the High Court of South Africa. He holds an LLB from the University of Pretoria and is currently a candidate in the LLM International Humanitarian Law and Human Rights in Military Operations programme.

Abstract

Discrimination and sexual and gender-based violence committed against lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) detainees remains one of the most pressing contemporary humanitarian challenges. This article focuses on the interpretation of the phrase “or any other similar criteria” as contained in Article 3 common to the four Geneva Conventions, upon which adverse distinction is

* The author wishes to extend his sincere gratitude towards Dr M. M. Bradley from the University of Pretoria, as well as to all other anonymous peer reviewers for commenting on previous drafts of this article.
prohibited, in order to qualify sexual orientation and gender identity as prohibited grounds of adverse distinction. The interpretation of “or any other similar criteria” will be embarked upon by employing the general rule of treaty interpretation provided for in the Vienna Convention on the Law of Treaties, so as to qualify sexual orientation and gender identity as “any other similar criteria” and ultimately to realize the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict.

Keywords: LGBTQI, international humanitarian law, common Article 3, sexual and gender-based violence, adverse distinction.

Introduction

Discrimination and sexual and gender-based violence (SGBV) directed at persons identifying as lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) remains one of the most pressing humanitarian challenges of our time. It is an unfortunate reality that persons identifying as LGBTQI face immense hardship in light of acceptance and tolerance even at the best of times, solely based on the fact that their sexual orientation or gender identity is non-conformant with the

---

1 International Criminal tribunal for Rwanda (ICTR), Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 688: “The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” For Gender-based violence (GBV), see International Criminal Court (ICC) Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, 5 June 2014, p. 3: “Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.” See also Inter-Agency Standing Committee (IASC), The Gender Handbook for Humanitarian Action, February 2018, p. 19: “GBV is an umbrella term for any harmful act that is perpetrated against a person’s will and that is based on power imbalances and socially ascribed (i.e., gender) differences between women, girls, men and boys. It includes acts that inflict physical, sexual or mental harm or suffering, threats of such acts, coercion and other deprivations of liberty.” For a discussion on the relationship between sexual violence and GBV, see Gloria Gaggioli, “Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law”, International Review of the Red Cross, Vol. 96, No. 894, 2014, p. 509.

2 United Nations (UN) General Assembly, Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN Doc. A/72/172, 19 July 2017, p. 3, para. 2: “Sexual orientation denotes a person’s physical, romantic and/or emotional attraction towards others, while gender identity concerns a person’s self-perceived identity, which may be different from the sex assigned at birth, as well as the expression of gender identity.” For the acronym LGBTQI, see ibid., p. 4, para. 7.

3 UN Office of the High Commissioner for Human Rights (UN Human Rights), Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity, UN Doc. A/HRC/29/23, 4 May 2015, p. 4.
social norm of society. The marginalization of LGBTQI persons as sexual and gender minorities specifically at risk is further exacerbated within the hyper-masculine context of armed conflict, in which hegemonic heteronormativity is prevalent. Comprehensively to the risks faced by women and children during armed conflict, so too are LGBTQI persons—self-identified or perceived—made victims of extreme atrocities during armed conflict. Such atrocities are especially prevalent within the context of detention; in which LGBTQI individuals constitute a specifically risk-facing minority when at the mercy of specific Detaining Powers, including armed non-State actors.

Reports on recent conflicts such as those in the Syrian Arab Republic, Yemen, and Colombia all suggest patterns of SGBV committed against LGBTQI individuals in detention. Reports on the Syrian conflict, for example, allege that homosexual men were tortured and raped on the grounds of their sexual orientation by both government forces and armed non-State actors while in custody. In Yemen, reports suggest that LGBTQI individuals endured sexual violence during interrogation while being accused of “spreading” homosexuality. The Colombian conflict similarly documented numerous allegations of rape and sexual violence perpetrated against lesbian and transgender females in detention as a form of “corrective rape”.

Other forms of violence directed at LGBTQI individuals include murder and beatings, sexual assault, forced anal examinations in order to “prove” homosexuality, genital mutilation, and forced sterilization. Moreover, SGBV

---


5 UN Human Rights, above note 3, p. 12, para. 42: “Discrimination against LGBT individuals is often exacerbated by other identity factors, such as sex, ethnicity, age and religion, and socioeconomic factors, such as poverty and armed conflict.” For a discussion on the hyper-masculine context of armed conflict, see Adam Jones, “Straight as a Rule: Heteronormativity, Gendercide, and the Non-Combatant Male”, Men and Masculinities, Vol. 8, No. 4, 2006.


11 UN General Assembly, above note 8.

12 UN Human Rights, above note 9, p. 12, para. 71.


directed at men and boys is often done through means of exploiting homosexuality.\textsuperscript{15} Reports on the conflicts in Burundi, the Central African Republic, the Democratic Republic of the Congo, South Sudan, Sri Lanka and the Syrian Arab Republic all allege incidents of rape, gang rape, forced public nudity and other forms of torture and inhumane and degrading treatment against men and boys, predominantly in detention facilities.\textsuperscript{16} The rape of men and boys has been used to attack their socially constructed identities as “protectors” in order to humiliate and “feminize” them and to impute a sense of homosexuality to them.\textsuperscript{17} These discriminatory attacks directed at perceived and self-identified LGBTQI individuals are said to constitute SGBV, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes.\textsuperscript{18}

Since the vast majority of modern-day armed conflicts are classified as non-international in character,\textsuperscript{19} the need exists to explore the extent to which the law of non-international armed conflict (NIAC) protects LGBTQI individuals detained during NIAC against discrimination and SGBV. Since no overt recognition is afforded to sexual orientation or gender identity as grounds upon which adverse distinction is prohibited in the application of Article 3 common to the four Geneva Conventions,\textsuperscript{20} this paper focuses on the interpretation of the phrase “or
any other similar criteria” upon which adverse distinction is prohibited. In interpreting “or any other similar criteria”, the general rule of treaty interpretation will be employed as contained in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), in order to qualify sexual orientation and gender identity as “any other similar criteria” upon which adverse distinction is prohibited.

As a point of departure, “or any other similar criteria” will be interpreted against the backdrop of its ordinary meaning by using the notion of “good faith” and in the context of its object and purpose. Secondly, Additional Protocol II to the Geneva Conventions (AP II) will be used as a measure in further interpreting the context of “or any other similar criteria”, as an instrument related to common Article 3 and accepted as such by the parties to the Geneva Conventions. Finally, international human rights law (IHRL) will be used in support of the interpretation of “or any other similar criteria”, under the auspices of “relevant rules of international law applicable in the relations between the parties.” This will be followed by a short conclusion and summary remarks.

Establishing the meaning of “or any other similar criteria” as found in common Article 3 through the general rule of treaty interpretation

Article 31(1) of the VCLT states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Therefore, considering “or any other similar criteria” against the backdrop of the general rule of treaty interpretation, the text of common Article 3 must be considered in its entirety. Common Article 3, as the sole treaty-based provision tasked with the oversight of all NIAC, prohibits certain acts against certain groups of persons during conflict “not of an international character”. These acts include, inter alia,

21 Common Art. 3(1).
23 Ibid., Art. 31(1).
24 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).
25 VCLT, above note 22, Art. 31(2)(b).
26 Ibid., Art. 31(3)(c).
28 ICRC Commentary on GC III, above note 19, para. 388: “Despite these developments, common Article 3 remains the core provision of humanitarian treaty law for the regulation of non-international armed conflicts.”
29 ICTY, Tadić, above note 19.
violence to life and person, in particular murder of all kinds, mutilation, cruel
treatment and torture,\textsuperscript{30} as well as outrages upon personal dignity, which includes
humiliating and degrading treatment.\textsuperscript{31} Moreover, the prohibitions against these
acts, together with the rest of the provisions of common Article 3, have attained
the status of customary international humanitarian law binding on both States
and armed non-State actors in a NIAC,\textsuperscript{32} and are considered the minimum
yardstick reflecting “elementary considerations of humanity”, as confirmed by the
International Court of Justice (ICJ) in the Nicaragua case.\textsuperscript{33}

In consideration of the above, common Article 3(1) asserts that:

Persons taking no active part in the hostilities, including members of armed
forces who have laid down their arms and those placed \textit{hors de combat} by
sickness, wounds, detention, or any other cause, shall in all circumstances be
treated humanely, without any adverse distinction founded on race, colour,
religion or faith, sex, birth or wealth, or any other similar criteria.\textsuperscript{34}

In the context of the above, it should thus be clear that in all circumstances,
individuals not or no longer actively participating in hostilities are to be protected
throughout the duration of the conflict and that individuals placed \textit{hors de combat} by, \textit{inter alia}, detention are to be treated humanely.\textsuperscript{35} As other scholars
have rightly noted, the fact of being a self-identified LGBTQI individual, or even
of being perceived as such, has no bearing on the question of whether such an
individual is a civilian or combatant for the purposes of the principle of
distinction.\textsuperscript{36} Under the principle of distinction, LGBTQI non-combatants would
be protected solely based on their status as civilians.\textsuperscript{37} The issue arises when such
individuals fall under the control of a party to the conflict, whether this entails
individuals being arbitrarily detained on the basis of their sexual orientation or
gender identity,\textsuperscript{38} LGBTQI combatants placed \textit{hors de combat} by detention,\textsuperscript{39} or
LGBTQI civilians lawfully interned for imperative security reasons who are then

\textsuperscript{30} Common Art. 3(1)(a).
\textsuperscript{31} Common Art. 3(1)(c).
\textsuperscript{32} Jean-Marie Henckaerts and Louise Doswald-Beck (eds), \textit{Customary International Humanitarian Law},
\textsuperscript{33} ICJ, \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)},
\textsuperscript{34} Common Art. 3(1) (emphasis added).
\textsuperscript{35} \textit{Ibid}; see also ICRC Commentary on GC III, above note 19, para. 608.
\textsuperscript{36} A. Margalit, above note 13, p. 253. See also AP II, Art. 13(2); ICRC Customary Law Study, above note 32,
Rule 1, p. 3: “The Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” For a
discussion on the principle of distinction, see Jean Pictet, “The Principles of International
\textsuperscript{37} Common Art. 3(1) (“Persons taking no active part in the hostilities … shall in all circumstances be treated
humanely”); AP II, Art. 13(2).
\textsuperscript{38} See UN General Assembly, above note 8, p. 12, para. 70; UN Human Rights, above note 9, p. 12, para. 71;
Theresia Thylin, “Violence, Toleration, or Inclusion? Exploring Variation in the Experiences of LGBT
\textsuperscript{39} T. Thylin, above note 38, p. 6; see also Marco Sassòli, \textit{International Humanitarian Law: Rules, Controversies and
subjected to discrimination and violence during detention. Clearly, sexual orientation and gender identity are not explicit grounds listed in common Article 3 upon which adverse distinction is prohibited. The provision provides for the prohibition of adverse distinction on the basis of race, colour, religion or faith, sex, birth or wealth, and then furthermore provides that no adverse distinction shall be made on “any other similar criteria” that have not been mentioned already upon which adverse distinction is prohibited.

The International Committee of the Red Cross (ICRC) Commentary on common Article 3—as an authoritative and subsidiary source for the determination of the rules of international humanitarian law (IHL)—states that the phrase “or any other similar criteria” makes the grounds listed upon which adverse distinction is prohibited a “non-exhaustive” list. The Commentary then continues to describe other grounds not listed in common Article 3 that would in theory be equally prohibited grounds of adverse distinction, such as age, state of health and family connections.

In the opinion of the present author, omitting sexual orientation and gender identity from the ICRC Commentaries as grounds similar to those listed in common Article 3 upon which adverse distinction is prohibited constitutes a missed opportunity. Discrimination and violence directed at LGBTQI individuals is certainly not a new phenomenon, and continues to be widespread during contemporary armed conflicts, keeping in mind the sexual violence and torture of homosexual men in concentration camps during the Third Reich, or contemporary armed conflicts such as that in Colombia, during which armed non-State actors demonstrated policies of “social cleansing” operations against LGBTQI individuals. What is clear from the phrase “or any other similar criteria” is that this specific wording is open to wide interpretation—as

40 GC III, Arts 21, 22. For an understanding of detention outside a criminal process (internment) during non-international armed conflict, See ICRC Commentary on GC III, above note 19, paras 755–758; see also A. Margalit, above note 13, p. 254.
42 ICRC Commentary on GC III, above note 19, para. 605.
43 Ibid.
44 The ICRC Commentary on GC III, above note 19, does, however, refer to “gender” and “sexual orientation” as prohibited grounds of discrimination in relation to the obligation of humanitarian bodies to provide impartial humanitarian assistance: see, for example, para. 831 (“The Geneva Conventions require a humanitarian organization wishing to offer its services on the basis of Common Article 3 to be ‘impartial’”) and fn. 778 (“[Humanitarian] assistance must be provided according to the principle of impartiality, which requires that it be provided solely on the basis of need and in proportion to need. This reflects the wider principle of non-discrimination: that no one should be discriminated against on any grounds of status, including … gender [and] sexual orientation.”).
mentioned, the phrase is non-exhaustive, which elevates the potential for inclusion of sexual orientation and gender identity as similar grounds upon which adverse distinction is prohibited. This brings the author to the task of interpreting the said phrase in order to elevate the protection afforded to LGBTQI individuals detained by State and armed non-State actors alike against discrimination and SGBV.

The textual interpretation: “Ordinary meaning”

The word “criteria” is defined as a standard or characteristic by which something can be judged or decided. In the context of “or any other similar criteria”, and keeping in mind the preceding terms “race, colour, religion or faith, sex, birth or wealth”, it can reasonably be interpreted that “criteria”, for the purposes of the prohibition of adverse distinction, refers to the differential characteristic traits present in all human beings, all of which set individuals apart from one another in societal standing. To confirm the qualification of sexual orientation and gender identity as “any other similar criteria” upon which adverse distinction is prohibited, it must be established that sexual orientation and gender identity are seen as criteria similar to race, colour, religion or faith, sex, birth or wealth. In making this determination, it is perhaps beneficial to consider how criteria other than sexual orientation and gender identity that are also not listed as prohibited grounds of adverse distinction are reflected upon.

Other similar grounds not mentioned in common Article 3 upon which adverse distinction is prohibited include that of nationality. It is held, however, that the omission of nationality from the list of prohibited grounds of adverse distinction has no bearing on the imperative obligation of humane treatment, and should therefore be understood as falling within the concept of “any other similar criteria”. In general, a Detaining Power may not take advantage of the fact that certain differential characteristics are omitted from common Article 3 by interpreting such omission as falling outside the protective scope of common Article 3. As indicated by the ICRC Commentary of 1960 on common Article 3, it is prohibited for an ill-intentioned Detaining Power to employ certain criteria as

48 ICRC Commentary on GC III, above note 19, para. 607: “Unlike other provisions of humanitarian law, common Article 3 does not list ‘nationality’ as a prohibited criterion.”
49 Ibid., para. 608, “Common Article 3 is strictly humanitarian in character. … It is focused exclusively on ensuring that every person not or no longer actively participating in the hostilities is treated humanely.”
50 Jean Pictet (ed.), The Geneva Conventions of 12 August 1949: Commentary, Vol. 3: Convention (III) relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, p. 40. In the context of the omission of nationality, it was held that “[i]t would be the very denial of the spirit of the Geneva Conventions to avail oneself of the fact that the criterion of nationality had been set aside as a pretext for treating foreigners, in a civil war, in a manner incompatible with the requirements of humane treatment, for torturing them, or for leaving them to die of hunger.”
a pretext for discrimination against one class of persons or another in order to avoid affording them humane treatment.51

The prohibition of adverse distinction on the basis of “any other similar criteria” in the application of common Article 3 is also imbedded in customary IHL.52 Although “any other similar criteria” is not defined under customary IHL, interpreting the phrase in light of its ordinary meaning and in light of the notion of “good faith”, it must be found that sexual orientation and gender identity qualify as “any other similar criteria” upon which adverse distinction is prohibited. According to the interpretive view of the author, “or any other similar criteria” suggests an all-encompassing and flexible blanket of protection that will be applicable to all spheres of differential criteria, which include sexual orientation and gender identity.

Other scholars concur with this interpretation.53 Sassòli, for example, argues that adverse distinction found on grounds such as sexual orientation and gender identity is prohibited under the guise of “any other similar criteria”, as reinforced by the interpretation of IHRL treaties.54 Moreover, it is correctly argued that existing IHL prohibits LGBTQI abuse when such abuse shows a nexus to the armed conflict,55 as it inevitably affects one of the categories of persons protected under IHL.56

“Object and purpose”

What lies at the heart of treaty interpretation is the notion of good faith, which implies the consideration of the object and purpose of a treaty.57 The VCLT furthermore stresses that apart from its ordinary meaning, a treaty shall be interpreted in light of its object and purpose.58 For common Article 3 as a “convention in miniature”,59 what is held to be the object and purpose is the obligation of “humane treatment”.60 Common Article 3 holds that persons taking
no active part in hostilities – those who have laid down their arms and those placed *hors de combat* – “shall in all circumstances be treated humanely”.61 The obligation of humane treatment has been described as the cornerstone of protections conferred by common Article 3, as well as “the leitmotiv of the four Geneva Conventions”.62 The obligation of humane treatment furthermore ensures that both State and armed non-State actors in a NIAC treat persons not or no longer actively participating in hostilities and falling under their power in a humane manner.63 It is therefore of vital importance to understand what constitutes humane treatment as the object and purpose of common Article 3 in qualifying sexual orientation and gender identity as “any other similar criteria” upon which adverse distinction is prohibited.

Neither common Article 3 nor any other provision of international humanitarian treaty law defines “humane treatment”.64 The Commentary to common Article 3 does confirm, however, that the meaning of humane treatment is context-specific and must be considered in the concrete circumstances of each case.65 Moreover, one factor that is considered to contribute to the understanding of humane treatment is the acknowledgement that women, men, girls and boys are affected differently by armed conflict, and that sensitivity to an individual’s inherent status, capacity and needs, and how such status, capacity and needs differ throughout society, must be considered when applying the obligation of humane treatment.66 In the context of LGBTQI persons detained during NIAC, the obligation of humane treatment would entail, for example, treatment with all due regard to the individual’s sex, respect for convictions, and protection from the violence and dangers associated with armed conflict.67

Customary IHL similarly pronounces on the obligation of humane treatment.68 The definition of “humane treatment” under customary IHL refers to humane treatment as an overarching concept with reference to respect for an individual’s dignity and the prohibition of ill-treatment.69 A significant observation worthy of mention regarding the definition of humane treatment prevent them from returning to the battlefield.” See also para. 90: “It should be recalled that common Article 3 provides the Third Convention, and the other Conventions, with an additional object and purpose, as it serves to protect persons not or no longer participating in hostilities, including persons deprived of liberty, in situations of non-international armed conflict.”

61 Common Art. 3(1).
64 ICRC Commentary on GC III, above note 19, para. 587.
under customary IHL is the assertion that the notion of humane treatment develops over time under the influence of changes in society. In this sense, as society becomes more aware of targeted violence directed at LGBTQI individuals, or considering the progressive development of LGBTQI rights in terms of IHRL over recent years, so too will the notion of humane treatment under IHL systematically evolve to integrate the specific needs and sensitivities of LGBTQI individuals detained during armed conflict.

Jurisprudence of the ad hoc international criminal tribunals seems to follow the construction of the notion of humane treatment found under customary IHL. The International Criminal Tribunal for the former Yugoslavia (ICTY), in the Aleksovski case, defined humane treatment in relation to forms of mistreatment that are without question incompatible with the general guarantee of humane treatment. The Trial Chamber noted that the purpose of common Article 3 is to uphold and protect the inherent human dignity of the individual by prescribing humane treatment without discrimination. Therefore, considering the prohibited acts listed in common Article 3, including violence to life and person, mutilation, cruel treatment, torture and outrages upon personal dignity, these prohibited acts are specific examples of conduct that are indisputably in violation of the obligation of humane treatment. It is therefore uncontroversial that common Article 3 prohibits all forms of SGBV against all protected persons—and specifically those placed hors de combat by detention for the purposes of this writing—as such violence amounts to a violation of the obligation of humane treatment, as well as the corresponding prohibitions against violence to life and person, mutilation, cruel treatment, torture and outrages upon personal dignity.

The International Criminal Tribunal for Rwanda (ICTR) confirmed in both Muvunyi and Kamuhanda that sexual violence amounts to inhumane treatment, while the Special Court for Sierra Leone (SCSL) in Brima confirmed that sexual and other physical violence qualifies as inhumane treatment. Therefore, prescribing

---

70 Ibid., Rule 87, p. 308.
72 UN Human Rights, above note 54.
73 ICTY Statute, above note 41, Art. 38(1)(d). Judicial decisions are considered a subsidiary means for the determination of the rules of international law.
74 ICTY, Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 49.
75 Ibid., para. 49.
76 ICRC Commentary on GC III, above note 19, para. 589.
77 Ibid., para. 732.
common Article 3’s obligation of humane treatment without discrimination as being in line with the reasoning of \textit{Aleksovski},\footnote{ICTY, \textit{Aleksovski}, above note 74, para. 49.} and without any adverse distinction on the basis of “any other similar criteria”, LGBTQI detainees would be protected against any adverse distinction during detention, which includes SGBV. Thus, subjecting LGBTQI detainees to rape, forced striping, anal examinations, genital mutilation or forced sterilization while in detention\footnote{See, for example, ICRC Commentary on GC III, above note 19, para. 2104: “[T]he requirement of separate dormitories may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment.”} amounts to a violation of common Article 3’s obligation of humane treatment and the corresponding prohibition against acts of violence to life and person and outrages upon personal dignity, and is consequently prohibited.

Scholarly opinion points to the obligation of humane treatment as the basis upon which the general principle of humanity under the so-called “Geneva law” is founded.\footnote{Robert Kolb and Richard Hyde, \textit{An Introduction to the International Law of Armed Conflict}, Bloomsbury, London, 2008, p. 45. For a discussion on the distinction between “Hague law” and “Geneva law”, see Jean Pictet, “The Principles of International Humanitarian Law”, \textit{International Review of the Red Cross}, Vol. 6, No. 66, 1966, pp. 456–458; see also J. Pictet, above note 36, p. 519.} Jean Pictet wrote that the “principle of Geneva” captures three duties towards victims of war: respect, protection and humane treatment, the last being a question of common sense and good faith.\footnote{J. Pictet, above note 36, p. 519.} For Kolb and Hyde, the principle of humanity consists of four facets: respect, protection, equality and humane treatment for all those not or no longer actively participating in hostilities.\footnote{R. Kolb and R. Hyde, above note 83, pp. 45–46.} Moreover, under Kolb and Hyde’s construction of the principle of humane treatment, the obligation to afford humane treatment to protected persons is consequential to the fact of them being human beings who should therefore be afforded a minimum degree of human dignity.\footnote{Ibid.} From an operational and practical perspective, Sassòli argues that the obligation of a Detaining Power to afford humane treatment must be interpreted as requiring special care when a Detaining Power becomes aware of special risks affecting certain detainees.\footnote{M. Sassòli, above note 39, p. 559.} In this sense, a lawful differentiation can be made, for example, by keeping homosexual and transgender detainees separate from other detainees, or even providing homosexual and transgender detainees with specially designated sanitary facilities.\footnote{See, for example, ICRC Commentary on GC III, above note 19, para. 2104: “[T]he requirement of separate dormitories may also extend to other categories of persons with distinct needs or facing particular risks where not doing so would violate the obligation of humane treatment.”} This is because common Article 3 does not prohibit distinction that is non-adverse – i.e., distinction that is justified by substantively different needs and perspectives of persons protected under common Article 3 for the purposes of realizing their humane treatment.\footnote{\textit{Ibid.}, para. 612: “This allows for differential treatment that in fact serves the purpose of realizing a person’s humane treatment.”}
It is thus clear that what lies at the epicentre of “humane treatment” of persons not or no longer actively participating in hostilities is human dignity and non-discrimination in the application of common Article 3. For the current author, and for the purposes of placing humane treatment in the context of the protection of LGBTQI detainees against discrimination and SGBV during NIAC, “humane treatment” connotes, at the very minimum, treatment with all due regard for such individuals’ status as such. As scholars have rightly noted, the intrinsic reality of armed conflict inevitably results in having protected persons under IHL lead a difficult life within an inherently unfavourable environment. However, treatment of protected persons in such a chaotic environment must always be humane, appropriate and acceptable. The current author acknowledges that although a Detaining Power may not be aware of the sexual orientation of a specific individual under its control, the obligation of the Detaining Power is, nevertheless, based on providing equal and non-discriminatory protection, without drawing an adverse distinction in affording humane treatment. Upon this basis, sexual orientation and gender identity qualify as “any other similar criteria” upon which adverse distinction is prohibited, in line with the object and purpose of common Article 3.

The next section of this article focuses on Additional Protocol II as an instrument made in connection with the conclusion of common Article 3 and accepted as such by the parties thereto for the purposes of Article 31(2)(b) of the VCLT.

Additional Protocol II as an instrument related to common Article 3 for the purposes of Article 31(2)(b) of the VCLT

According to Article 31(2)(b) of the VCLT, the context of a treaty for the purposes of its interpretation shall comprise, in addition to the text, preamble and annexes, any instrument made in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. AP II fulfils the requirements of an “instrument” for the purposes of Article 31(2)(b) of the VCLT in the following ways. Firstly, the Commentary to AP II describes AP II as

90 Ibid., para. 591: “State practice has called for treatment that respects a person’s inherent dignity as a human being.”
91 Ibid., para. 587. Sensitivity towards an individual’s inherent status is held to contribute to the understanding of “humane treatment” enshrined in common Article 3.
92 R. Kolb and R. Hyde, above note 83, p. 46.
93 See above note 24.
94 VCLT, above note 22, Art. 31(2)(b).
95 Ibid.; see also M. E. Villiger, above note 27, pp. 429–430: “The agreement or instrument mentioned in para. 2 as a means of interpretation will concern a subject-matter of a treaty (and in particular the treaty term to be interpreted), and are, or were, ‘germane’ to the treaty, i.e., they stand in some connection with the conclusion of the treaty (but need not necessarily have eventuated at the time of the conclusion of the treaty).”
the first real legal instrument for the protection of victims of NIAC. Secondly, and although common Article 3 remains the core treaty-based provision tasked with the oversight of all NIAC, AP II supplements and develops the general provisions of common Article 3, albeit only for those States that have ratified it. Furthermore, as Article 31(2)(b) requires an instrument to be made in connection with the conclusion of a treaty, there will be no bearing on AP II being utilized in the interpretation of “or any other similar criteria”, as AP II promotes the subject matter and purpose of common Article 3. Moreover, even though AP II was not adopted until 1977, this cannot be construed so as to mean that AP II was not made in connection with the conclusion of the Geneva Conventions for the purposes of Article 31(2)(b), as the instrument does not need to have eventuated at the time of the conclusion of the related treaty.

Despite the arguments raised above in favour of utilizing AP II for the purposes of the interpretation of “or any similar criteria”, AP II is not necessarily free from any obstacles. AP II is only applicable to armed conflict taking place on the territory of a State that has ratified it as many States were opposed to the assertion that its provisions reflected existing customary IHL at the time of its adoption. Moreover, for AP II to become applicable to a certain NIAC, AP II requires certain additional application criteria, including, \textit{inter alia}, that the dissident armed forces or organized armed groups engaged in the conflict are organized under a responsible command structure, exercise control over a part of the State Party’s territory, and are able to implement the provisions of AP II. The high threshold of intensity necessary for an armed conflict to thus trigger the applicability of AP II means that many situations of armed conflict do not qualify as an AP II-type NIAC, and thus do not trigger its application. Nevertheless, the provisions of AP II relevant for the purposes of this article, and for the protection of LGBTQI detainees against discrimination and SGBV during NIAC, restate and clarify customary IHL. Therefore, the relevant provisions of AP II can be applied for the purposes of interpreting “or any other similar criteria” in

97 ICRC Commentary on GC III, above note 19, para. 388.
98 AP II, Art. 1(1). See also ICRC Commentary on GC III, above note 19, para. 388: “In comparison [to common Article 3], Additional Protocol II is not universally ratified, and its scope of application is more limited, without, however, modifying common Article 3’s existing conditions of application.”
100 \textit{Ibid.}, p. 430.
101 AP II, Art. 1(1); see also ICRC Customary Law Study, above note 32, p. xxxiv.
103 AP II, Art. 1(1).
its context, and for the purposes of qualifying sexual orientation and gender identity as such.\textsuperscript{106}

To begin with, the preamble to AP II reinforces the principles of the famous Martens Clause of the 1899 and 1907 Hague Conventions respecting the laws and customs of war on land.\textsuperscript{107} These principles, which have attained the status of customary international law,\textsuperscript{108} recall that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.\textsuperscript{109} Although these principles were originally adopted in the context of “means and methods of warfare” for international armed conflicts, and applied in that context as seen in the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion),\textsuperscript{110} the ICJ nevertheless held that these two systems of law – the “Hague law” and “Geneva law” – “have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law”.

The principles of the protection of humanity and the dictates of the public conscience have been held to serve as fundamental guidance in the interpretation of international customary or treaty rules.\textsuperscript{111} Cassese argues, for example, that in case of doubt, rules belonging to IHL must be construed to be consonant with the general standards of humanity and the demands of public conscience.\textsuperscript{112} Moreover, the Commentary to AP II holds that if a case is not covered by the law in force, whether due to a lacuna in the law or because the parties to the conflict do not consider themselves bound by common Article 3 or AP II, that does not mean that anything is permitted.\textsuperscript{113} An \textit{a contrario} interpretation is therefore prohibited, and the human person remains under the protection of the principles of humanity and the dictates of the public conscience.\textsuperscript{114} Therefore, since sexual orientation and gender identity are not explicitly covered by the law in force in qualification of such characteristics as “any other similar criteria”, the lack of explicit recognition of sexual orientation and gender identity under either

\begin{itemize}
\item \textsuperscript{106} AP II, Arts 2(1), 4.
\item \textsuperscript{107} AP II, Preamble; see also Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, Preamble; Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Preamble.
\item \textsuperscript{109} AP II, Preamble.
\item \textsuperscript{110} Nuclear Weapons Advisory Opinion, above note 108, para. 84.
\item \textsuperscript{111} A. Cassese, above note 108, p. 212.
\item \textsuperscript{112} \textit{Ibid}.
\item \textsuperscript{113} ICRC Commentary on AP II, above note 96, para. 4434.
\item \textsuperscript{114} \textit{Ibid}.
\end{itemize}
common Article 3 or AP II\textsuperscript{115} cannot be interpreted to suggest that it is permitted to subject LGBTQI detainees to discrimination and SGBV while in detention. The protection of LGBTQI detainees against discrimination and SGBV during detention is first and foremost to be found under the principles of humanity and the dictates of the public conscience.

Moving forward, AP II’s personal field of application under Article 2(1) provides for the application of the Protocol without any adverse distinction.\textsuperscript{116} Similar to that of common Article 3, AP II’s non-discrimination clause makes no provision for sexual orientation and gender identity as grounds upon which adverse distinction is prohibited. However, as in the case of common Article 3, the list of prohibited grounds of adverse distinction is non-exhaustive, leaving room for the inference of sexual orientation and gender identity as “any other similar criteria”. Praise must be given to AP II, though, in expanding the list of grounds upon which adverse distinction is prohibited, by adding, for example, “or other status”, juxtaposed against “or any other similar criteria”.\textsuperscript{117} This holds the potential for inference of sexual orientation and gender identity as prohibited grounds of adverse distinction under both “or other status” as well as “or any other similar criteria”. Moreover, AP II’s personal field of application guarantees humane treatment to all whose liberty has been restricted for reasons related to the armed conflict.\textsuperscript{118}

AP II furthermore provides for certain fundamental guarantees to all persons not taking a direct part in hostilities, or who have ceased to take part, whether or not their liberty has been restricted.\textsuperscript{119} In the first instance, as with common Article 3, the general obligation of humane treatment is guaranteed without any adverse distinction.\textsuperscript{120} The general obligation of humane treatment is then informed by a list of prohibited acts of absolute character that applies at all times and in all places and which includes, \textit{inter alia}, violence to the life, health and physical or mental well-being of persons,\textsuperscript{121} as well as outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.\textsuperscript{122} The express list of prohibited acts under AP II is thus wider than that of common Article 3 due to the inclusion, for example, of rape, enforced prostitution and any form of indecent assault, which reaffirms and supplements common Article 3.\textsuperscript{123}

\textsuperscript{115} See AP II, Art. 2(1). According to the personal field of application, AP II applies without any adverse distinction founded on “race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”.

\textsuperscript{116} AP II, Art. 2(1).

\textsuperscript{117} \textit{Ibid.}, Art. 2(1).

\textsuperscript{118} \textit{Ibid.}, Arts 2(2), 5(3).

\textsuperscript{119} \textit{Ibid.}, Arts 4(1)–4(2).

\textsuperscript{120} \textit{Ibid.}, Art. 4(1).

\textsuperscript{121} \textit{Ibid.}, Art. 4(2)(a).

\textsuperscript{122} \textit{Ibid.}, Art. 4(2)(e).

\textsuperscript{123} ICRC Commentary on AP II, above note 96, para. 4539.
fundamental guarantees are further supplemented by the customary IHL rules covering rape and other forms of sexual violence.\(^{124}\) While rape and indecent assault were added to the list of prohibited acts primarily out of concern for the protection of women and children,\(^{125}\) such protection is nevertheless applicable to LGBTQI detainees who find themselves in the hands of a specific Detaining Power or armed non-State actor during NIAC, as persons not or no longer actively participating in hostilities. Moreover, these prohibited acts, which fall under the broader category of sexual violence,\(^ {126}\) are held today to encompass violence directed not only against women and girls, but also against men and boys.\(^ {127}\) Furthermore, and for the purposes of international criminal law, rape and any other form of sexual violence also constituting a serious violation of common Article 3 constitute a war crime when committed against any person.\(^ {128}\) The International Criminal Court (ICC) in its recent decision in Ntaganda, for example, acknowledged that the concept of “invasion” for purposes of the war crime of rape is intended to be gender-neutral so as to also cover same-sex penetration, and encompasses both male and female victims and perpetrators.\(^ {129}\) Moreover, it is recognized that acts of SGBV directed at LGBTQI detainees may include other acts which do not necessarily consist of rape.\(^ {130}\) Other acts which have similarly been construed as sexual violence, and are therefore equally applicable to LGBTQI detainees during NIAC, include forced public nudity and forced stripping as pronounced in Akayesu,\(^ {131}\) as well as genital mutilation as in Bagosora.\(^ {132}\) Therefore, acts constituting rape and indecent assault for the purposes of the fundamental guarantees contained in AP II should be construed as sufficiently gender-neutral so as to also cover protection of LGBTQI detainees during NIAC. Considering this context for the purposes of “or any other similar criteria”, sexual orientation and gender identity qualify as prohibited grounds of adverse distinction.

As the context for the purposes of the interpretation of “or any other similar criteria” is now settled by the analysis of the relevant provisions of AP II, the final step in the interpretation process turns to the relevant rules of international law applicable in the relations between the parties, in accordance with Article 31(3)(c) of the VCLT.\(^ {133}\)

\(^{124}\) ICRC Customary Law Study, above note 32, Rule 93, p. 324.
\(^{125}\) ICRC Commentary on AP II, above note 96, para. 4539.
\(^{126}\) ICRC Commentary on GC III, above note 19, para. 734.
\(^{127}\) Ibid., para. 736; See also UN Security Council, above note 6, p. 3, para. 4; ICRC Customary Law Study, above note 32, Rule 93, p. 327.
\(^{129}\) See ICC, Ntaganda, above note 55, para. 933.
\(^{130}\) UN Human Rights, above note 7.
\(^{131}\) ICTR, Akayesu, above note 1, para. 693; ICTY, Prosecutor v. Miroslav Kvočka, Case No. IT-98-30/1-T, Judgment (Trial Chamber), 2 November 2001, para. 180.
\(^{132}\) ICTR, Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008, para. 976; see also ICRC Commentary on GC III, above note 19, para. 734.
\(^{133}\) VCLT, above note 22, Art. 31(3)(c).
International human rights law as “relevant rules of international law applicable in the relations between the parties”

This section explores the extent to which IHRL can be utilized as an interpretive tool in aiding the qualification of sexual orientation and gender identity as “any other similar criteria”. To this end, the section will first consider the relationship between IHRL and IHL; it will then present the applicable IHRL instruments giving effect to the recognition of sexual orientation and gender identity as prohibited grounds of adverse distinction, and will lastly consider international jurisprudence giving effect to sexual orientation and gender identity as prohibited grounds of adverse distinction.

Looking towards IHRL as an interpretive tool for the qualification of sexual orientation and gender identity as “any other similar criteria”, certain difficulties arise. This is because the question of whether and to what extent IHRL applies to armed non-State actors remains controversial.\(^\text{134}\) It is today widely accepted that the rules of IHL are binding on both States and armed non-State actors in a NIAC, as enforced by the wording of common Article 3: “each Party to the conflict shall be bound to apply, as a minimum, the following provisions”.\(^\text{135}\) Customary IHL similarly requires that each party to the conflict must respect and ensure respect for IHL by its armed forces.\(^\text{136}\) The same is not accepted for IHRL.\(^\text{137}\) However, what this section seeks to achieve is not to apply IHRL to non-State actors; rather, it seeks to utilize IHRL as an interpretive tool for the purposes of qualifying sexual orientation and gender identity as “any other similar criteria” upon which adverse distinction is prohibited. Moreover, as Article 31(3)(c) of the VCLT specifically provides for the consideration of relevant rules of international law that are applicable in the relations between the parties, the parties as such, for the purposes of Article 31(3)(c), refer to States party to the treaties under IHRL, which are binding upon such States Parties.\(^\text{138}\)

The relationship between IHL and IHRL

The relationship between IHL and IHRL can be traced back to the International Conference on Human Rights held in Tehran in 1968, at which Resolution XXIII,


\(^{135}\) Common Art. 3(1).

\(^{136}\) ICRC Customary Law Study, above note 32, Rule 139, p. 495.

\(^{137}\) J. K. Kleffner, above note 134, p. 50.

\(^{138}\) M. E. Villiger, above note 27, p. 433: “they are applicable in the relations between the parties, i.e., binding on all parties to the treaty at issue”. See also M. E. Villiger, above note 27, p. 432: “These rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms. On the whole, they will provide a contemporary interpretation of the ordinary meaning of a term.”
entitled “Human Rights in Armed Conflict”, was adopted. As a result, the Tehran Conference became the decisive event for the establishment of a relationship between IHL and IHRL. A tendency thus developed in perceiving IHL as part of human rights law applicable during armed conflict, as both these branches of law prohibit the killing of detainees, torture and rape, and uphold the requirement of humane treatment of detainees. As both these branches of international law consist of a protective purpose – for example, IHL operates from the basis of the need to balance military necessity with the preservation of humanity and humane treatment during armed conflict, while IHRL operates from the basis of the protection of human dignity during peacetime – the possibility of overlap between these two special regimes increases.

The ICJ in its Nuclear Weapons Advisory Opinion held that the protection of the International Covenant on Civil and Political Rights (ICCPR) does not cease during time of war, subject to certain derogations in terms of Article 4. In expounding on this approach, the ICJ in its subsequent Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), held that for the relationship between IHL and IHRL, some rights may be exclusive matters of IHL and others exclusive matters of IHRL, while still others may be matters of both these branches of international law. Even though the more popular view in recent times suggests that IHRL applies concurrently with IHL during armed conflict, it must be acknowledged that this view is not universally accepted and remains unsettled.

The present question, however, concerns how to reconcile the qualification of sexual orientation and gender identity as “any other similar criteria” with IHRL, seeing that IHL operating as lex specialis during armed conflict falls silent as regards to sexual orientation and gender identity as prohibited grounds of adverse

141 L. Doswald-Beck and S. Vité, above note 140, p. 94.
142 International Covenant on Civil and Political Rights, I-14668 UNTS 999, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Preamble, Arts 6, 7, 9, 10; Common Art. 3(1)(a), 3(1)(c); AP II, Arts 4, 5; M. Sassòli, above note 39, p. 425.
143 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), Art. 57; ICRC Customary Law Study, above note 32, Rule 1, p. 3; R. Kolb and R. Hyde, above note 83, pp. 46–47.
144 ICCPR, above note 142, Preamble.
146 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2004 (Wall Advisory Opinion), para. 106.
distinction.\textsuperscript{148} In this regard, the International Law Commission’s study on fragmentation of international law held that the operation of IHL as \textit{lex specialis} during armed conflict does not abolish IHRL during time of war.\textsuperscript{149} Moreover, some scholars argue that IHL does not always constitute \textit{lex specialis} during armed conflict simply because it applies to and was specifically designed for those situations, but rather that IHL constitutes \textit{lex specialis} on certain issues during armed conflict, while IHRL is \textit{lex specialis} on others.\textsuperscript{150} Scholarly opinion thus suggests that a case-by-case determination should be made as to the applicable law governing a certain norm, and that in a conflict between the two potential applicable rules, the one with the larger “common-contact surface area” applies.\textsuperscript{151}

In addition, seeing that Article 31(3)(c) of the VCLT provides for the consideration of “relevant rules of international law applicable in the relations between the parties” when interpreting a certain norm, what is described to be imbedded in this method of interpretation is the principle of complementarity.\textsuperscript{152} Therefore, on the basis of the principle of complementarity, a norm of IHL can be interpreted in light of IHRL and vice versa, since these branches of international law both concern the preservation of human dignity and humane treatment and are therefore mutually reinforcing.\textsuperscript{153} Consequently, considering the qualification of sexual orientation and gender identity as “any other similar criteria” upon which adverse distinction is prohibited, which concerns primarily the non-discriminatory application of the protective guarantees of common Article 3 on the basis of sexual orientation and gender identity, the principle of non-discrimination in terms of IHRL instruments must be engaged.

\textbf{LGBTQI recognition under IHRL}

At the outset it must be mentioned that treaties under IHRL, the same as with common Article 3, contain no explicit recognition of sexual orientation and gender identity as prohibited grounds of distinction. What is significant about the principle of non-distinction under IHRL, however, is the instruments and interpretive tools adopted in order to give effect to such recognition.\textsuperscript{154} Although these instruments and interpretive tools mainly consist of resolutions and other “soft-law” instruments of the political organs of the United Nations (UN) and other regional human rights law mechanisms, and are thus not binding on States

\textsuperscript{148} ICRC Commentary on GC III, above note 19, para. 104: “In the event of a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as \textit{lex specialis derogat legi generali}, by which a more specific legal norm takes precedence over a more general one.” See also International Law Commission (ILC), \textit{Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law}, UN Doc. A/CN.4/L.682, 13 April 2006, p. 35, para. 57.

\textsuperscript{149} ILC, above note 148, p. 57, para. 104.

\textsuperscript{150} M. Sassòli, above note 39, p. 438.

\textsuperscript{151} \textit{Ibid}.


\textsuperscript{153} \textit{Ibid}; for a discussion on the principle of “systemic integration”, see ILC, above note 148, p. 206, para. 410.

\textsuperscript{154} HRC Res. 17/19, “Human Rights, Sexual Orientation and Gender Identity”, UN Doc. A/HRC/RES/17/19, 14 July 2011; see also UN Human Rights, above note 54; Yogyakarta Principles, above note 71.
per se, they nevertheless consist of normative values that serve as influential guidelines for States in their conduct.\textsuperscript{155}

The first instrument to engage for the purposes of the qualification of sexual orientation and gender identity as “any other similar criteria” is the ICCPR, which, as discussed above, applies concurrently with IHL during armed conflict.\textsuperscript{156} Article 2 of the ICCPR establishes for States Parties the obligation of non-distinction in the application of the rights contained in the Covenant.\textsuperscript{157} Although the UN Human Rights Committee in its General Comment No. 18 on non-discrimination makes no reference to sexual orientation or gender identity upon which distinction is prohibited, the Committee holds that the term “discrimination” as used in the ICCPR should be understood to imply any distinction based on any grounds which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons of all rights and freedoms contained in the Covenant.\textsuperscript{158}

During 2011, the Human Rights Council adopted Resolution 17/19, entitled “Human Rights, Sexual Orientation and Gender Identity”, expressing grave concern at acts of violence and discrimination against LGBTQI individuals and recalling the universal application of the rights enshrined in the Universal Declaration of Human Rights and other human rights treaties.\textsuperscript{159} Furthermore, the UN Office of the High Commissioner for Human Rights, in the second edition of its publication Born Free and Equal, has reinforced the obligation of non-discrimination under Article 2 of the ICCPR as including non-discrimination on the basis of sexual orientation, gender identity and sex characteristics.\textsuperscript{160} Other human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Discrimination against Women, similarly set out the obligation of non-discrimination to include discrimination based on sexual orientation and gender identity.\textsuperscript{161}

In the context of the protection of LGBTQI detainees against SGBV, Article 10 of the ICCPR imposes the obligation upon States to treat all persons deprived of their liberty with humanity and with respect for human dignity.\textsuperscript{162} In

\begin{flushright}

\textsuperscript{156} ICCPR, above note 142.

\textsuperscript{157} Ibid., Art. 2.

\textsuperscript{158} Human Rights Committee, CCPR General Comment No. 18, “Non-Discrimination”, 10 November 1989, p. 2, para. 7; See also Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, para. 8.7, in which the Committee held that reference to “sex” in Articles 2 and 26 of the ICCPR also includes sexual orientation.

\textsuperscript{159} HRC Res. 17/19, above note 154.

\textsuperscript{160} UN Human Rights, above note 54, p. 52.


\textsuperscript{162} ICCPR, above note 142, Art. 10.
General Comment No. 21 on Article 10, the Human Rights Committee held that Article 10 imposes a positive obligation upon States towards persons who are particularly vulnerable due to their status as “persons deprived of their liberty”.\textsuperscript{163} It is furthermore held that for “persons deprived of their liberty”, the sanction on torture and other cruel, inhuman or degrading treatment or punishment is emphasized.\textsuperscript{164} This emphasis placed on the prohibition of torture and cruel, inhuman or degrading treatment or punishment has been held to include the prohibition of SGBV perpetrated against LGBTQI detainees.\textsuperscript{165} From a regional perspective, in 2014 the African Commission on Human and Peoples’ Rights (ACHPR) adopted Resolution 275, condemning human rights violations including “corrective rape” and torture, as well as arbitrary arrests and detention committed by both State and non-State actors throughout the African region against persons based on their sexual orientation and gender identity, and furthermore reinforcing the obligation of States under the African Charter to respect the right to be free from torture and other cruel, inhuman and degrading treatment or punishment.\textsuperscript{166} Judicial practice of human rights treaty bodies has similarly upheld sexual orientation and gender identity as prohibited grounds of distinction. In \textit{Toonen v. Australia}, the UN Human Rights Committee found the reference to “sex” under Articles 2 and 26 of the ICCPR to include “sexual orientation”.\textsuperscript{167} Moreover, in the case of \textit{Identoba and Others v. Georgia}, the European Court of Human Rights (ECtHR) held that the prohibition of discrimination under Article 14 of the European Convention on Human Rights also covers discrimination based on sexual orientation and gender identity.\textsuperscript{168} In a more recent landmark decision, the Inter-American Court of Human Rights (IACtHR), in \textit{Azul Rojas Marín et al. v. Peru}, held that Article 1(1) of the American Convention on Human Rights, which prohibits the discriminatory application of the rights contained in the Convention, also prohibits discrimination on the basis of sexual orientation, gender identity or gender expression.\textsuperscript{169} The IACtHR went one step further and held that rape constitutes torture when the purpose behind the rape is to discriminate on the basis of sexual orientation or gender identity.\textsuperscript{170} In conclusion, and considering the ICJ’s approach in the Wall Advisory Opinion that certain rights concern matters of both IHRL and IHL,\textsuperscript{171} looking towards IHRL as an interpretive tool in qualifying sexual orientation and gender

\textsuperscript{163} Human Rights Committee, General Comment No. 21, “Article 10 (Humane Treatment of Persons Deprived of Their Liberty)”, UN Doc. HRI/GEN/1/Rev.9 (Vol. 1), 10 April 1992, para. 3.
\textsuperscript{164} \textit{Ibid.}; see also ICCPR, above note 142, Art. 7.
\textsuperscript{165} UN Human Rights, above note 54, p. 29.
\textsuperscript{166} ACHPR Res. 275(LV), “Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity”, 28 April–12 May 2014.
\textsuperscript{167} Human Rights Committee, \textit{Toonen}, above note 158.
\textsuperscript{168} ECtHR, \textit{Identoba and Others v. Georgia}, Appl. No. 73235/12, Judgment, 12 May 2015, para. 96.
\textsuperscript{170} \textit{Ibid.}, paras. 160–167.
\textsuperscript{171} Wall Advisory Opinion, above note 146.
identity as “any other similar criteria” seems accurate. In this regard, accepting that IHRL may be directly applied to certain situations during armed conflict where IHL falls silent (such as the omission of sexual orientation and gender identity as prohibited grounds of adverse distinction under common Article 3), subjecting LGBTQI detainees to SGBV, or any other adverse distinction during NIAC, constitutes a violation of States’ obligation to afford humane treatment under both IHRL and IHL. Lastly, it is argued that the protection of persons based on their sexual orientation or gender identity does not require the establishment of new or special rights for LGBTQI persons, but rather the enforcement of existing rights, particularly the universally applicable guarantee of non-discrimination.172

Conclusion

As discussed, discrimination and violence directed at LGBTQI individuals during armed conflict are widespread.173 Used as a tactic of terror and social control,174 SGBV during armed conflict has been described as the most effective weapon for terrorizing and changing the very demographics of the community it impacts.175 As SGBV is prevalent in the context of detention,176 State and armed non-State actors are reminded of their obligation to provide LGBTQI individuals under their control with “humane treatment” as the fundamental guarantee of common Article 3. As mentioned above, the protection of persons based on their sexual orientation or gender identity does not require the establishment of new rights, but rather the enforcement of existing rights.177 Moving forward, in giving effect to sexual orientation and gender identity as “any other similar criteria”, sexual orientation and gender identity must be addressed as specific grounds for discrimination and violence.178 Although significant progress is being made in terms of IHRL, affording recognition to these grounds under IHL is what will ultimately qualify them as “any other similar criteria” upon which adverse distinction is prohibited, thus helping to achieve the realization of non-adverse treatment of LGBTQI detainees during NIAC.

173 UN Security Council, above note 6; UN Human Rights, above note 3; UN Security Council, above note 7; UN Security Council, above note 8, p. 2, para. 6; UN Human Rights, above note 9.
176 UN Human Rights, above note 7; UN Security Council, 2015, above note 7, paras 6, 20, 30, 61; UN General Assembly, above note 8; UN Human Rights, above note 9.
178 UN Human Rights, above note 54, p. 89.
Investigating the Jana Adalat of the 1996–2006 armed conflict in Nepal

Yugichha Sangroula
Yugichha Sangroula is an Assistant Professor at Kathmandu School of Law, Nepal. Email: yugichhasangroula@gmail.com.

Abstract
The Communist Party of Nepal (Maoist) (CPN-M), an organized armed group, engaged in a non-international armed conflict against the Government of Nepal between 1996 and 2006. During the armed conflict, the organized armed group operated a judicial system in the territories under its effective control, called the Jana Adalat (the People’s Court). The legitimacy of the Jana Adalat has been a contentious subject matter. This article examines the historical, legal and practical dimensions of the Jana Adalat, especially focusing on the perspectives of the CPN-M.

Keywords: Nepal, Maoists, non-State armed group courts, summary justice, regularly constituted courts.

Introduction
A non-international armed conflict (NIAC) occurred in Nepal, from February 1996 to November 2006, between the Communist Party of Nepal (Maoist) (CPN-M) and His Majesty’s Government (HMG) of Nepal. The CPN-M was a particular type of “political armed group”, one which used violence, including detentions, as a “legitimacy-contestant”. The justice system operated by the CPN-M in the territories it deemed as liberated was known as the Jana Adalat (the People’s Court). The Government of Nepal, naturally, repudiated and condemned it. The International Bar Association deemed the Court as unconstitutional and contrary...
to human rights, and appealed to the CPN-M to instate a “properly constituted court”. In contrast, the CPN-M accused international organizations of “inherent bias against the rebels”. The Office of the United Nations High Commissioner for Human Rights (OHCHR) in its Nepal Conflict Report has concluded that the Jana Adalat was in violation of international humanitarian law (IHL) and international human rights law.

There is no known consolidated study on the Jana Adalat that also incorporates the perspectives of the CPN-M. As stressed by Miroiu, rather than dismissing the legitimacy-contestants, perhaps there should be an effort to understand their role within the “social order”. This article contextualizes the Jana Adalat, especially from the perspective of the CPN-M. In doing so, it relies on CPN-M party instruments, including statements of the party leaders, common minimum policies and two regulations that were enforced by the CPN-M in their controlled/liberated territories. One of these regulations, the Karyabidhi Sambandhi Kanooni Byawastha (Provisions related to Procedural Law), has not been explored in previous research related to Jana Adalat, or scholarship about courts operated by non-State armed groups in general. The article also draws on independent studies containing primary and secondary data that illuminate the practices of the Jana Adalat.

The article first briefly recapitulates the ongoing discussion concerning the lawfulness of courts constituted by organized armed groups (OAGs). It then describes the foundations of the People’s War (Jana Yuddha) in Nepal, the CPN-M’s claim of legitimate representation of the Nepali people and their control over parts of Nepal. After that, it describes the structure of the Jana Adalat, the response of various actors towards the Jana Adalat, the CPN-M policies and regulations concerning essential guarantees of fair trial applicable to the Jana Adalat, the documented practices regarding the same, and the challenges encountered by the CPN-M in operating the Jana Adalat.

Lawfulness of the courts established by organized armed groups

Sub-article 1(d) of Article 3 common to the four Geneva Conventions lays down a prohibition (in the case of a NIAC) on “the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized

---

5 A. Miroiu, above note 1, p. 49.
The provision essentially prohibits summary justice,⁷ that is, summary punishment or execution, and protects all civilians and combatants who have fallen in the hands of a party to the NIAC (and who are prospectively subjected to criminal prosecution).⁹ The provision concerns criminal detentions rather than security detentions, although “the two situations are usually conflated”.¹⁰ It is widely agreed that common Article 3 binds OAGs.¹¹

Several scholars¹² and the International Committee of the Red Cross (ICRC) in its 2020 Commentary on the Third Geneva Convention (GC III)¹³ have deduced that the phrase “regularly constituted court” under sub-article 1(d) of common Article 3 includes the courts constituted by OAGs. The 2020 Commentary further clarifies that such courts must afford “essential guarantees of independence and impartiality”, otherwise their conduct amounts to summary justice;¹⁴ that the question of “whether an armed group can hold trial providing these guarantees is a question of fact and needs to be determined on a

⁷ Article 3 common to the four Geneva Conventions; the term “civilized nations” is currently read as “generally recognized as indispensable under international law”. International Committee of the Red Cross (ICRC), Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War, 2nd ed., 2020 (ICRC Commentary on GC III), para. 719, available at: https://ihl-databases.icrc.org/ihl/full/GCIII-commentary (all internet references were accessed in November 2021).

⁸ Ibid., para. 725.

⁹ The scope of application has been clarified in this manner. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), Commentary on the Additional Protocols, ICRC, Geneva, 1987, p. 1397.

¹⁰ Human Rights Committee, General Comment No. 35, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 15.


¹³ The ICRC cites opinions of scholars and an opinion of the European Court of Human Rights. ICRC Commentary on GC III, above note 7, para. 728.

case-by-case basis”, and that common Article 3 does not imply that States must “recognize or give legal effect to the results of a trial” by such courts.

However, diverse opinions are prevalent on whether OAGs have a right to introduce law, try and pass and enforce judgements for the function of courts they constitute. As regards whether OAGs have an obligation under IHL to set up courts, the prevalent conclusion is that there is no such obligation.

This section concludes that it cannot be ascertained apart from an academic conclusion that OAGs have a right or an obligation to constitute courts, although it is apparent that such courts would fall under the definition of regularly constituted courts under sub-article 1(d) of common Article 3.

These might be awkward conclusions; however, as noted by Kolb, the law of NIAC is marked by “minimality of rules … unbalancedness … and chaoticness”.

Contextualizing the Jana Yuddha and its Jana Adalat

Curiously, in spite of the somewhat chaotic nature of the law of NIAC, OAGs usually regard themselves as the legitimate authorities—as equally exemplified in the Nepali context. In this regard, scholars have suggested that the legitimacy of OAG courts should be thought of “creatively” for their maximum enhanced compliance with IHL. The aims, convictions, self-image, concern for public relations and people’s support and military strategies are some of the factors demonstrated to influence compliance of OAGs with IHL.

15 ICRC Commentary on GC III, above note 7, para. 730.
16 Ibid., para. 731.
20 E. Heffes, M. D. Kotlik and M. J. Ventura, above note 17, p. 20.
21 Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not?, International Review of the Red Cross, Vol. 93, No. 882, 2011, pp. 365–7; The Roots of Behaviour in War, and its update, The Roots of Restraint in War also explore the formal and informal sources that influence the behaviour of armed forces during armed conflicts, including those of non-State armed forces. See Daniel Muñoz-Rojas and Jean-Jacques Fréard, The Roots of Behaviour in War:
The CPN-M and its claim of historical legitimacy behind the Jana Yuddha

The foundation of the Nepali Maoist movement was laid in 1949, a few years before a nation-wide people’s revolution led to the abolition of a feudal autocratic system of government known as the Ranashahi. The revolution introduced a prototypical “liberation army” in Nepal, although not all the revolutionaries identified or supported the Maoist ideologies flourishing in neighbouring China. In 1962, the King replaced the newly introduced multi-party system with the Panchayat system, accusing the parties of “internecine fighting at the country’s expense”.

In 1971, a faction of the Communist Party of Nepal (CPN) launched an underground guerrilla movement called the Jhapa Uprising. In 1990, the multi-party system was restored and a new Constitution was adopted following a seven-week struggle for democracy called the Jana Andolan (the People’s Revolution).

The Constitution guaranteed periodic elections and a range of civil and political rights. However, a faction of Nepali communists opined that Nepal remained a “semi-feudalistic formal democracy”, rather than a “real democracy”. Concurrently, the facts on the ground revealed that despite national economic growth: (a) more people were living under absolute poverty than ever; (b) the expanding infrastructure eluded most of the population; and (c) inequality among linguistic, ethnic, religious, racial, caste and religious groups had increased.

In this atmosphere, a faction of the CPN disassociated itself from the CPN-UML (Communist Party of Nepal – Unified Marxist–Leninist) by abandoning the policy of Bahudaliya Janabad (multi-party people’s democracy) and adopting what it called Naulo Janbad (new democracy). Invoking Mao’s doctrine of “war as an instrument of political transformation”, the faction declared that an armed struggle was the logical next step in Nepali politics to remedy the historical social injustice towards Nepali people. It separated from the CPN-UML, transformed into CPN-M and expeditiously decided to launch its own protracted...
People’s War in Nepal.\textsuperscript{31} The \textit{Jana Yuddha} began in February 1996. It constituted a NIAC having met the requirements of minimum intensity and sufficient organization (of the CPN-M).\textsuperscript{32} The CPN-M held self-perceptions of “a genuine revolution”,\textsuperscript{33} seeing itself as the legitimate representative of the Nepali people and of a democratic institution. Michael Miklaucic opines that although the NIAC was “brutal and economically devastating … there is little indication that CPN-M leaders … systematically used [it] for venal purposes”.\textsuperscript{34} Further, the \textit{Jana Yuddha} directly drove significant progress in Nepali democracy, including abolition of the monarchy, introduction of federalism, secularism and proportional representation of groups historically put at a disadvantage in various spheres of public and private life.\textsuperscript{35} Notwithstanding these, this article does not intend to be a political commentary on the legitimacy of the \textit{Jana Yuddha}, and, in any case, as a party to the conflict, the CPN-M was required to comply with IHL. However, it appears that the above self-perceptions guided the aims, policies and principles of the \textit{Jana Yuddha}, and hence those of the \textit{Jana Adalat}.

The aim, Common Minimum Policies and guiding principles of the \textit{Jana Yuddha}

The aim of the \textit{Jana Yuddha} was to form a counter-State with the motive of “supplanting the [existing State] to embark on a socialist revolution”.\textsuperscript{36} The aim was two-fold—a protracted military warfare and State-building, the latter planned to be realized through “[political] mobilization and construction of capacity”.\textsuperscript{37} The Common Minimum Policies of the \textit{Jana Yuddha}, as mentioned in the titular party document, included: (a) guarantee of non-discrimination; (b) equality of opportunity with equal wage; (c) inclusion of socio-economic rights as


\textsuperscript{32} I have described in another publication how the indicators of intensity and organization have been met based on the facts on the grounds. See Yugichha Sangroula, “Lest We Forget the Realm of Armed Conflicts: A Guided Discussion on the Law of Armed Conflict/International Humanitarian Law”, \textit{Kathmandu School of Law Review}, Vol. 7, No. 1, 2019, pp. 6–7.

\textsuperscript{33} CPN(M) and CPI-ML(PW), Joint Press Statement, 14 July 2000, cited in International Crisis Group, above note 29, footnote 10. Adversely, a political commentator has described the situation as a power trip, rather than a people’s war. Om Asta Rai, “What Was it All For: Revisiting the 40-Point Demand of the Maoists 20 Years Later”, \textit{Nepali Times}, 5 February 2016.


\textsuperscript{35} The CPN-M explicitly and consistently demanded for these reforms throughout the \textit{Jana Yuddha}.

\textsuperscript{36} Prachanda, “Two Momentous Years of Revolutionary Transformation”, in A. Karki and D. Seddon, above note 25, p. 212.

fundamental rights; (d) secularism (with religion as an individual choice); and (e) balance between democracy and centralism.\(^{38}\)

The chairperson of the CPN-M, Prachanda, explained that the *Jana Adalat* was an exercise of coercive power, whereas political, economic, social, cultural and educational activities in the so-called “liberated territories” were exercises of non-coercive power and this approach was based on the dialectic separation between construction and destruction.\(^{39}\) Policies particular to the *Jana Adalat* will be explored in the subsequent sections. In summary, the *Jana Yuddha* aimed to replace the then Government of Nepal and in that process the CPN-M gained control over parts of Nepal.

The extent of the CPN-M’s control over territory of Nepal

The *Jana Yuddha* was planned in three stages: strategic–defensive, equilibrium and strategic–offensive. Formation of “base areas” was part of the first stage.\(^ {40}\) Base areas were where the CPN-M exercised most control. First, following the CPN-M attack, the Government of Nepal “removed around 65% of the police units located in rural areas and merged them with units located in towns”,\(^ {41}\) after which the group took advantage of the authority vacuum and established their base areas in Rukum, Rolpa, Jajarkot and Sallyan. Soon after, the People’s Government, the People’s Committees, the People’s Court and the People’s Jail were created in the base areas.\(^ {42}\) The liberated areas became part of the “new regime”.\(^ {43}\) The expansion of the new regime was gradual\(^ {44}\) and aided by the formation of the People’s Liberation Army (PLA),\(^ {45}\) the prevention of state elections,\(^ {46}\) support of or dominance over local people,\(^ {47}\) and the near absence of state security caused by the vacated police units. In 2003, the CPN-M divided these liberated/controlled areas into various autonomous regions.\(^ {48}\)

---

38 *Common Minimum Policy & Programme of United Revolutionary People’s Council*, adopted by the First National Convention of the Revolutionary United Front of CPN-M, September 2001 (on file with the author). Policies (c) and (d) are particularly remarkable since the 1990 Constitution presented Nepal as a Hindu nation and did not recognize key socio-economic rights as fundamental rights. For example, food and health were not recognized as fundamental rights and rather as directive principles and state policies within Article 24(1) of the 1990 Constitution. For a detailed analysis, see Geeta Pathak Sangroula, “Breaking the Generation Theory of Human Rights: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal”, *Kathmandu School of Law Review*, Vol. 3, Human Rights and Democratization Special Issue, 2013, p. 36.


40 A. Karki and D. Seddon, above note 25, p. 31.


44 CPN-M, above note 3, p. 11.


46 “Revolution in Nepal”, above note 27, p. 3.

47 L. Onesto, above note 42, p. 128.

48 CPN-M, above note 3, p. 117.
The extent of the territory under the CPN-M’s control remains disputed. The CPN-M claimed to have “liberated more than 80% of the territory” and that ten out of twenty-three million people lived in these territories. In a survey, the International Bar Association traced de facto governance in twenty-three districts and a U.S. Army War College research project has reported the CPN-M’s “presence in 68 districts”. The CPN-M reportedly controlled all the borders in west Nepal. It has also been mentioned, however, that the CPN-M was “only able to control territory on a permanent basis in a few districts in the Midwest, including Rukum and Rolpa” and that it was unable to control district headquarters. It appears that the extent of control and influence varied, and the majority of the effective control was exercised in rural territories.

**The structure of the Jana Adalat**

The *Jana Adalat* was established around three years after the start of the NIAC. As a policy, it was supposed to be appointed by the (People’s) House of Representatives. However, this was aspirational and contingent upon the CPN-M’s war victory. During the NIAC, the *Jana Adalat* was actually established by the People’s Representative Council of the party. The CPN-M has stated that the *Jana Adalat* was comprised of three levels, namely the district courts, the appellate courts and the court of last resort, akin to the LTTE (Liberation Tigers of Tamil Eelam)-established court system in Sri Lanka. Village-level *Jana Adalat* seem to have also existed, but only sporadically. Although not mentioned in the CPN-M Public Legal Code itself, separate civilian and criminal courts seem to have existed in some districts. Most of the cases decided by the *Jana Adalat* were regarding “land and false bonds” and few were criminal in nature.

According to the CPN-M, district courts were three-in-one committees whose “[m]embers were elected on a 3-in-1 basis...40% from the Party, 20% from the People’s Army and 40% from the masses”. “Masses” generally stood

---

50 “Revolution in Nepal”, above note 27, p. 3.
51 International Bar Association, above note 2, p. 29.
52 S. D. Crane, above note 22, p. 13.
56 CPN-M Common Minimum Policy, above note 38, policy 18.
58 OHCHR, above note 4, p. 187.
59 S. Sivakumaran, above note 12, p. 493.
61 L. Onesto, above note 42, pp. 94–5.
for “mass [sister] organizations” of the CPN-M. Women were reportedly encouraged to join the three-in-one committees. Each appellate court consisted of a senior political cadre of the party, and the court of last resort consisted of three judges, including a member of the CPN-M Central Committee. Apparently, the Joint Revolutionary People’s Council of the CPN-M reserved a review power as the supreme legal authority over the entire judicial system.

The CPN-M Common Minimum Policy recommended that “masses should be involved in major counter-revolutionary criminal cases” in accordance with the principle of mass line-based people’s participation. The CPN-M Public Legal Code stipulated that the district court was the court of first instance and its decisions were subject to appeal. Hence, in principle, the Jana Adalat was conceived as a regular court system, as opposed to an ad hoc one.

However, these policies were most likely aspirational for the then emerging “new regime”, in the light of documented gaps between policies and practices of the Jana Adalat. To elaborate, first, between 1999 and 2003, or before the CPN-M Public Legal Code was enforced, there was admittedly a lack of uniform, objective and consistent normative standards in place. Second, throughout the NIAC, the actual structure of the Jana Adalat varied from one territory to another. To exemplify, in some areas, the District-in-Charge of the CPN-M, rather than the three-in-one committee, reportedly determined the verdict and punishment; whereas in some remotely located areas, the party leadership, the PLA or militia leaders usually performed the judicial functions. Third, in a few districts including Bardiya, Banke, Kailali and Kanchanpur the Jana Adalat reportedly operated out of stand-alone signposted buildings; otherwise, the courts were mostly mobile.

Legal status of the Jana Adalat according to the Government of Nepal

The Government understandably considered the Jana Adalat an illegal parallel system. The CPN-M members’ rebellion prima facie amounted to a crime against

---

64 Ibid., pp. 126–7.
65 Ibid., p. 174.
67 Ibid.
68 CPN-M Common Minimum Policy, above note 38, policy 19.
69 Ibid., policy 19.
70 CPN-M Public Legal Code, above note 49, section 20.
71 This is reflected in the preamble of the CPN-M Public Legal Code. Ibid.
72 OHCHR, above note 4, p. 91. However, the 2020 Commentary on GC III has suggested that courts can be composed from members of OAGs “as long as procedures are in place to ensure they perform their judicial functions independently and impartially”. ICRC Commentary on GC III, above note 7, para. 716.
73 OHCHR, above note 4, p. 187.
74 ICJ, above note 53, p. 8.
75 “Revolution in Nepal”; above note 27, p. 80.
the State by the virtue of “causing disorder with an intention to overthrow the government” as well as a “breach of public peace” and administration of the Jana Adalat qualified as multiple criminal offences including illegal detention, abduction, hostage taking and theft. It also amounted to a violation of multiple fundamental rights including personal liberty and freedom of movement. The gravity of the offence was aggravated when the CPN-M was declared a terrorist organization under an ordinance that later in April 2002 became the Terrorist and Disruptive Acts (Prevention and Punishment Act) (TADA). The Government also did not recognize the situation as NIAC. It typically “preferred instead to portray it as a fight against criminals and terrorists”. The Comprehensive Peace Agreement (CPA) did not recognize or give legal effect to the decisions of Jana Adalat, implicitly or explicitly, and to recall the conclusion drawn in the 2020 ICRC Commentary on GC III, that there is no obligation under common Article 3 for States to recognize or give legal effect to decisions of OAG courts. The CPA, however, implicitly vitiated the legal status of the Jana Adalat by requiring the CPN-M to restore criminal investigations according to prevailing law, and to cease activities that obstruct public agencies and employees. By virtue of the CPA, the Jana Adalat was subsequently dissolved on 18 January 2007.

The judiciary of Nepal has neither made any explicit observations regarding the legal status of the Public Legal Code and the Jana Adalat nor upheld any of its judgements. However, the Supreme Court of Nepal in a case concerning the arbitrary nature of the TADA, plainly observed that both preventive and punitive detentions should be “as prescribed by the law”. The Supreme Court of Nepal also implicitly took cognizance of the Jana Adalat when it concluded a case pending since 1984 after the latter issued its own verdict on the matter. This seems to be a stand-alone case, although existence of other similar but undocumented cases cannot be ruled out. Hence, a conclusion about the judiciary’s stance on the subject matter cannot yet be drawn, based on available evidence.

Legitimacy of the state laws and judiciary from the CPN-M’s perspective

CPN-M firmly classified the official Nepali legal system in two categories: (a) repressive legal provisions, such as those on public security, land administration

79 Constitution of Nepal, 1990, Arts 12(a) and 12(d).
81 ICRC Commentary on GC III, above note 7, para. 731; see the earlier section “Lawfulness of the courts established by organized armed groups”.
82 CPA held between Government of Nepal and Communist Party of Nepal (Maoist), November 2006, clauses 5.1.6, 5.2.11.
83 ICJ, above note 53.
84 Wenoj Adhikari v. HMG, DN 6487 (author’s translation).
and reform, taxation, exploitation of natural resources and parental property (which it considered discriminatory on the grounds of gender);\(^{86}\) and (b) agreeable legal values, such as the guarantee of fundamental rights and principles of natural justice.\(^{87}\) It asserted its right to rebel against an oppressive system\(^{88}\) and objected to “being placed in the same category as Bin Laden”.\(^{89}\) It also alleged that the Government of Nepal engaged in “state terrorism in the guise of democracy, constitution and human rights”.\(^{90}\)

The CPN-M alleged the State judicial system to be “a top to bottom corruption”.\(^{91}\) A judge of the Jana Adalat went as far as to say, “At state they ‘sell justice’ … it is a commodity of exchange.”\(^{92}\) As a general policy, the CPN-M did not cooperate with the State’s criminal investigations.\(^{93}\)

The “People” in the People’s War and the People’s Court

“People” as defined by the CPN-M

The CPN-M classified individuals as Janata (People) and Dushman (Enemy) and elaborated that “anyone can fall in the category of Dushman, regardless of their position, all that is necessary is animosity towards the Maoist movement, others are Janata”.\(^{94}\) This category was based on their ideologies of class struggle and Bargiya Pakshyadharita (class preference), derived from a narrative of historic oppressor and oppressed that not all social scientists agree with.\(^{95}\) Primarily, class preference seems to be arbitrary and contradictory to both common Article 3 and the CPN-M’s Common Minimum Policy. The CPN-M defended its position in section 2.1 of the CPN-M Public Legal Code, which reads “[this] law shall be based on class preference, however, everyone shall be entitled to the equal protection of the law”.\(^{96}\) Taking this into account, it appears that class preference can have relative interpretations. However, it cannot be concluded whether class preference is inherently and irreconcilably against the principle of non-discrimination without delving into its philosophy – doing so is outside the scope

---


\(^{87}\) B. R. Upreti, above note 43, p. 108.


\(^{89}\) CPN-M, above note 3, p. 17.

\(^{90}\) Prachanda, above note 36.

\(^{91}\) Arjun Karki, “A Radical Reform Agenda for Conflict Resolution in Nepal”, in A. Karki and D. Seddon, above note 25, p. 446.

\(^{92}\) ICJ, above note 53, p. 7.

\(^{93}\) L. Onesto, above note 42, p. 86.


\(^{96}\) CPN-M Public Legal Code, above note 49, section 2.1.
of this article. However, while reserving any detailed judgement of the theory, it appears that such class preference was discriminatory in practice as the CPN-M reportedly killed so-called “feudalists” and “royalists” in their power.97 In reference to the *Jana Adalat*, a report quotes an interviewee who said, “you have to be a Maoist to win a case”98 (referring to the *Jana Adalat*).

The People’s response towards the *Jana Adalat*

Multiple reports demonstrate a decline in the number of cases registered at state courts after 2001, although it is not clear whether the decline was significant.99 The decline was peculiar to rural areas, a significant proportion of which had come under the CPN-M’s control. It is reported that 90% of the cases were settled locally in some CPN-M-controlled/liberated areas.100

While the CPN-M stated that it had obtained the people’s mandate by consensus in the areas they had liberated,101 independent reports reveal that people were governed by a range of ways, including familiarity, sympathy, feeling of alienation from the State, revenge, co-option, fear and coercion.102 A report103 has classified people based on their relationship with the *Jana Adalat*, which can be summarized as: (a) CPN-M members, supporters or sympathizers; (b) people who found its procedures native and culturally appropriate, cost-effective and easily accessible in contrast to the state judicial system, particularly those residing in remote rural areas; (c) people who habitually sought out informal justice systems, even, in some instances, in serious criminal cases such as rape, who probably found the *Jana Adalat* an upgrade anyway; and, finally, (d) people who were coerced to cooperate.104

Regarding (d), documented instances include: restricting freedom of movement for official purposes, which could also cause statutes of limitations in cases such as rape to expire;105 compelling lawyers to hand over case files;106 threatening people not to use district courts, and threatening lawyers to prevent them from attending courts;107 creating a state of fear for lawyers, causing them

97 OHCHR, above note 4, p. 86.
101 M. Hutt, above note 94, p. 125.
106 International Bar Association, above note 2, p. 31.
to turn to other occupations or flee;\textsuperscript{108} murdering lawyers;\textsuperscript{109} creating barriers to the
delivery of subpoenas and execution of judgements;\textsuperscript{110} and making it difficult to
arrest or detain absconding offenders, and to execute penalties and
punishments.\textsuperscript{111} These coercions amount to multiple violations and were against
the CPN-M’s own policies and regulations that were based on a dialectic
separation between coercive and non-coercive exercise of power discussed earlier.

\section*{Essential guarantees at the Jana Adalat}

\subsection*{The regulations}

The definitions of crime and punishment were not uniform and consistent before
the CPN-M Public Legal Code was introduced. The members of the CPN-M
relied on the Maoist principle of “do not ill-treat captives” included in Mao’s
eight points for attention.\textsuperscript{112} Death penalties were given occasionally.\textsuperscript{113} Drug-
trafficking, smuggling, thievery, black-marketing, looting, murder, rape, domestic
violence and dowry were regarded as the greatest maladies in society.\textsuperscript{114}
Reportedly, shamanism, animal sacrifice and some Hindu festivals were
forbidden, especially in the base areas.\textsuperscript{115}

Nonetheless, the CPN-M Common Minimum Policy which applied from
the beginning of the NIAC contained some guidelines for the administration of
justice. It stated that the “security organs shall exercise the functions and rights of
the procuratorial organs”\textsuperscript{116} and that office-bearers or state organs of the People’s
Government were liable for disciplinary action or criminal prosecution if they
violated the laws (of the People’s Government) or did not discharge their duties
property. People had the right to lodge complaints in such matters against the
office-bearers.\textsuperscript{117}

The CPN-M Public Legal Code was designed to implement the Jana Adalat.
Part 3 of the Code described the crimes and punishments. Crimes were broadly
categorized as serious and simple offences, including: crimes against the State,
corruption, homicide, foeticide and infanticide, battery, looting, arson, soliciting
prostitution, extra-marital sexual intercourse, incest, rape (including statutory
rape), theft, fraud, forgery and narcotic offences. Punishments were classified as
simple punishment, imprisonment, labour imprisonment, fine and fine along
with confiscation of property. The maximum term of imprisonment was ten

\begin{footnotes}
\footnotetext{108} Ibid.
\footnotetext{109} Ibid.
\footnotetext{110} ICJ, above note 53, p. 19.
\footnotetext{111} Ibid.
\footnotetext{112} Mao, above note 30, pp. 343–4.
\footnotetext{113} ICJ, above note 53, p. 11.
\footnotetext{114} CPN-M, Declaration of the Beginning of the Jana Yuddha (on file with the author). L. Onesto, above note 42, pp. 75–6.
\footnotetext{115} I. Zerkevich, above note 102, p. 232.
\footnotetext{116} CPN-M Common Minimum Policy, above note 38, policy 19.
\footnotetext{117} Ibid., policy 21.
\end{footnotes}
years. In cases of damage to property, interim relief was the liability of the accused and compensation was the liability of the convict. The Code did not prescribe a death penalty.\textsuperscript{118}

Part 2 of the CPN-M Public Legal Code outlined the principles of criminal law and procedure, notably including: non-discrimination; accessible and affordable justice; the right to a defence; reformatory justice; preference of “real justice” over “legal justice”; natural justice; creative application of the law; evidence- and legal criteria-based justice; and the dynamic nature of law.\textsuperscript{119} Part 3 specified that: punishment should be proportionate to the severity of the crime; crime should be eliminated, not the criminal; crime control requires identification of the root of the problem; and forgiveness over tit-for-tat.\textsuperscript{120}

Further, part 11 of the CPN-M Public Legal Code described the aspects of the trial procedure, which were: right to make a complaint (with one year as the statute for limitation for all crimes); investigation of the crime, recording of any witness(es)’ statements, the collection of further evidence, filing of a charge-sheet, the record of testimonies, evaluation of evidences, judgement, sentencing with right to appeal and execution of judgement.\textsuperscript{121}

The CPN-M reportedly organized seminars in mid-western Nepal to introduce its Public Legal Code.\textsuperscript{122}

In 2006, towards the end of the NIAC, the CPN-M introduced another regulation titled \textit{Karyabidhi Sambandhi Kanooni Byawastha}\textsuperscript{123} (Provisions related to Procedural Law) as a complementary regulation to the CPN-M Public Legal Code. Some of its remarkable provisions included: (a) the requirement of written, scientific and organized documentation of evidence; (b) a stated prohibition on custodial torture; (c) the requirement of specific charges in a charge-sheet; (d) a right to file counterstatements; (e) the introduction of standard templates for various stages of trial; (f) a requirement of an arrest warrant; (g) provision for judicial custody; (h) the introduction of standard templates for steps involved in criminal procedure; and (i) the introduction of probation and parole.\textsuperscript{124}

Concerns could be raised about whether the phrase “real justice” in the CPN-M Public Legal Code endangered fair trial by being a possible leeway for justifying summary justice, especially since as discussed earlier, the CPN-M had admitted to a lack of uniform standard of justice in liberated/controlled territories before the Code’s enforcement. Another observation, upon a thorough reading of the Provisions related to Procedural Law, was that it did not clarify the process of appeal. Nonetheless, it can be deduced that these provisions indicate an endeavour to provide essential guarantees of fair trial. Further, during the NIAC in Nepal, provisions of probations and parole had not been introduced in the

\textsuperscript{118} CPN-M Public Legal Code, above note 49, part 3.
\textsuperscript{119} \textit{Ibid.}, part 2.
\textsuperscript{120} \textit{Ibid.}, part 3.
\textsuperscript{121} \textit{Ibid.}, part 11.
\textsuperscript{122} ICJ, above note 53, p. 11.
\textsuperscript{123} CPN-M Provisions related to Procedural Law, above note 6.
\textsuperscript{124} \textit{Ibid.}, chapter on criminal procedure.
criminal justice system of Nepal; it can be deduced that these particular aspects of the criminal justice system operated by the CPN-M were more progressive than those of their state counterpart. Lastly, it can also be observed that although the regulations were absent at the beginning of conflict, they gradually developed throughout the NIAC.

**Documented misconduct**

Notwithstanding the above-mentioned regulations, independent studies have *prima facie* revealed several instances of misconduct in various phases of trials that took place in the *Jana Adalat*, which could amount to a violation of both common Article 3 and the regulations of the CPN-M. These include instance of torture,\(^{125}\) mutilations,\(^{126}\) public humiliations as punishment,\(^{127}\) gender-insensitive interrogation,\(^{128}\) beating, lashing and slapping as punishments,\(^{129}\) treatment of juveniles as adults\(^{130}\) and execution for failing to heed summons.\(^{131}\) Notably, while public pronouncement of judgement is regarded as an essential guarantee,\(^{132}\) in contrast, using public humiliation as punishment is a clear violation of sub-article 1(c) of common Article 3.

Furthermore, the *Nepal Conflict Report* reported the following instances as violations of the principles of independence and impartiality:

No formal criteria for the qualification or selection of “judges”; No defence lawyer present in most proceedings; Poor case management and a lack of formal records kept by the courts; A common bias in favour of the complainant; No requirement for witnesses to take any form of oath before giving evidence.\(^{133}\)

Other reported practices that may amount to violation of the above principles include: that courts were presided over by local Maoist militia and did not employ legal professionals;\(^{134}\) that detainees were moved around frequently and not given access to their relatives initially;\(^{135}\) that accused spies were executed with insufficient evidence.\(^{136}\) The OHCHR reported a lack of uniformity, proper management and transparency\(^{137}\) in the administration of

\(^{125}\) OHCHR, above note 4, p. 126; L. Onesto, above note 42, pp. 74–5.
\(^{126}\) OHCHR, above note 4, p. 125.
\(^{127}\) M. Hutt, above note 94.
\(^{128}\) ICJ, above note 53, p. 13.
\(^{130}\) OHCHR, *ibid.*, p. 5.
\(^{131}\) OHCHR, above note 4, p. 129.
\(^{132}\) ICRC Commentary on GC III, above note 7, para. 722.
\(^{133}\) OHCHR, above note 4, p. 90.
\(^{135}\) OHCHR, above note 129, p. 5.
\(^{136}\) OHCHR, above note 4, p. 87.
\(^{137}\) OHCHR, above note 129, p. 8.
Jana Adalat, as also admitted by the CPN-M, as mentioned in the previous section. These may have, depending on the circumstances, amounted to violations of the principle of independence and impartiality, that in turn amount to summary justice.

Challenges before the Jana Adalat

First, the NIAC seems to have evolved quicker than anticipated by the CPN-M in its military strategy of a protracted war. While from the outset the Party preached that the Jana Yuddha was not going to be “smooth and easy”, it admitted to making mistakes and having weaknesses and inadequacies. Further, the Party gradually shifted from “a global Maoist revolution” to a “more nationalist disposition” and from “new democracy” to “a transitional republic” which was more sympathetic towards multi-party democracy. It is plausible that these political shifts significantly impacted the policies and practices of the Jana Adalat. Further, as mentioned earlier, the Jana Adalat was instituted within three years after the start of the NIAC. By contrast, the LTTE courts in Sri Lanka were instituted ten years after the start of the conflict. The Jana Adalat was a prototype for CPN-M, and its evolution was gradual. Notably, soon after the somewhat comprehensive criminal procedures discussed in the earlier section were introduced by the CPN-M, the NIAC in Nepal terminated. Hence, it is difficult to draw conclusions regarding the impact of this particular regulation on the administration of the Jana Adalat.

Second, the CPN-M encountered challenges in determining the qualification of the judges and in selecting them in a manner commensurate with common Article 3 as well as with their own policies and regulations. The Jana Adalat mostly operated in rural areas, most of which were remotely located and where a lack of formal education had been a perpetual concern. Recruitment in the CPN-M was strongest among “School Leaving Certificate Failed” non-brahmins of rural communities. Most of the judges were local, in accordance with the Maoist principles of cultural revolution and democratic centralism. Hence, selection of individuals with legal education as judges was generally unviable. Further, when the TADA was promulgated, many lawyers who supported, provided legal counsel to or were members of the CPN-M were subjected to preventive detention without habeas corpus and some went missing or were killed. It is plausible that these actions of the State deterred legal professionals from volunteering as both judges and legal counsels in the Jana Adalat. However, it is also plausible that the paucity of legal professionals was

139 M. Miklaucic, above note 34, p. 205.
140 Ibid., p. 10.
141 S. Sivakumaran, above note 12, p. 493.
142 S. D. Crane, above note 22, p. 15.
143 International Bar Association, above note 2, pp. 31 and 32; ICJ, above note 134, p. 4.
caused by the CPN-M’s own coercion directed at lawyers and judges, who consequently fled CPN-M-controlled areas.

Notably, both the CPN-M and the earlier mentioned practices corroborate that members of the Party, militia and PLA were involved as judges in the Court. While such practices *per se* do not necessarily violate the principle of independence under common Article 3, the competence of such judges was questionable. The CPN-M has admitted to a lack of proper training of its members particularly after the NIAC intensified in 2001. This obviously extends to the members appointed as judges in the various levels of Jana Adalat. Further, local compliance was also a challenge for the CPN-M as the interpretations of Maoist ideology varied from village to village, and were adapted for those with little experience with politics, in familiar terms.

The third challenge concerns resource constraints. The Jana Adalat was a war-time judicial system, and its creator, the CPN-M, was engaged in an inherently resource-intensive war against the Government of Nepal. The 2017 Garance Talks identified lack of resources as a common characteristic among armed groups. Somer has discussed the apparent difficulty faced by OAGs in providing judicial guarantees “due to factual capabilities”. Sivakumaran has observed that it is particularly challenging for OAGs to provide the necessary means of defence and that the right to adequate time and facilities in armed conflict differs from a time of relative peace. One of the resource constraints faced by the CPN-M was the lack of legally trained judges discussed above. However, further independent studies are necessary to fully identify and examine the implications of the resource constraints faced by the CPN-M in the administration of Jana Adalat.

Conclusions

Common Article 3 of the 1949 Geneva Conventions prohibits summary justice and since this provision binds OAGs, the CPN-M had an obligation not to carry out summary justice during the NIAC that took place in Nepal. The legitimacy of the Jana Adalat operated by the CPN-M is unclear from the perspective of international law, although the domestic law of Nepal clearly deemed it illegal. The stance of the Nepali state judiciary towards the Jana Adalat is inconclusive and further research is required in this regard, especially since it seems to have taken implicit cognizance of one judgement of the Jana Adalat.

144 ICRC Commentary on GC III, above note 7, para. 716.
145 “Interview with Prachanda”, Kantipur Online, 8 February 2006 (on file with the author).
148 J. Somer, above note 14, p. 676.
149 S. Sivakumaran, above note 12, p. 504.
150 Ibid.
Regarding the CPN-M itself, the OAG not only asserted the legitimacy of the *Jana Adalat*, but also formulated regulations to enforce it. These regulations reflect the OAG’s intention to provide judicial guarantees. However, the article raised two concerns pertaining to the regulations, which were the idea of “real justice as opposed to legal justice” and the lack of appeal procedures. It was also observed that the provisions of parole and probation included in these regulations were absent in the state judicial criminal system during the NIAC and to this extent the criminal justice system of the CPN-M was more progressive than that of the state counterpart.

Having said that, the gaps between regulations and policies on one hand and the practices on the other, of the *Jana Adalat*, led to a conclusion that the CPN-M may well have violated the essential guarantees enshrined in common Article 3 and its own policies and regulations. Given the extent of the violations, the proceedings of the *Jana Adalat* may well be termed summary justice. Lastly, the rapid evolution of the NIAC and shifts in CPN-M policies, difficulties in selection of competent judges and resource constraints were identified as challenges in the administration of *Jana Adalat*. 
Whose perception of justice? Real and perceived challenges to military investigations in armed conflict

Claire Simmons
Claire Simmons is a PhD Candidate at the University of Essex Law School and Human Rights Centre.

Abstract
States must investigate possible violations of international humanitarian law in armed conflict, and many States use military procedures for all or part of the investigation process. Particular tensions can arise with regard to the perception of justice in the context of military judicial procedures, especially surrounding questions of independence and impartiality. This article lays out the international legal framework which should be used to solve these challenges, arguing that a State must address both the specificities of military institutions and the need for a perception of justice by the affected communities in considering the proper administration of justice in armed conflict.

Keywords: military justice, investigations, IHL violations, independence and impartiality, perception of justice.

Introduction
States must investigate possible violations of international humanitarian law (IHL) in armed conflict, and many States use military procedures for all or part of the investigation process, especially for extraterritorial military operations. IHL gives
very little explicit guidance on how such procedures must be carried out, and although the standards under international law are beginning to gain more clarity, there remain key challenges to determining the legality or illegality of certain military-led procedures. Particular tensions arise with the perception of justice in the context of military judicial procedures, especially surrounding questions such as whether independence is possible within a chain of command, or how military culture might affect impartiality. In addition to these challenges, the nature of an armed conflict itself can often lead to aggravated distrust of State institutions, leading to particular difficulties in establishing a perception of justice.

This article lays out the international legal framework which should be used to solve the challenges surrounding a perception of justice with regard to military investigations into possible violations of IHL. It focuses on the concept of an effective investigation into violations of IHL, and what effectiveness means, in legal terms, when it is a military institution engaged in an armed conflict which is tasked with carrying out the investigation. The article argues that certain specificities of military institutions must be taken into account in determining the adequate standards of independence and impartiality of investigations, and that in many cases these can be adequately dealt with through due diligence and a careful application of existing judicial norms. However, the unique context of each armed conflict and the perception of justice by the affected communities may raise questions that are yet to be fully answered by the law.

Investigations into violations of IHL and issues surrounding military justice are both under increasing scrutiny in the legal and policy sphere in armed conflict. There is not always consensus between IHL lawyers, human rights lawyers, civil society actors and military practitioners as to the answers to some of these challenges. The very broad scope of what is understood as a “military justice system” means that criticisms of one specific system may be taken out of context and assumed to represent flaws inherent to all military systems. In order to hold States and their military institutions to account when violations of IHL are alleged, it is necessary for scrutiny into their actions to be based on legal reasoning. Existing literature addressing the adequacy of military institutions does not necessarily examine the whole scope of challenges which may affect the administration of justice in armed conflict. To this end, this article finds it helpful to divide the challenges facing military investigations into actual structural requirements for effectiveness on the one hand, and more abstract or perceived obstacles, which may nonetheless need to be addressed, on the other. Furthermore, it is important to clarify such obligations from an IHL perspective, including in assessing what reasonableness in investigating means.

The article begins in by addressing the legal framework and standards applicable to investigations into possible violations of IHL under international law, and how military institutions can contribute to effective investigations. The article then addresses one element which is often considered to undermine the effectiveness of military investigations – namely, their ability to be independent and impartial. Following this, the article examines the matter of the perception of justice when it comes to military investigations, and the challenges of achieving a
perception of justice in situations of armed conflict. The article concludes that there are structural and cultural obstacles to effectiveness which must be addressed in a military setting, but that there are also important measures related to improving the perception of independence and impartiality which must be considered by States when faced with possible violations of IHL. The ways in which investigations are carried out have a real humanitarian impact due to their role in addressing the rights of both victims and those suspected of committing violations. It is therefore important to gain further clarity at the legal and theoretical level as to how justice can and should be carried out in armed conflict.

Framework for investigations in armed conflict

In assessing whether a State investigating a possible violation of IHL is complying with its international legal obligations, it is necessary to understand the legal framework of an effective investigation. A State will need to consider, in each circumstance, how the nature of an investigator (for example, whether they are civilian or military) may contribute to or hinder the effectiveness of the investigation. This section lays out the applicable international legal framework, and some of the ways in which military investigators are usually considered to contribute towards effectiveness in investigating.

Investigations must be effective

Despite the lack of explicit guidance in treaty law, it is clear that States have an obligation to carry out some form of investigation into serious violations of IHL. The form that such an investigation will take (for example, whether it is criminal or administrative in nature, and the standards applicable) may well depend upon the nature of the alleged violation and the context. In all cases, however, investigations must be “effective” – that is, they must be carried out in a manner

---

appropriate to the context in order to enable a determination of whether there was a violation of IHL.\(^2\) Five general principles are generally recognized as contributing towards this effectiveness: independence, impartiality, thoroughness, promptness and transparency.\(^3\) These are not absolute principles, but rather need to be adapted to the context in which the investigation is being carried out, and must be employed in a manner which contributes to the investigation’s overall goal.

The concept of “effectiveness” also implies an element of reasonableness, insofar as States have an obligation to use in good faith all reasonable means to achieve the investigation’s goal.\(^4\) What is considered “reasonable” will depend on the practical context, but also on the particularities of the applicable law in question.\(^5\) International human rights bodies, for example, have taken into account situations of armed conflict in determining what effectiveness in investigating means.\(^6\) Courts under international criminal law have also assessed what is required under the obligation on commanders to take all “necessary and reasonable measures” to repress war crimes (which can include investigative duties).\(^7\) Under IHL, the concept of reasonableness may be usefully informed by the fundamentals of the body of law, namely the “compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other”.\(^8\) This balance is used in the general interpretation of the concept of what is “feasible” in the context of precautions in attack in the conduct of hostilities under IHL.\(^9\) What

---

2 Guidelines on Investigating Violations of IHL, above note 1, para. 32.
is considered “reasonable” in the context of IHL is therefore dictated by the core of the body of law, thus taking both military necessity and humanity as the balancing factors in understanding the content of this reasonableness. When a State is faced with decisions of prioritization of resources, or security risks for its personnel in investigating, both these elements must therefore be considered in finding the correct way forward. When considering the role of military institutions in investigating, and what structural and other safeguards may be put in place, States must consider, in good faith, what reasonable measures can be taken.

The role of the military in effectiveness

In situations of possible violations of IHL committed by a State’s armed forces, it will often be military personnel who are legally and/or practically able to investigate initially. Legally, this may be because it is the military that has jurisdiction over offences committed extra-territorially (if applicable), or, more rarely, because an exceptional jurisdictional arrangement (such as “wartime” jurisdiction) has been triggered which expands military jurisdiction. It may also be because the alleged violation is not criminal in nature, in which case it will most likely be a matter which only the military can deal with (such as administrative offences). Practically, it may simply be that civilian police are not able or willing to come to the scene of the incident because of security risks, or at least not promptly enough to serve the effectiveness of the investigation. There are other reasons why military investigators may be preferred, such as the need for expertise in the matter under investigation, obligations arising under command responsibility, and a commander’s need to maintain discipline over their troops.

---


10 This article focuses on violations committed by a State’s own armed forces. Although duties to investigate may arise in other contexts and for other actors, different considerations may apply in such contexts, especially related to the perception of justice.


As noted above, investigations into serious violations of IHL must be effective, and the adequacy of the reasonable measures put into an investigation must be assessed in light of this effectiveness. There are multiple ways in which effectiveness can be served by the use of military institutions in situations of armed conflict, not least because these are often the actors most promptly and safely able to access scenes of potential violations. With this in mind, it is however important to consider the ways in which the use of military institutions may undermine effectiveness in investigating.

It is important to note at this stage that both legal and practical obstacles to the involvement of civilian investigators can potentially be overcome. Laws can be changed, and civilian police can be trained and equipped to accompany armed forces. This article will not cover the full scope of arguments for and against the use of military versus civilian jurisdiction; rather, it will focus on the fact that military personnel are often de facto and de jure involved in investigations into alleged violations of IHL, and that there are at least some ways in which they can contribute to effectiveness in investigating. In light of this, what challenges arise, and can they be overcome?

**Independence, impartiality and effectiveness for military investigations**

Perhaps one of the biggest causes of contention regarding the effectiveness of any military investigation into possible violations of international law is the matter of independence and impartiality. It is often perceived that if military personnel investigate a member of the armed forces for alleged (criminal) offences, this is nothing more than “the military investigating itself”, and an expectation exists that a finding of wrongdoing would have no credibility. There are many different assumptions which arise in such criticisms, some more legitimate than others, and not all can be covered here. This section addresses two of the main elements which are believed to be most relevant to this concern – namely, how the independence and impartiality of investigators may be affected by military hierarchies on the one hand, and military culture and values on the other. Both these elements must necessarily be taken into account when seeking to establish an effective investigation.

**Military hierarchy**

The factor which has most commonly been examined in light of the independence and impartiality of military investigations (and trials) is how military hierarchies...
may affect these standards. Indeed, the unique relationships of subordination and discipline within armed forces are known to create dynamics which necessarily need to be taken into account in judicial proceedings. It is important to highlight first that the standards of independence and impartiality are not absolute standards in the context of investigations; an investigation may not necessarily be found to be ineffective simply because one of the standards is not fully met. What matters is whether, overall, the standards of independence and impartiality (alongside the other principles of thoroughness, promptness and transparency) were sufficient to contribute to the effectiveness of the investigation, in light of the circumstances at the time. The use of military investigations does not necessarily, on its own, violate the required standards of independence and impartiality, though structural safeguards need to be set up for this to be possible.

An impartial investigator is expected to be able to make decisions related to the investigation (for example, in the collection of evidence) based solely upon the relevant facts of the case and the law or regulations applicable to the investigation procedures. Disciplinary or administrative powers (including both negative powers, such as demotion, and positive powers, such as promotion) over a judicial officer may lead them to consciously or unconsciously take into account whether their superior will approve or disapprove of the investigative decisions being made. If such a superior is considered to have an interest in the case, this is particularly problematic for the subordinate’s ability to make impartial decisions, as an investigator should be sufficiently independent of persons whose responsibility is likely to be engaged. An investigator should therefore not be institutionally or practically subordinate to anyone personally implicated in an alleged violation.

However, being a superior to an individual implicated in a violation may also occasionally be problematic. There are specific obligations incumbent upon commanders with regard to the repression and suppression of violations of IHL, as elaborated inter alia under international criminal law and the notion of command responsibility for war crimes. These obligations involve a duty either to directly suppress or repress (for example, through disciplinary action) or to report to the competent authority who may effectively suppress or repress the violation. Courts examining this notion have found explicitly in certain cases that a commander has a duty to carry out an effective investigation into war crimes. Nevertheless, this duty must be considered in light of developments in international law. It is clear that an investigation into possible criminal liability

18 ECtHR, Tunç, above note 17, para. 223; IACHR, Favela Nova Brasil, above note 17, para. 189; ACHPR, Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, Case No. 279/03-296/05, Decision, 27 May 2009, para. 150.
cannot be carried out by those directly implicated in the violation being investigated.\textsuperscript{21} Regardless of the role that the commander had in the commission of the possible war crime, the very notion of command responsibility means the commander is implicated in some way, as their responsibility is one of the elements of liability that must be investigated.\textsuperscript{22} In such cases the effectiveness of the investigation may very well mandate that it be removed from the responsibility of the commander and passed on to a further authority. This will most likely be a military or civilian law enforcement agency, depending on the domestic system.\textsuperscript{23} As international law currently stands, it is reasonable to suggest that in the case of war crimes, a commander should “discharge their duty to investigate by reporting and referring the case” to the relevant professional body for investigation.\textsuperscript{24} This should not, however, be seen as withdrawing all authority from a commander; indeed, they will still have a crucial role to play in the initial stages and triggering of investigations, and domestic structures should reflect this responsibility.\textsuperscript{25}

It may therefore be suggested that an investigator needs to be outside the chain of command from those possibly implicated. Yet in practice, this is complicated by the difficulty in determining precisely what constitutes “the chain of command” in any individual case, as chains of command are usually less like “chains” and more like a tree with many roots. Within the same armed forces there may be multiple branches of command, sometimes under the same single head (for example, under the commander-in-chief, who may be the political leader of the State). This raises questions with regard to the actual relationships of subordination and command, and how these may impact the personal independence of investigators. It is not the fact that an investigator is in a chain of command that is problematic, but rather which chain of command and where in the chain of command the individual holds their place. Even within a civilian justice system, there are hierarchical structures which may have the potential to create problems for impartiality if junior officers feel under pressure by more senior members to make certain judicial decisions. Independence can be threatened within the judiciary itself through administrative and personnel pressures exerted by senior judges over judges lower in the hierarchy.\textsuperscript{26} Such pressures, therefore, are not unique to military hierarchy but rather relate to general requirements of personal independence for investigators to be free from any undue influence. In some institutions, military judges, and sometimes

\begin{itemize}
  \item A. Margalit, above note 6, p. 69.
  \item See \textit{ibid.}, pp. 153–183.
  \item \textit{ibid.}, p. 65.
  \item Guidelines on Investigating Violations of IHL, above note 1, Guideline 2; A. Margalit, above note 6, p. 188.
\end{itemize}
investigators, have a separate chain of command from military personnel participating in military operations, and may report directly to the judicial instead of the executive branch of government. Unless the suspect under investigation is a member of the military judicial chain of command (for example, a military judge or member of the military police), it should not be a problem that the investigator is in a military chain of command; rather, the issue is whether their chain of command is sufficiently free from undue pressure exerted by the chain of command implicated in the violation.

It is beyond the scope of this article to cover all structural requirements for an independent and impartial investigation, and how such requirements may differ in the context of non-criminal violations of IHL. However, it is clear that there are certain structural safeguards which must be met for any military judicial institution to be considered legitimate, and that it is possible for military investigations to be considered sufficiently independent and impartial to be effective.

Military culture

There are, however, concerns beyond the structure of military institutions which may be said to affect the independence and impartiality of military investigators. In a similar fashion to investigations into police misconduct, there is an assumption that there are factors within military life and military culture which will affect the impartiality of investigators, regardless of any structural guarantees of independence that may be in place (for example, even if the investigator is outside the operational chain of command).

Most pertinently, the concept of loyalty, a value which is encouraged in professional military forces, may be seen as hindering the administration of justice. Specifically, the argument posited by some observers suggests that military personnel will necessarily seek to protect the personal interests of other military personnel out of a sense of institutional loyalty, beyond the interests of justice. It must be noted first of all that the counter-argument is also put forward, at least in theory, that the right type of loyalty to an institution may in fact have the opposite effect on impunity. This argument suggests that rather than military personnel being more likely to want to “conceal their part in the situation or to downplay the seriousness of the alleged crime”, it would in fact be in the interests...
of the military to hold a soldier accused of violations accountable and to “isolate him or her from the armed forces as a whole by describing the soldier as a ‘bad apple’ and thus restore the public image of the armed forces”\(^{30}\).

However, it is also true that a certain type of “toxic loyalty” has led to attempted cover-ups of violations\(^ {31}\). Such toxic loyalty may lead to a “wall of silence”, a “closing of ranks” or “selective memory loss” by military personnel in the face of investigators, as members of a unit may believe that ethically, and perhaps even militarily, the right thing to do is to cover up for misconduct by their peers\(^ {32}\). However, this is not a matter of independence and impartiality, but rather affects an investigator’s (whether civilian or military) ability to access and collect evidence, or the triggering of the investigation in the first place. This is extremely problematic for the administration of justice in military contexts, yet it cannot be addressed by providing more independence; in fact, it would appear that the more independent an authority would be, the more the ranks would close. A “wall of silence” is likely to occur precisely because an independent investigator is perceived to be outside of the loyalty sphere which is seeking to preserve certain interests\(^ {33}\).

On the other hand, if the investigator is themself included within a subgroup of toxic loyalty which has developed a separatist mentality from the applicable laws and regulations, it could be expected that this investigator may hold a bias towards those under investigation, usually leading the investigator to act more favourably towards their peers, above the interests of justice\(^ {34}\). In such a case, it would seem necessary to provide further independence so as to ensure impartiality. Nevertheless, it would be necessary to be able to determine the exact scope or catchment of this loyalty. Is a military member expected to be problematically loyal to their unit members, their battalion, their service, or the

---

30 Peter Rowe, “How Well Do International Human Rights Bodies Understand Military Courts?”, in A. Duxbury and M. Groves (eds), above note 11, p. 28.

31 The effects of in-group loyalty on cover-up attempts are not unique to armed forces, and have been observed, for example, within private companies (Timothy G. Kundro and Samir Nurmohamed, “Understanding When and Why Coverups Are Punished Less Severely”, *Academy of Management Journal*, Vol. 64, No. 2, 2021). The phenomenon is, however, particularly problematic in contexts involving potential use of State-sanctioned lethal force such as police and military personnel (Marie Ouellet, Sadaf Hashimi, Jason Gravel and Andrew V. Papachristos, “Network Exposure and Excessive Use of Force: Investigating the Social Transmission of Police Misconduct”, *Criminology & Public Policy*, Vol. 18, No. 3, 2019, p. 679). For an example of how toxic loyalty has impeded military investigations, see Philip McCormack, “Case Study 1: Levels of Loyalty: Country, Service, Mission, Troops”, in Michael Skerker, David Whetham and Don Carrick (eds), *Military Values*, Howgate Publishing, Havant, 2019.


33 This closing of ranks has been observed in various cases, such as the Baha Mousa scandal involving the British Armed Forces (P. McCormack, above note 31, p. 88) and the war crimes allegedly committed in Afghanistan by the Australian Defence Force, as detailed in the Brereton Report (D. Whetham, above note 32, p. 504).

armed forces as a whole? This issue may not necessarily be addressed by simply replacing a military investigator with a civilian one; indeed, even broader/alternate catchments can be envisioned, such as nationality, ethnicity, religion or political affiliation. It is worth considering that problematic loyalty affiliations are not confined to armed forces, and in the context of an armed conflict, problematic loyalties may well be drawn along the lines of “sides of an armed conflict” rather than belonging to a particular military institution or not.

There are, therefore, specificities unique to military institutions which can raise concerns with regard to these institutions’ ability to carry out effective investigations. Some of these concerns relate to the personal independence of investigators, which must be secured through adequate structural safeguards such as separate chains of command and other sufficient guarantees of independence from undue pressure. Other concerns appear to be related to problematic forms of loyalty which may be more likely to arise in a military setting, and which may not be adequately addressed through structural safeguards. Preventing and addressing such forms of toxic loyalty requires shaping adequate leadership within the armed forces, as well as appropriate training and effective sanctions of problematic behaviour in order to ensure that the “right type” of loyalty and values are upheld in the conduct of military operations. Insofar as these factors may affect the effectiveness of investigations, States will therefore have to take them into account in addressing accountability mechanisms.

The perception of justice in armed conflict

The above section considered the specificities of military institutions that may hinder the effectiveness of investigations in practice. Yet the need for a perception of justice, even for investigations, leads to some additional, difficult questions regarding what justice can and should mean in situations of armed conflict. Even if military investigations are independent and impartial enough to be effective, with adequate safeguards in the chains of command and no presence of toxic loyalty found to be promoting impunity, what role should the perception of justice have on the use of military investigations? And how can a State increase such a perception in armed conflict?

The role of the perception of justice for investigations

Although the standards applicable are not the same, both trials and investigations serve the administration of justice, and both must serve to contribute to the legitimacy of the State as the body with the monopoly over the use of force, and as a fair arbitrator over disputes. It is therefore crucial that justice is not only

37 See C. Simmons, above note 12, pp. 20–21; ECtHR, Tunç, above note 17, paras 219–225.
done but is also seen to be done, at both the investigative and trial stages. Indeed, the public must trust that the judicial system is fair, or it may withdraw its confidence in the State’s ability to function as a legitimate government.39 Nationals who withdraw their trust in the legitimacy of the State are likely to take justice and the use of force into their own hands; this can be seen in situations of armed self-defence groups that perceive their governments as corrupt.40 A perception of justice is therefore as crucial as justice itself in seeking to establish the rule of law. An element of this perception is the need for “objective” impartiality – namely, the need for the appearance of (as well as factual) impartiality, which is crucial for the “confidence which the courts must inspire in the public in a democratic society”.41

There are various problems that arise when trying to apply this requirement for the perception of justice to military investigations in armed conflict. First, the need for independence and impartiality in adjudication appears to stem from a nation-State-centric theory, although it has transcended to the international sphere through international human rights law.42 It is undoubtable, therefore, that this idea holds most traction when it is a judicial body seeking to adjudicate over its own citizens, with whom a government is seeking to maintain legitimacy. What, then, can this mean for a State seeking to adjudicate on matters which may affect individuals beyond its own citizens, such as in extra-territorial armed conflicts? Furthermore, what does this mean for an internal conflict whose roots may lie in the very lack of trust in State institutions by a section of the population? These questions are not limited to situations of armed conflict, as similar crises of legitimacy are frequently seen in other contexts – for example, with police forces in their relationship with religious or ethnic minorities.43

In seeking to tackle this issue, it is important to address whose perspective is determinative in establishing the perception of justice. Some of these concerns are raised in contexts of occupation, or when a State is investigating or prosecuting individuals who are not members of its own armed forces,44 where the accused or suspect may doubt the legitimacy of the proceedings. For a State investigating its

---

43 M. Ouellet et al., above note 31, p. 676.
own armed forces for alleged violations, the tensions usually lie with the perception by the victim or other individuals affected by military operations and judicial proceedings. However, the test generally accepted in assessing objective impartiality in courts and tribunals under fair trial rights is that of a “reasonable observer” in the general public, insofar as it is the public’s confidence in the courts which must be maintained through the objective test. It is therefore not only the perception of the accused, or indeed the victim, that matters in determining whether a lack of perception of impartiality is “objectively justified”, but rather that of the broader community. This may involve not only the communities affected by the possible violations, but also the broader international community, as the State’s obligations to investigate arise under international law, not domestic law. This may require that the investigation is also perceived to be independent and impartial from an international perspective, regardless of whom a violation is alleged to have been committed against.

How can the perception of independence and impartiality be improved in armed conflict?

With this in mind, it may be asked what can be done to improve the perception of independence and impartiality of investigations in armed conflict, given the difficulties in measuring such an abstract element. There is not one blanket answer for these challenges, and the adequate measures will always depend on the individual context, but there are some steps that can serve to enhance a perception of independence and impartiality.

One measure which may be taken to improve the perception of justice is to increase the level of civilian involvement in military justice. Many States have been moving towards a “civilianization” of military justice, which can mean anything from increased oversight to actual elimination of some forms of military justice. At a domestic level, the increased role of civilian oversight over military justice can be seen as improving legitimacy because of the need for balanced civil–military relations in a democratic State. Civilian oversight can also aid in legitimacy even when it is only military actors who may be able to investigate, which, as seen above, may be the case in some conflict situations. However, it must also be remarked that replacing military actors with civilian ones may not always solve the issue at hand – for example, if the “toxic loyalty” described above extends to civilian actors, and more generally if civilian actors are also corrupt.

46 ECtHR, Piersack, above note 41, para. 30.
47 ECtHR, Hauschildt v. Denmark, Appl. No. 10486/83, Judgment, 24 May 1989, para. 48. Although the function of investigations is not the same as that of trials, these considerations are still useful in informing the standards applicable to investigations as one element of the administration of justice by a State.
48 A. W. Dahl, above note 14, p. 21; B. Heng et al., above note 14, pp. 136–137.
50 C. Simmons, above note 12, p. 23.
In this regard, improving the perception of justice will always depend on the context, as it will be necessary to understand where the perception of injustice comes from. In a situation in which there has been a history of systematic violations, patterns of abuse and widespread impunity, structural changes to military (or civilian) institutions may not be sufficient to improve trust in these systems. In the context of such systematic violations, where the mistrust may be widespread throughout society and even internationally, the requirement of a perception of justice may be a strong tool for advocating for increased independence, for example by setting up exceptional investigative mechanisms.

Perhaps the most contentious yet important element that may support a perception of justice is increased transparency in investigation proceedings. Even if States do not consider it a direct legal obligation in all circumstances, transparency is key to enhancing the legitimacy of a State’s actions in armed conflict. Transparency can be important in two ways. First, in publishing the existing procedures and structures, States may make clear the structures of the judicial military chains of command and the safeguards that exist. Second, transparency in the carrying out and results of investigations serves to improve communication with those directly affected by the possible violations. Even if there are legitimate security concerns which may justify withholding certain information, especially in relation to military operations, there will usually be some form of information on investigation proceedings which may reasonably be made public.

Additionally, insofar as the international community’s perception may be relevant in considering a perception of justice under international law, the role of international bodies must be mentioned. It may be that the use of (or at the very least monitoring by) international bodies would help to address some of these problems, and many individuals affected by IHL violations do call for international mechanisms to be used when serious violations of IHL are alleged. However, this must be considered in light of the fact that international investigative mechanisms are necessarily exceptional measures which take up a lot of time and resources and are rarely considered to be the most effective form of investigations. Indeed, international mechanisms are almost exclusively set up as a measure of last resort in response to repeated failures by States to domestically address violations of

---


52 Guidelines on Investigating Violations of IHL, above note 1, para. 147.

53 Ibid., para. 153.

international law.55 It is therefore important for States to seek to implement effective domestic systems of redress for violations of IHL.

Finally, it is possible that conceptions of justice in such contexts will need to be considered beyond legal (especially criminal) measures. The role of investigations in disseminating truth, and potentially providing reparations, may be important in terms of contributing towards a more holistic conception of justice in armed conflicts than simply holding individuals and/or States to account. This also ties into the role of investigations within the broader concept under international law of a right to truth.56 As established above, assessing who is best placed to carry out an effective investigation requires determining the purpose of the investigation. If the purpose goes beyond criminal accountability and traditional legal adjudication, but rather might involve the dissemination of truth and the recording of different accounts by those involved, the answer to the question “who can most effectively investigate?” may well change and may involve a greater variety of actors from civil society.

A perception of justice is therefore as crucial as the procedural carrying out of justice itself, especially with regard to maintaining a sense of legitimacy of State institutions. Yet such a perception can be difficult to achieve, especially in situations of armed conflict where the general political context may lead to a situation in which the accused or victims do not perceive the justice system as independent, impartial or generally just. Furthermore, the issue of the “reasonable observer” whose perception matters in such contexts is further complicated by the diversity of potential communities involved. There are certain steps which can be taken to begin answering these challenges, although these will always be context-dependent.

Conclusion

IHL is premised upon the principle that justice can and must still continue to be sought in situations of armed conflict. Key to the administration of justice is the

---

55 This is evident through the subsidiary and complementary nature of most international mechanisms, such as regional human rights courts and the ICC. It is also observable through mechanisms set up by different UN bodies, often in response to “gross and systematic” violations at the domestic level. See, for example, Cecilia Medina Quiroga, The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System, Martinus Nijhoff, Dordrecht, 1988, p. 7; Lori F. Damrosch, “Gross and Systematic Human Rights Violations”, in Max Planck Encyclopaedia of Public International Law, Oxford University Press, Oxford, 2011, paras 1–9.

effective implementation of the rules of IHL, to which investigations are crucial. As international law currently stands, States may still legally use military justice systems in various situations, including to investigate possible violations of IHL, and this article has addressed some of the ways in which properly structured military bodies can contribute to effectiveness in investigating. It has also considered some of the tensions which commonly arise when it is military institutions that investigate. States should be aware of the real dimensions of influence as well as the perceived tensions present through the use of such military institutions. There are structural specificities inherent to military hierarchies which must be taken into account when considering what constitutes an adequate system of military justice. There are also forms of toxic loyalty that may arise in a military setting and are not always addressed when considering possible spheres of influence in the administration of justice. Insofar as they may affect the likelihood of impunity or cover-ups, it is suggested that such influences must be further examined.

There is also a need for judicial proceedings to be perceived as just, a further element that has not been at the forefront of accountability efforts for violations of IHL. Such a perception can be particularly difficult to attain in situations of armed conflict, where the very legitimacy of a State may be part of the conflict itself. In addressing this challenge, it is first important to understand whose perception matters, and recognize that beyond the suspect and the victim, the perception of the international community may have a role to play in enhancing legitimacy. In all cases, States will need to make reasonable adjustments to mitigate the lack of appearance of independence and impartiality. Improving the perception of justice will necessarily depend on the context, but involving civilian actors and oversight, increasing transparency, and the use of international monitoring can all support this goal. Finally, considering the broader purpose of an investigation, for example in relation to truth-telling in conflict settings, may also affect how legitimacy can be achieved.

Fair scrutiny of military investigations into possible violations of IHL requires considering how military institutions can carry out effective investigations with adequate structural safeguards and due diligence measures in order to mitigate challenges that are likely to arise in military contexts. As long as armed conflicts exist, it is likely that military bodies will have a role in judicial proceedings involving their personnel, and it is therefore important to understand how they may carry out such proceedings according to their legal obligations. Yet States also need to consider all obligations arising under international law, including the role of a perception of justice. It would be necessary to further explore what such a perception of justice can mean at an international level, and within armed conflict where the relationships between States and the individuals affected by violations may be broken or non-existent. In the meantime, there are already recognized steps which can serve to promote legitimacy, and if such measures can reasonably be implemented, States may well have a legal obligation to do so.
Automating occupation: International humanitarian and human rights law implications of the deployment of facial recognition technologies in the occupied Palestinian territory

Rohan Talbot
Rohan Talbot is Advocacy and Campaigns Manager at Medical Aid for Palestinians (MAP). Email: rohan.talbot@gmail.com.

Abstract
In 2019, media investigations revealed that Israel had added facial recognition technologies (FRTs) to the panoply of security and surveillance technologies deployed in its administration and control of the occupied Palestinian territory (oPt). Despite growing academic and judicial scrutiny of the legal implications of these technologies for privacy and freedom of assembly in domestic contexts, scant attention has been paid to their uses by militaries in contexts where international humanitarian law (IHL) applies. This article seeks to establish the international legal framework governing an Occupying Power’s deployment of FRTs, particularly in surveillance, and apply it to Israel’s uses in the oPt. It is demonstrated that IHL provides flexible, but incomplete, provisions for balancing an Occupying Power’s
right to employ surveillance technologies within its measures of control and security against the imprecisely defined humanitarian interests of the population under occupation. The relevant legal framework is completed through the concurrent application of an Occupying Power’s international human rights law (IHRL) obligations. What is known of Israel’s use of FRTs in surveillance appears prima facie not to satisfy the cumulative IHRL criteria for limitations on the right to privacy—legality, legitimate aims, necessity and proportionality—even where these are broadened by reference to IHL. Consideration is also paid to corollary human rights impacts of these technologies, and the potential that they may entrench an Occupying Power’s control while simultaneously rendering this control more invisible, remote and less reliant on the physical presence of troops.

Keywords: international humanitarian law, surveillance technologies, facial recognition technologies, law of occupation, international human rights law, right to privacy.

Introduction

Recent advancements in artificial intelligence (AI) have given rise to security and surveillance technologies of hitherto unthinkable scope, speed and intrusiveness. At least seventy-five governments are known to use AI-powered surveillance technologies, including “predictive policing” systems that aggregate and analyse data to predict potential crime, “smart city” platforms that monitor crowd behaviour, and facial recognition technologies (FRTs) which permit rapid, covert and automated identification of individuals from distance.

To policing and intelligence agencies, FRTs promise increased reach and efficiency in the surveillance of perceived security threats and criminals. The mass processing of biometric data and identification of individuals in public spaces means that FRTs may, however, interfere with privacy on a massive scale. Ethical and legal debates have inevitably arisen, particularly concerning compliance of States’ domestic uses of FRTs with their human rights obligations. These technologies are also increasingly deployed by militaries in the conduct of hostilities and the control of populations and territories held under occupation. Nevertheless, the international legal framework governing such uses remains largely unexplored.

This article will first describe the contemporary domestic uses of FRTs and concerns that have arisen regarding civil liberties and freedoms. Application of FRTs by militaries will then be briefly examined, focusing on recent media revelations regarding Israel’s reported deployment of FRTs at checkpoints and in automated surveillance inside the occupied Palestinian territory (oPt).

International humanitarian law (IHL) will then be applied to Israel’s use of FRTs within its security measures in the oPt. It will be demonstrated that the law of occupation provides a flexible framework applicable to contemporary occupations and technologies, but grants only general guidance for balancing the humanitarian interests threatened by FRTs with the military exigencies of the Occupying Power, creating a lacuna that may be filled by international human rights law (IHRL).

Israel’s obligations toward Palestinians’ right to privacy under IHRL, and the permissible limitations on this right, will then be analysed. It will be concluded that Israel’s reported use of FRTs in surveillance appear prima facie to fail to satisfy the cumulative requirements of lawfulness, legitimate aims, necessity and proportionality, even where these are interpreted by reference to the more permissive framework of IHL as the body of law which specifically applies to contexts of belligerent occupation. Finally, the broader human rights implications of FRTs will be briefly considered, including the potential that such technologies may entrench and further prolong occupations, while simultaneously rendering an Occupying Power’s control more invisible, remote and less reliant on the physical presence of troops.

Facial recognition technologies – a new challenge to human rights

Facial recognition technologies

FRTs are computer systems that identify individual humans from digital photographs or video according to their unique facial feature characteristics. Modern AI-powered systems use algorithmic techniques to isolate and detect patterns from faces, convert these into mathematical representations (“templates”), and statistically compare these to other facial data stored in a database. These algorithms are trained on large datasets of faces, often taken from public sources.

There are two primary applications for FRTs. Verification systems involve one-to-one matching of a face against a single reference template, and are used to confirm a person’s official identity. Identification, or one-to-many, FRTs compare captured templates against a database to establish whether the identity of the person is known. Such algorithms can “be deployed in anything from cell

---

5 B. Leong, above note 2, p. 109.
phones to large multi-server search engines” and are claimed to be “capable of searching over 100,000,000 faces in just a few seconds”.

These technologies have valuable applications for a variety of actors. Companies deploy facial verification to prevent banking fraud and offer security protection for mobile phones. Social media corporations use facial identification to help users “tag” others in photographs. The International Committee of the Red Cross (ICRC) has tested FRTs to aid family tracing for those affected by conflict.

FRTs also form part of the post-millennium boom in new security technologies. Alongside predictive policing and digital surveillance technologies, their development has been fuelled in part by the perceived exigencies of national security and counterterrorism since 2001, and advancements in AI, camera technology and computer processing power. FRTs are deployed to control movement, verifying identities of those crossing borders or accessing secure buildings, and enabling investigation or exclusion of those deemed a security threat. Police and intelligence agencies use FRTs to compare faces from crime-scene photographs and video against mugshot databases to provide investigatory leads. The U.S. Federal Bureau of Investigations’ Next Generation Identification System permits law enforcement agencies to search a database of thirty million criminal photographs and has access to wider state and federal databases of non-criminal facial images, such as visa applications and driver licences.

Live facial recognition (LFR) systems integrate automated facial recognition into live video feeds, allowing operators to scan public spaces to identify people in real time, matching against “watch lists” of wanted individuals such as criminals or suspected terrorists. Police forces in the United Kingdom, for example, have deployed LFR at sports events, shopping centres and protests.

LFR systems are promoted as “a potential solution to … problems of surveillance labor and video overload”. Though facial recognition functions can be done by humans, automation makes verification and identification more efficient, reducing human resource costs and issues of distraction or fatigue, and vastly expanding the number of possible comparisons in a given time.

---

9 Ibid.
10 B. Leong, above note 2, p. 112.
13 Ibid., p. 1.
14 K. A. Gates, above note 4, p. 64.
15 Ibid.
identifying individuals at distance, without physical contact, and using a feature usually visible in public, FRTs are less physically obtrusive, or more covert, than other biometric technologies, such as fingerprint scanners.16

Ethical and legal issues

The ability to discover people’s identities, without their knowledge, on a mass scale, opens a new frontier of concern regarding privacy and freedoms. This is made more acute given the exponential growth of personal data held by governments and corporations – including social media profiles, social connections and interactions, location history, and financial information – to which identification through FRTs may facilitate access.17 U.S. Senator Al Franken aptly described these concerns:

Once someone has your faceprint, they can get your name, they can find your social networking account and they can find and track you in the street, in the stores that you visit, the Government buildings you enter, and the photos your friends post online. Your face is a conduit to an incredible amount of information about you.18

FRTs are also situated within wider national projects of bureaucratization and mass individuation. Establishing and verifying the identity of individuals has become central to the interaction between State and citizen, regulating participation in public life, such as accessing services or crossing borders. The “securitization” of these identities, Gates argues, has increasingly become:

a means of tying individuals into circuits of inclusion and exclusion, determining their status as legitimate self-governing citizens or more problematic identities deemed to fall outside the realm of legal rights who can therefore be subjected to a range of repressive strategies.19

New digital surveillance technologies including FRTs have been deployed by States in ways that “produce racially discriminatory structures that holistically or systematically undermine enjoyment of human rights for certain groups, on account of their race, ethnicity or national origin, in combination with other characteristics”.20

The use of FRTs to intentionally restrict the rights or freedoms of individuals or populations with specific racial, ethnic or national identities is inherently discriminatory. FRTs may also have indirect discriminatory effects. As

16 Ibid., p. 46.
19 K. A. Gates, above note 4, p. 34.
Leong highlights, “[b]y using machine learning programs as the underlying foundation, these systems are built on existing data that reflect human biases, and automate them”.21 Inherent algorithmic biases which cause higher rates of “false-positives” when identifying certain groups such as women and people of colour imbue these technologies with “a striking capacity to reproduce, reinforce and even to exacerbate racial inequality within and across societies”.22

The use of FRTs during the policing of public demonstrations may also have a “chilling effect” on freedoms of assembly and expression.23 During 2019 protests in Hong Kong, demonstrators expressed fears that FRTs were being used to identify and target them for arrest, leading many to don face masks.24 Police in Russia have reportedly used Moscow’s comprehensive LFR-enabled surveillance system to identify and detain journalists and activists taking part in peaceful demonstrations.25

At least sixty-four countries are known to use FRTs, including LFR surveillance systems.26 The implications for privacy and other freedoms have prompted scrutiny of the compatibility of these uses with States’ human rights obligations.27 As with other modern surveillance technologies, they are often deployed with limited transparency, public oversight, or adequate domestic legal frameworks,28 engendering calls for a moratorium on their use, sale and transfer.29

Military uses of face recognition technologies

Militaries have been at the vanguard of the development and deployment of FRTs since the 1960s.30 As Gates explains: “The war-fighting promise of automated facial recognition … lay precisely in their potential to identify objects automatically and “at a distance”, whether the final aim was to control, capture, or destroy these targets.”31 These functions are of increasing interest to militaries involved in counterterrorism and asymmetric warfare. The U.S. Military maintains a database of 7.4 million identities, including face scans, many

21 B. Leong, above note 2, p. 113.
22 T. Achiume, above note 20, para. 12.
26 S. Feldstein, above note 1, p. 7.
29 D. Kaye, above note 28, para. 66.
30 K. A. Gates, above note 8, p. 432.
31 K. A. Gates, above note 4, p. 104.
obtained during operations in Afghanistan and Iraq. Its Automated Biometric Information System enables individuals placed on a watchlist to be “identified through surveillance systems on battlefields, near borders around the world, and on military bases”. Between 2008 and 2017, the U.S. military “used biometric and forensic capabilities to capture or kill 1,700 individuals [and] deny 92,000 individuals access to military bases”. The Turkish military has reportedly integrated FRTs into lethal unmanned aerial vehicles to aid targeting.

Militaries may therefore use FRTs to control physical access to secured areas and to identify “wanted” individuals for detention, questioning, or even lethal targeting in contexts where IHL applies—namely armed conflicts and belligerent occupations. Nevertheless, the implications of IHL for military use of the technologies remain under-explored.

Israel’s use of face recognition technologies in the occupied Palestinian territory

In 2019, investigations by *Haaretz*, *NBC* and *NPR* reported that the Israeli army had deployed two FRT systems supplied by Israeli company AnyVision, in the oPt. The first, a verification system, was installed at twenty-seven checkpoints controlling access for Palestinians from the West Bank to East Jerusalem and Israel:

Palestinians who request permits to enter Israel must first get photographed and fingerprinted at an Israeli military office. Their photos are stored in a biometric database and are connected to electronic ID cards they scan at the checkpoint. Facial recognition software at the checkpoint matches their face to their photos in Israel’s biometric database.

Around 450,000 Palestinians have electronic ID cards and are therefore known to have their facial data stored in databases by Israel.
Israel has also deployed FRT verification to facilitate control over the movement of Palestinians in and out of neighbourhoods in Hebron, in the southern West Bank.41 Here, again, FRTs are deployed to verify Palestinians’ identity against a database of individuals permitted certain freedom of movement.

AnyVision also reportedly provided an LFR surveillance system, deployed “deep inside the West Bank [to] spot and monitor potential Palestinian assailants”.42 The Israeli military has installed more than 1700 surveillance cameras at “roads, intersections and in settlements” in the West Bank,43 and AnyVision’s software purportedly “lets customers identify individuals and objects in any live camera feed … and then track targets as they move between different feeds”.44 A significant visual surveillance infrastructure has been documented in the Old City in occupied East Jerusalem, including closed-circuit television (CCTV) cameras with visibility covering 95% of public areas, reportedly upgraded to include LFR capabilities.45

As is typical of States’ surveillance practices, many details of the Israeli military’s use of FRTs in the oPt are secret, though these reports are consistent with the known “plethora of new technologies, such as phone and internet monitoring and interception, CCTV, and biometric data collection [which] have enabled Israel to surveil the population it occupies on a massive, intrusive scale”.46 Israel is also known to monitor Palestinians’ social media activity, and uses predictive policing algorithms to arrest those it considers guilty of “incitement” and that it deems a future security threat.47

The deployment of FRTs in the oPt raises similar ethical and legal issues to uses in domestic contexts, relating to the direct effects on privacy, and wider impacts on movement and other freedoms to which privacy is a gateway. Human rights organizations have accordingly expressed concerns about the lack of transparency around the use of these technologies, and their impact on Palestinians.48 The specific legal framework governing FRT uses in occupied territory, however, currently remains under-explored.

41 Six checkpoints in the city were installed with FRTs in 2015, “allowing for total separation between the soldiers or Border Police officers staffing them and the Palestinians passing through them”: see B’Tselem, Playing the Security Card: Israeli Policy in Hebron as a Means to Effect Forcible Transfer of Local Palestinians, Jerusalem, September 2019, p. 16.
42 A. Ziv, above note 36.
44 O. Solon, above note 37.
Facial recognition technologies under the law of occupation

The applicability of international humanitarian law

During the 1967 war, Israel took military control over the West Bank, including East Jerusalem, from Jordan, and Gaza from Egypt. As these Palestinian territories were “actually placed under the authority of a hostile army”, and Israel established and exercised its authority, the criteria for determining the existence of a belligerent occupation under Article 42 of the Regulations annexed to the 1907 Hague Convention (“Hague Regulations”) were met.

The Government of Israel does not recognize the de jure applicability of the law of occupation to its actions in the oPt, including the Fourth Geneva Convention (GC IV) to which it is a party. It asserts, however, that it applies the Convention’s “humanitarian provisions” de facto without specifying which provisions those are. The Israeli Supreme Court, nevertheless, accepts that Israel holds the West Bank at least under belligerent occupation, and has subjected Israel’s conduct to judicial review on the basis of the Hague Regulations and those provisions of GC IV that it considers to reflect customary IHL.

The applicability of the law of occupation is affirmed by almost total unanimity among the international community, demonstrated by successive United Nations (UN) Security Council (UNSC) and General Assembly resolutions. In its Advisory Opinion considering the legal consequences of Israel’s building of the separation wall in the oPt (“Wall Opinion”), the International Court of Justice (ICJ) found that developments since 1967 “have done nothing to alter this situation”, and that Israel remains an Occupying Power.

Modern AI-powered security technologies, such as FRTs, were not envisioned by the drafters of the core IHL treaties, and are therefore not addressed directly by their provisions. Nevertheless, the law of occupation is imbued with inherent flexibility, enabling its application to the varied scenarios arising in contemporary occupations. This includes two key treaty provisions

50 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 (entered into force 26 January 1910) (Hague Regulations), Art. 42.
51 E. Benvenisti, above note 49, p. 208.
52 Ibid., p. 206.
53 Supreme Court of Israel, Beit Sourik Village Council v. Israel and IDF Commander in the West Bank, HCJ 2056/04, 2004, para. 23.
56 See, for example, UNSC Res. 2334, 23 December 2016.
57 See, for example, UNSC Res. 73/97, 18 December 2018.
58 International Court of Justice (ICJ), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para. 78.
59 A. Roberts, above note 55, p. 51.
explored below, which provide an IHL framework governing the deployment of these new technologies.

The law of occupation: Balancing humanitarian imperatives and military exigencies

1907 Hague Regulations

The balancing of military exigencies and humanitarian imperatives is a core function of IHL. Article 43 of the Hague Regulations stipulates two duties of the Occupying Power: to “take all the measures in his power to restore, and ensure, as far as possible, public order and civil life”, and to do so “while respecting, unless absolutely prevented, the laws in force in the country”. Benvenisti characterizes this as “a sort of mini-constitution for the occupation administration; its general guidelines permeate any prescriptive measure or other acts taken by the occupant”.

The first duty requires the Occupying Power to protect the local population from a breakdown in both “security or general safety” and ensure continuance of “social functions [and] ordinary transactions which constitute daily life”. The caveats to this duty indicate that an Occupying Power is neither required to act beyond its means or the level of control it can exert, nor guarantee public order and civil life as an outcome. These exceptions provide leeway to the Occupying Power to balance this duty against its own interests—including its security—as does the caveat in the second duty that it respects existing laws “unless absolutely prevented”.

1949 Fourth Geneva Convention

GC IV further clarified an Occupying Power’s humanitarian obligations toward the occupied population. Article 27 outlines the Convention’s core humanitarian principle, asserting that protected persons, including civilians in occupied territory, “are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs” and that “[t]hey shall at all times be humanely treated, and … protected especially against all acts of violence or threats thereof”. These

60 While the ICRC’s English translation references “public order and safety”, a more authoritative translation of the original French (“l’ordre et le vie publics”) is “public order and civil life”. See Y. Dinstein, above note 54, p. 99.
61 Hague Regulations, above note 50, Art. 43.
62 E. Benvenisti, above note 49, p. 69.
65 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. 27(1).
duties are to be applied “without adverse distinction based, in particular, on race, religion or political opinion”.

Balancing these humanitarian duties, Article 27 also authorizes Occupying Powers to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war”. This general provision permits the Occupying Power to take action necessary to address security threats arising from the occupied territory, and is flexible to a broad array of factual scenarios and measures. Pictet’s Commentary to the Convention underlines that “[a] great deal is … left to the discretion of the Parties to the conflict as regards the choice of means”. It also provides a non-exhaustive list of examples of permissible measures, including less intrusive restrictions such as requiring the carrying of identity cards or prohibiting the carrying of weapons, to harsher measures, such as assigned residence or internment.

Facial recognition technologies under the law of occupation

Consistent with Hague Regulations Article 43’s duty to “restore, and ensure … public order and civil life”, an Occupying Power may seek to deploy FRTs to protect the security of the local population, much as they are used by police in a domestic context. FRTs may also be deployed within the “measures of control and security” permitted under GC IV, Article 27(4). Deployed at checkpoints within occupied territory, or crossings into the Occupying Power’s sovereign territory, they may be intended to identify those permitted access and restrict those considered a security risk. In surveillance, FRTs may be deployed to help identify and capture individuals considered a threat, such as civilians taking direct part in hostilities.

FRTs deployed like this can, however, have adverse humanitarian effects on protected persons. Examining the role of digital technology in contexts where IHL applies, the ICRC has identified “potential humanitarian consequences – digital risks – for civilian populations from misuse of AI-enabled digital surveillance, monitoring and intrusion technologies”, including FRTs, such as “being targeted, arrested, facing ill-treatment … or suffering from psychological effects from the fear of being under surveillance”. The ICRC further reports that “[u] nprecedented levels of surveillance of the civilian population” from such technologies “can exacerbate … existing vulnerabilities of persons affected by armed conflicts”.

66 Ibid., Art. 27(3).
67 Ibid., Art. 27(4).
In the oPt, LFR surveillance could further facilitate detention of Palestinian children, journalists and human rights defenders by Israel’s security forces, with clear impacts on the wellbeing of those affected. They are likely to exacerbate the “generalized feeling of being watched and surveilled” experienced by Palestinians under Israel’s broader surveillance and control practices.

Similarly, physical and bureaucratic restrictions on freedom of movement within the oPt, of which FRTs are now a key component at checkpoints, cause well-documented disruptions to family life, access to healthcare and livelihoods. This is particularly true of Israel’s isolation of East Jerusalem from the rest of the West Bank which, as the city is “an important centre for Palestinian economic, cultural and social activity, has a serious impact on surrounding communities”. FRTs are now an integral part of Israel’s separation wall’s “associated regime” of administrative measures, including permits and ID cards, that the ICJ considered “gravely infringe a number of rights of Palestinians”.

FRTs sit at the fulcrum of interests balanced by IHL. On the one hand, they may facilitate an Occupying Power’s attempts to “ensure public order and civil life” and constitute “measures of control and security” enacted to ensure its own security. On the other, obtrusive surveillance and movement restrictions facilitated by these technologies may diminish “civil life” and undermine the local population’s humanitarian interests.

Though an Occupying Power is granted significant discretion as to measures of control and security permissible under GC IV Article 27(4), this choice is not unlimited. Such measures deemed “necessary as a result of the war”, including the deployment of FRTs, must be balanced against the duty to treat protected persons humanely “at all times”, and that they be entitled “in all circumstances, to respect for their persons”. Thus, an Occupying Power’s control and security measures must be proportionate: the harm caused to protected persons must not be excessive in relation to the security interest being advanced. Indeed, in its judicial review of security measures imposed by Israel’s security forces in the West Bank, the Israeli Supreme Court has recognized that proportionality, as a “general principle of international law”, applies as the “standard for balancing the authority of the military commander in the area with the needs of the local population”.

Delineating the proportionality of such measures under IHL, however, is challenged by the lack of precision regarding the humanitarian interests to be balanced against the Occupying Power’s security interests. Privacy and freedom of movement—threatened by FRTs—are not explicitly guaranteed to protected persons under GC IV Article 27(1) or other IHL treaty provisions.

---

74 Ibid., para. 30.
75 ICJ, above note 58, paras. 133–7.
76 GC IV, above note 65, Art. 27(1).
77 Supreme Court of Israel, Beit Sourik case, above note 53, para. 39.
Pictet’s *Commentary* provides some guidance in this regard, explaining that “respect for the person” in Article 27(1) “must be understood in the widest sense: it covers all the rights of the individual which are inseparable from the human being by very fact of his existence”.\(^{78}\) He identifies among those rights “in particular, the right to physical, moral and intellectual integrity – an essential attribute of the human person”.\(^{79}\)

Pictet identifies “[t]he right to personal liberty, and in particular, the right to move about freely” among individual rights covered implicitly by Article 27(1), providing some guidance on the balancing of interests: while this right “may certainly be restricted, or even temporarily suppressed, if circumstances so require” it is not to be “suspended in a general manner”.\(^{80}\) Rather, Pictet argues, “the regulations concerning occupation … are based on the idea of the personal freedom of civilians remaining in general unimpaired”.\(^{81}\)

Regarding “respect for intellectual integrity”, Pictet makes limited reference to the privacy of protected persons by asserting that: “[i]ndividual persons’ names or photographs, or aspects of their private lives must not be given publicity”.\(^{82}\) Relatedly, Article 27(2) requires that protected persons be afforded protection against “public curiosity”. However, the prohibition on the “publicity” of private information and protection from “public curiosity” do not encapsulate a full protection of an individual’s privacy. In particular, it does not regulate the non-public capture, storage and processing of personal information – including biometric data – by the Occupying Power, in ways that may have profound effects on the wellbeing of the protected person, as outlined above.

Determining whether an Occupying Power’s use of FRTs within its measures of control and security is proportionate and consequently permissible therefore requires an assessment of their impact on rights – in particular the right to privacy – not expressly protected under IHL. If the duty of “respect for the person” under Article 27(1) is understood to cover “all rights of the individual” as Pictet asserts, it may be possible to interpret the content of this duty by reference to the body of law which does expressly protect these rights, IHRL. As Dinstein asserts: “Human rights law may … fill a gap in an occupied territory, when the norms governing belligerent occupation are silent or incomplete.”\(^{83}\) Van der Heijden similarly states:

> Considering that Article 27 is seen as reflecting the intrinsic rights and freedoms of the human being, international human rights law (IHRL) can and should be used to a certain extent as a means to interpret the provisions contained in this Article.\(^{84}\)

---

78 J. Pictet, above note 68, p. 201.

79 Ibid.


81 Ibid.

82 Ibid.

83 Y. Dinstein, above note 54, p. 94.

The ICRC, examining the military uses of digital surveillance technologies, has too
concluded that “[o]ther bodies of law, including international human rights law, might also be relevant when assessing surveillance.” 85

IHL therefore provides flexible, but incomplete, instructions regarding the
permissibility of a given deployment of FRTs by an Occupying Power, either in its
measures to ensure its own security, or in the maintenance of public order and civil
life. The proportionality of such deployments may therefore be assessed by reference
to IHRL, which can fill the lacuna in IHL as pertains to the content of humanitarian
interests threatened by FRTs, in particular the right to privacy. Below, the
applicability of IHRL to the context of the oPt will be assessed, as will the scope
of Israel’s obligations regarding the right to privacy of protected persons in light
of the concurrent applicability of IHL.

**Facial recognition technologies under international human rights law in the context of occupation**

**Human rights obligations of an Occupying Power**

Israel ratified the International Covenant on Civil and Political Rights (ICCPR) in
1991 but contends that its treaty obligations do not extend to the oPt, arguing
instead that IHL and IHRL “are codified in separate instruments, remain distinct
and apply in different circumstances”. 86

Nevertheless, the concurrent extraterritorial applicability of IHRL and IHL
is widely supported by international jurisprudence, State practice and legal
scholarship. 87 The ICJ has established that an Occupying Power’s duty under
Hague Regulations Article 43 to ensure public order and civil life “comprised the
duty to secure respect for the applicable rules of international human rights
law”. 88 The Human Rights Committee (HRC) has concluded that the
applicability of IHL “in a situation of occupation, does not preclude the
application of the [ICCPR]”, and that Covenant provisions “apply to the benefit
of the population of the occupied territories … with regard to all conduct by the
State party’s authorities or agents in those territories”. 89 The applicability of
IHRL to Israel’s conduct in the oPt was affirmed in the ICJ’s Wall Opinion. 90

---

85 ICRC, above note 70, p. 29.
86 Fifth Periodic Submitted by Israel Report Under Article 40 of ICCPR, UN Doc. CCPR/C/ISR/5, 30
October 2019, paras. 22–6.
89 HRC, Concluding Observations on the Third Periodic Review of Israel, UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para 5.
90 ICJ, above note 58, para. 106.
Applying international humanitarian law and international human rights law concurrently

An Occupying Power’s deployment of FRTs is therefore governed by both IHL and IHRL which apply concurrently. Though these legal frameworks often complement each other, sometimes they “point in diverse—perhaps contradictory—directions”.91 In such situations, consideration must be paid to how such conflicts may be resolved.

In its Wall Opinion, the ICJ considered “both … human rights law and, as lex specialis, international humanitarian law”.92 The lex specialis principle provides that in the event of a conflict between legal norms, the more specific rule (lex specialis) overrides the more general one.93 In this case, the Court indicated that IHL, as the legal framework specifically governing contexts of belligerent occupation, applies as lex specialis. In its Nuclear Weapons opinion, the Court found that the right to life under ICCPR Article 6 is applicable during hostilities, but that “whether a particular loss of life … is to be considered an arbitrary deprivation of life contrary to Article 6” could only be “decided by reference to the law applicable in armed conflict, and not deduced from the terms of the Covenant itself”.94 Thus the Court indicated that, though conflicts between IHRL and IHL norms cannot be resolved by the wholesale transposition of one body of law over another, IHL will take primacy in this circumstance.

The HRC, however, has eschewed the lex specialis principle when considering contexts of armed conflict where IHL and IHRL apply concurrently, asserting that while certain IHL rules “may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive”.95 As discussed above, where IHL rules are general or incomplete, they may need to be interpreted by reference to concurrently applicable specific rules of IHRL. The International Criminal Tribunal for the former Yugoslavia (ICTY), for example, used the detailed definition of torture taken from IHRL (Convention Against Torture Article 1) as an “interpretive guide” for the prohibition of torture in customary IHL and Article 3(a) common to the four Geneva Conventions, where no definition is provided.96 The Tribunal cautioned, however, that “notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law”.97

As Prud’homme highlights, the lex specialis principle “is silent as to what is specific and what bears a general character”, concluding that “the vagueness of the

91 Y. Dinstein, above note 54, p. 95.
92 ICJ, above note 58, para. 106.
93 Y. Dinstein, above note 54, p. 95.
94 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para. 25.
95 HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.
97 Ibid., para. 471.
lex specialis maxim, and its consequential broad scope, allows the theory to be interpreted in all directions”.

Indeed, in the present case IHL is the more specific body of law as regards contexts of belligerent occupation, whereas IHRL provides more specific guidance regarding States’ obligations toward privacy.

In such instances it may be advisable to take a harmonizing approach which “brings international humanitarian law and international human rights law closer while acknowledging the specificities of each discipline”. This is consistent with the requirement of the Vienna Convention on the Law of Treaties that treaty provisions be interpreted in light of “any relevant rules of international law applicable in the relations between the parties”. As Prud’homme asserts, such an approach “underscores the fact that the two disciplines are already involved together inasmuch as they are both inspired by a common objective—the protection of humanity—and apply concomitantly”. Assessing the ICJ’s Nuclear Weapons Opinion, Ben-Naftali and Shany find that “the emphasis the Court placed on the humanitarian considerations that inform IHL, underscores the purpose and underlying principles common to both regimes as the rationale for their co-application”, with the effect that:

each affects the interpretation of the other’s norms: international humanitarian law may be used to interpret a human right rule, and human rights law influences the proper application of IHL in tilting the balance between military considerations and humanitarian concerns in favor of the latter.

Following a harmonizing approach in the present case, IHRL obligations regarding the right to privacy should be read through the prism of IHL, as the body of law that specifically governs the conduct of an Occupying Power. At the same time, as IHL provides only general or incomplete guidance as regards protecting the privacy of protected persons, the proportionality of the Occupying Power’s measures of control and security under GC IV Article 27 should be assessed in light of the more specific rules of IHRL relating to the rights upon which they impinge.

Face recognition technologies and the right to privacy

The human rights implications of FRTs depend on the specific nature of a given technology and the circumstances of its use. ID verification at checkpoints, the construction of biometric databases and watchlists, and LFR surveillance, all raise varied human rights challenges. Here, focus is placed on the right to privacy,

99 Ibid., p. 387.
102 Ibid., p. 56.
103 P. Fussey and D. Murray, above note 27.
as the right most directly interfered with by FRTs, and, in particular, Israel’s reported deployment of LFR surveillance in the West Bank.

ICCPR Article 17 provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”, and that “[e]veryone has the right to the protection of the law against such interference or attacks”. Though definitions of “privacy” vary, it broadly encompasses:

the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals.

While, historically, interferences with privacy by States have primarily delved into private spaces and communications (e.g. home searches, or interception of correspondence), LFR surveillance typically takes place in public spaces. The HRC has established that information available in public areas may still be protected by Article 17. The UN High Commissioner for Human Rights has outlined:

the right to privacy comes into play when a Government is monitoring a public space, such as a marketplace or a train station … The public sharing of information does not render its substance unprotected.

The European Court of Human Rights (ECtHR) has correspondingly concluded that there is “a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’”, and that while simple monitoring of individuals in public spaces (e.g. through CCTV) does not per se interfere with the right to privacy, “the recording of the data and systematic or permanent nature of the record may give rise to such considerations”.

The automated identification of individuals, and collection, storage and processing of sensitive personal biometric information in public spaces, whether or not they are on a watchlist, therefore constitutes an interference with the right to privacy. Moreover, as outlined above, covert identification of individuals through FRTs can enable access to a significant amount of personal data stored in private sources, such as national intelligence databases, or open sources, such as social media. Consequently, the deployment of these technologies is regulated by ICCPR Article 17.
Permitted limitations on the right to privacy

Article 17 does not contain a limitation clause. The HRC, however, has established that interferences with the right to privacy “can only take place on the basis of law” and, to be non-arbitrary, must “be in accordance with the provisions, aims and objectives of the Covenant and … reasonable in the particular circumstances”. \(^{110}\) The HRC has interpreted reasonableness to mean that interferences with privacy “must be proportional to the end sought and be necessary in the circumstances of any given case”. \(^{111}\)

In General Comment 31, the HRC asserted that in imposing restrictions on Covenant rights, “States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims”. \(^{112}\) Interferences with privacy must therefore comply with the cumulative requirements of legality, legitimate aims, necessity and proportionality. \(^{113}\)

As outlined above, when considering the application of ICCPR Article 6 in situations of armed conflict, the ICJ interpreted the term “arbitrary” in line with relevant rules of IHL. More broadly, Ben-Naftali and Shany assert that in contexts where IHRL and IHL apply concomitantly, “[e]xplicit limitation clauses found in human rights instruments … should also be applied in line with IHL”. \(^{114}\) Consistent with a harmonizing approach, the implicit requirements for the permissibility of limitations for the right to privacy under Article 17 must likewise be interpreted by reference to IHL.

Legality

A State’s interference with the right to privacy “can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant”. \(^{115}\) National laws delineating permitted interferences with privacy “must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances”. \(^{116}\) To prevent arbitrary interferences with privacy, legal safeguards on surveillance should articulate, “the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided”. \(^{117}\)

\(^{110}\) HRC, General Comment 16: Article 17 (Right to Privacy), UN Doc. HRI/GEN/1/Rev9, 8 April 1988, paras. 3-4.
\(^{112}\) HRC, above note 95, para. 6.
\(^{113}\) Office for the High Commissioner for Human Rights (OHCHR), The Right to Privacy in the Digital Age, UN Doc. A/HRC/27/37, 30 June 2014, para. 23.
\(^{114}\) O. Ben-Naftali and Y. Shany, above note 101, p. 105.
\(^{115}\) HRC, above note 110, para. 3.
\(^{116}\) OHCHR, above note 113, para. 23.
An individual need not know, in all circumstances, when their privacy is being interfered with, as this would render sometimes-necessary covert surveillance impossible. Instead, the ECtHR has determined that laws must be sufficiently precise to enable individuals “to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”. An individual must therefore be able to anticipate what conduct (e.g. engaging in serious crime) may result in them being placed under surveillance and their privacy interfered with, and adjust their behaviour accordingly.

Though an Occupying Power is generally restricted from enacting new legislation in the occupied territory under IHL under Article 43 of the Hague Regulations, failing to provide sufficiently clear criteria and limitations for restricting the rights of protected persons – for example through its military orders – is arguably also contrary to the requirement that an Occupying Power “restore … civil life”, particularly in contexts of prolonged occupation.

As discussed above, key provisions of IHL do permit an Occupying Power to undertake security measures, including surveillance, in the interests of public order, civil life, and its own security. These general IHL provisions do not by themselves, however, clearly and precisely delineate the circumstances in which such measures may be taken, nor provide legal safeguards against abuses.

Contrary to what is the case in East Jerusalem (the latter being considered to have been annexed by Israel), Palestinians in the West Bank are not subject to Israeli domestic laws, but to Israeli military orders. These orders do not establish criteria under which Palestinians may be targeted by LFR surveillance, nor place clear limits on these measures. Furthermore, the military orders laying out criminalized actions – which may potentially cause protected persons to be selected for surveillance – are “written so broadly that they violate the obligation … to clearly spell out conduct that could result in criminal sanction”.

Israel has not published policies outlining where its forces are permitted to deploy LFR surveillance in the oPt, who may be targeted, how that data is stored and processed, or who may access it. Reservists from Israel’s military intelligence Unit 8200 have made allegations, reported by the press, claiming that it surveilled innocent people, making “no distinction between Palestinians who are, and are not, involved in violence”. If this is true, it underscores the broad discretionary power of surveillance afforded to Israeli authorities in the oPt.

As the OHCHR has established, “secret rules and secret interpretations – even secret judicial interpretations – of law do not have the necessary qualities of ‘law’”. Palestinians have no reasonable “foreseeability” regarding any use of LFR surveillance by Israel. They cannot know what actions may cause them to be

118 ECtHR, The Sunday Times v. The United Kingdom, App. No. 6538/74, Judgment, 26 April 1979, para. 49.
119 Hague Regulations, above note 50, Art. 43; GC IV, above note 65, Art. 64.
120 HRW, above note 47, p. 2.
122 OHCHR, above note 113, para. 29.
placed on a watchlist, nor are they afforded opportunities to adjust their behaviour to avoid having their faces scanned in public spaces and thus their privacy invaded.

**Legitimate aim**

ICCPR Article 17 does not specify for which aims the right to privacy may legitimately be limited, though these may be inferred from the limitation clauses to other qualified Convention rights as laid out in HRC General Comment 27: “to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others”.123

The prevention of terrorism and serious crime may therefore constitute legitimate aims for surveillance, including through FRTs.124 These aims are broad, however, with States often using “an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights” through surveillance.125 LFR surveillance, and the adding of individuals to a watchlist, should thus only be considered for the most serious criminal offences.126

Considering the concurrent applicability of IHL, the Occupying Power’s duty to ensure public order and civil life for the occupied population encompasses the same legitimate aims for security measures, including surveillance. The right of the Occupying Power to deploy “measures of control and security” under GC IV Article 27 means that these aims should also be expanded to include the protection of its own legitimate security interests. Allegations from Unit 8200 whistle-blowers that Israeli military surveillance practices are “used for political persecution” raise concerns that LFR surveillance may, however, be used for illegitimate aims.127

**Necessity and proportionality**

The HRC has specified that limitations on qualified rights must be “necessary in a democratic society” and “conform to the principle of proportionality”.128 UN special procedures have applied “necessary in a democratic society” as the standard of necessity for limitations on the right to privacy under ICCPR Article 17.129 The European Convention on Human Rights (ECHR) similarly prohibits interferences with the right to privacy “except such as is ... necessary in a democratic society”.130 This standard for necessity is stricter than that presented

---

123 HRC, General Comment 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev1/Add9, 1 November 1999, para. 11. This reflects similar limitations clauses of, for example, Art. 19 (freedom of expression) and Art. 21 (peaceful assembly).
125 F. La Rue, above note 117, para. 60.
126 D. Kaye, above note 28, para. 50; P. Fussey and D. Murray, above note 27, p. 55.
127 The Guardian, above note 121.
128 HRC, above note 123, paras. 11 and 14.
130 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNTS 222, 3 September 1953, Art. 8(2).
for security measures in IHL under GC IV Article 27 (“necessary as a result of the war”). As the context under consideration is one of belligerent occupation – where the normal democratic function of a state may be temporarily suspended – this is one area where harmonization is required and the greater contextual specificity of IHL recognized. Thus the concept of necessity must be widened to permit interferences with right to privacy to both uphold the “pressing social needs”\(^\text{131}\) of the local population, and to meet the Occupying Power’s military exigencies, including the protection of its forces and materiel from threats arising in the territory.

A proportionate balance must also be struck between these needs and the severity of a given interference with privacy.\(^\text{132}\) HRC General Comment 27 establishes that, to be proportionate, limitations on ICCPR rights must be “appropriate to achieve their protective function”; “the least intrusive instrument amongst those which might achieve the desired result”; and “proportionate to the interest to be protected”.\(^\text{133}\) For surveillance technologies, then:

…it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened.\(^\text{134}\)

GC IV Article 27(4) also does not provide *carte blanche* to the Occupying Power’s security measures, which “may not exceed what is reasonably required to achieve a legitimate security purpose in the circumstances”.\(^\text{135}\) The ICJ invoked the HRC’s necessity and proportionality tests in its Wall Opinion, concluding that the route of Israel’s separation wall was not “necessary to attain its security objectives” and that the infringements on Palestinians’ rights caused by the wall and its associated administrative regime “cannot be justified by military exigencies or by the requirements of national security or public order”.\(^\text{136}\)

For a given means to be the “least intrusive” available, its limitations on privacy must not exceed what is necessary to achieve the legitimate aim. The HRC has established that interferences with privacy should only be permitted “on a case-by-case basis”.\(^\text{137}\) In *S. and Marper v. UK*, the ECtHR found that the “blanket and indiscriminate” power to retain DNA and biometric data of individuals suspected, but not convicted, of a criminal offence, “fail[ed] to strike a fair balance between the competing public and private interests” and was therefore disproportionate.\(^\text{138}\) UN special procedures have assessed that mass

---

\(^{131}\) ECtHR, *Sunday Times v. UK*, above note 118, para. 59.


\(^{133}\) HRC, above note 123, para. 14. See also OHCHR, above note 113, paras. 23–5.

\(^{134}\) OHCHR, above note 113, para. 25.


\(^{136}\) ICJ, above note 58, paras. 136–7.

\(^{137}\) HRC, above note 110, paras. 6–8.

digital surveillance “constitutes a potentially disproportionate interference with the right to privacy”.

It is sometimes claimed that LFR surveillance is minimally invasive due to the lack of physical search involved. Where deployed in public spaces, however, these systems involve interferences with the privacy of all individuals whose faces are scanned, not only those on a watchlist. Such “widespread and bulk monitoring, collection, storage, analysis or other use” of biometric data may be considered “indiscriminate mass surveillance.”

Furthermore, the accuracy of these technologies is hotly contested, and “false-positives”, where people are wrongly identified, potentially expose innocent individuals to unnecessary searches, ID checks, detention and further rights interferences. For example, police tests of LFR technologies have reported as many as 95% of matches as “false-positives”. Fussey and Murray have thus argued for a “broader proportionality analysis” that “takes into account the rights impact of those not on the watchlist”. As with mass interception of internet communications, assessments of the proportionality of LFR surveillance should therefore “also take account of the collateral damage to collective privacy rights”. These issues have led some to assert that LFR systems are “inherently disproportionate”.

As established above, Pictet similarly asserts that measures of control and security under GC IV Article 27 should not suspend rights “in a general manner”, with personal freedoms remaining “in general unimpaired”. IHL and IHRL are therefore in agreement that LFR surveillance technologies used in public spaces in occupied territory, constituting mass, indiscriminate surveillance, are likely to constitute disproportionate limitations on the right to privacy of protected persons.

Finally, although the concept of belligerent occupation contains an “implicit assertion that military control is temporary”, Israel’s control has persisted for fifty-four years. The duration of an occupation should also factor into balancing the interests of the local population and the Occupying Power when determining proportionality. Benvenisti, for example, asserts that, “as hostilities subside, and security considerations permit, the occupant is expected to restore civil and political rights”. The Israeli Supreme Court has also recognized “the needs of the local population gain weight in a long-term military

139 B. Emmerson, above note 132, para. 18.
140 K. A. Gates, above note 4, p. 46.
142 Big Brother Watch, above note 12, p. 15.
143 P. Fussey and D. Murray, above note 27, pp. 60–1.
144 B. Emmerson, above note 132, para. 52.
147 A. Roberts, above note 55, p. 45.
149 E. Benvenisti, above note 49, p. 75.
occupation". The general lack of hostilities in the West Bank and prolonged nature of Israel’s occupation should further tilt the balance of proportionality in favour of the right to privacy of Palestinians.

**Corollary human rights impacts**

As established above, in domestic contexts, FRTs have been used in ways which consolidate abusive control over securitized populations by restricting movement and clamping down on dissent. The possibility similarly exists that, by inhibiting the enjoyment of privacy by protected persons, these technologies may facilitate the entrenchment of an Occupying Power’s control over occupied territory and populations in ways which violate broader individual and collective rights.

**Freedom of assembly, association and expression**

The enjoyment of the ICCPR rights to freedom of peaceful assembly (Article 21), association (Article 22) and expression (Article 19) are often contingent on the enjoyment of the right to privacy and anonymity in public spaces. These rights are not only important individual rights, but are also essential to express legitimate collective grievances and motivate the peaceful development of societies. As UN Special Rapporteur David Kaye described:

> In environments subject to rampant illicit surveillance, the targeted communities know of or suspect such attempts at surveillance, which in turn shapes and restricts their capacity to exercise rights to freedom of expression [and] association.

The HRC’s General Comment 37 outlines that state surveillance at assemblies “must strictly conform to applicable international standards, including on the right to privacy, and may never be aimed at intimidating or harassing participants or would-be participants in assemblies”. LFR surveillance, however, challenges anonymity, potentially permitting security forces to identify individual protesters and subject them to harassment or detention.

For the duration of its prolonged occupation, Israel has placed significant restrictions on these rights. In the West Bank, Military Order 101, issued in 1967, prohibits *inter alia* assemblies of ten or more persons where “a speech is being made on a political subject” and authorizes “every soldier … to use the degree of force necessary” to prevent violations of this order. Breaches are punishable by

---

150 *Jamayat Askan v. Commander of the IDF in Judea and Samaria*, HCJ 393/82 (1983), para. 22.
151 HRC, General Comment 37: Article 21 (Right of Peaceful Assembly), UN Doc. CCPR/C/GC/37, 17 September 2020, para. 1.
152 D. Kaye, above note 28, para. 21.
153 HRC, above note 151, para. 61.
ten years’ imprisonment and a fine. UN special procedures and human rights organizations have opposed Israel’s restrictions on freedom of assembly, expression and association, and called for the repeal of Military Order 101.155 Israel’s digital surveillance has documented a “chilling” effect on the free political expression of Palestinian activists and journalists online.156

The use of LFR surveillance in public spaces may thus deter Palestinians from attending peaceful public demonstrations demanding change from an Occupying Power that they have no democratic control over, for fear of being identified, detained or suffering reprisals. Pervasive interferences with privacy permitted by FRTs may ultimately reduce pressure on an Occupying Power to change its policies, grant further rights to the population, or withdraw.

**Freedom of movement**

Privacy and control of movement are also inextricably linked. The freedom of movement of Palestinians is controlled, not only by physical barriers such as checkpoints and the separation wall, but also by administrative and legal controls which require their identification, and the collection, processing and storage of their personal data. This includes “more than a dozen different travel permits, each allowing different categories of persons to travel to different categories of space”,157 and Israel’s control over the Palestinian population registry and IDs.158

In its Wall Opinion, the ICJ determined not only that the construction of the wall beyond the Green Line was contrary to international law, but so too was its associated administrative regime of permits and ID cards issued to Palestinians living in, or seeking to enter, the “closed area” between the wall and the Green Line.159 These measures together were found to “impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory” and to “impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living”.160 As described below, the Court held that these measures create a “fait accompli”, imposing permanent rather than temporary impediments to Palestinians’ rights.161

As Weizman observes, the separation wall and its checkpoints are “not only an instrument of partition, but also of observation and control”.162 Interferences with privacy, through the mass collection and processing of Palestinians’ facial data, comprise an increasingly integral part of Israel’s administrative regime, consolidating its control over the lives – and movements – of Palestinians.

156 HRW, above note 47, p. 7.
159 ICJ, above note 58, para. 85.
Self-determination

The primary advantages of FRTs for an Occupying Power are efficiency and scale—more individuals can be monitored and their movements controlled with fewer resources. Installed at checkpoints, automated ID checks further reduce physical interactions between Palestinians and border guards, limiting points of potential “friction”.163 LFR systems enhance the scope of surveillance and potential to target individuals for arrest or application of force, while reducing the need for human monitoring of CCTV, or the physical presence of soldiers in occupied territory.

Weizman observes, however, that Israel has sought to render the occupation increasingly “invisible” in order “to absolve itself of the responsibilities it has assumed as the occupying power”—including the maintenance of the humanitarian needs of the population—“without losing overall ‘security control’”.164 In 2005, for example, Israel removed its troops and settlements from inside Gaza, while retaining control over Gaza’s airspace, land crossings, territorial waters, population registry and ability to conduct frequent military incursions.165 As Scobie highlights: “Given the high-tech means of surveillance and attack employed by Israel, this was an attempt to deny responsibility for the territory while reaping the benefits of effective, albeit remote, control.”166

AI-powered technologies—including FRTs, predictive policing and digital surveillance—may render Israel’s control not only more “invisible” and “remote”, but also increasingly automated. Through these systems, security threats can be identified and neutralized earlier and with fewer boots on the ground, and resistance and protest can be nullified both directly and indirectly through self-censorious behaviour of those fearing repercussions. The population under occupation, meanwhile, may endure increasing humanitarian costs as their privacy disappears, their movement reduces and civil life erodes. Increasing automation may entrench an Occupying Power’s control while reducing the pressure on it to withdraw, thus prolonging what is intended to be a temporary situation.

As Ben-Naftali, Sfard and Viterbo assert, “if an occupation could continue indefinitely, the interests it is designed to protect would all become meaningless” including “the inhabitants’ interest in regaining control over their life and exercising their right to self-determination”.167 Israel’s obligation to respect the Palestinian people’s collective right to self-determination and thus “freely determine their political status and freely pursue their economic, social and

163 Ibid., p. 150.
164 Ibid., pp. 156–9.
cultural development”\textsuperscript{168} was affirmed by the ICJ in its Wall Opinion.\textsuperscript{169} The Court, finding that the construction of the wall and other measures impede Palestinians’ enjoyment of their economic, social and cultural rights, reflected fears that these measures “will prejudge the future frontier between Israel and Palestine” and thus “create a \textit{fait accompli} on the ground that could well become permanent”.\textsuperscript{170} The measures, contravening the assumption of temporariness in an Occupying Power’s control, were therefore found to “severely [impede] the exercise by the Palestinian people of its right to self-determination”.\textsuperscript{171}

Israel’s use of FRTs should be considered in light of not only the half-century duration of its occupation, but also what UN Special Rapporteur Michael Lynk has termed a failure to govern the oPt in “good faith” as “measured by the criteria of substantive compliance with United Nations resolutions or by the satisfaction of its obligations as occupier under the framework of international law”.\textsuperscript{172} The “avaricious” nature of its occupation should also be considered, as demonstrated by “the expanding settlement enterprise, the annexation of territory, the confiscation of private and public lands, the pillaging of resources, [and] the publicly-stated ambitions for permanent control over all or part of the Territory”.\textsuperscript{173}

Just as Israel’s separation wall engenders the risk of imposing permanent control over occupied territory and alterations to its demographic composition,\textsuperscript{174} the use of FRTs and related technologies may also facilitate the prolonging of an Occupying Power’s control over an occupied population – particularly if it is governing in bad faith – and thus inhibit the exercise of their collective right to self-determination. As Lubell explains:

\begin{quote}
The expectation that the occupation should be a temporary affair, and that sovereignty … is not transferred to the Occupying Power, requires rules designed to minimize the possibility of the occupier creating changes that would endanger these assumptions.\textsuperscript{175}
\end{quote}

The broader impacts on Palestinians’ collective right to self-determination should therefore also be considered when assessing the proportionality, and permissibility, of these measures.

\section*{Conclusion}

Despite their increasing ubiquity and implications for the rights and freedoms of people in areas of conflict and occupied territories, there has been scant academic

\textsuperscript{168} ICCPR, above note 104, Art. 1.
\textsuperscript{169} ICJ, above note 58, paras. 88 and 149.
\textsuperscript{170} \textit{Ibid.}, para. 121.
\textsuperscript{171} \textit{Ibid.}, paras. 134 and 122.
\textsuperscript{174} ICJ, above note 58, para. 122.
\textsuperscript{175} N. Lubell, above note 87, p. 329. See also E. Benvenisti, above note 49, p. 349.
or judicial exploration of the legal implications of military uses of FRTs. This reflects both the newness of these technologies, and the covert nature of their use.

Though these technologies were unforeseeable to the drafters of the core IHL treaties, the law of occupation is flexible, adapting to a broad array of modern scenarios and technologies. Where deployed within an Occupying Power’s measures of control and security, FRTs sit at the fulcrum of the law of occupation’s central balance between the Occupying Power’s security interests and the humanitarian interests of protected persons. IHL provides only general guidance, however. Assessing the humanitarian impacts of an Occupying Power’s uses of FRTs, and thus their proportionality, requires reference to overlapping IHRL obligations, particularly regarding the right to privacy. Under IHRL, interferences with privacy are permissible so long as they satisfy the cumulative requirements of legality, legitimate purpose, necessity and proportionality.

Although a thorough examination is limited by the secrecy surrounding Israel’s deployment of LFR surveillance in the oPt, its documented uses appear prima facie not to satisfy these criteria, even where they are harmonized with the framework of IHL which specifically concerns the conduct of belligerent occupation. In particular, it lacks adequate basis in law, and the indiscriminate mass interference with privacy caused by the unfettered use of LFR surveillance in public spaces would constitute a disproportionate interference with Palestinians’ right to privacy.

Furthermore, pervasive interferences with the right to privacy engendered by FRTs may have corollary impacts on the rights to freedom of movement, expression, assembly and association. FRTs, and related technologies, may reduce the costs of occupation while simultaneously rendering the occupant’s exercise of authority less visible, more remote and increasingly automated, thus entrenching its control. In the context of Israel’s already-prolonged occupation they thus engender risks to the Palestinians’ exercise of their collective right to self-determination. Additional study is warranted into these issues, particularly regarding the challenge posed to the very concept of “occupation” and the task of determining the existence of an occupation under Hague Regulations Article 42 where the Occupying Power’s control is increasingly automated and remote.

Further examination of the international legal implications of these technologies is imperative. While FRTs, and other AI-powered security technologies, touch the lives of more and more people around the world, the governments and corporations at the vanguard of developing, deploying and exporting them also influence the norms governing their uses. Should such technologies be increasingly used without the essential safeguards of international humanitarian and human rights law, a spectre of digital authoritarianism lies ahead.
A legal obligation under international law to guarantee access to abortion services in contexts of armed conflict? An analysis of the case of Colombia

Juliana Laguna Trujillo
Juliana Laguna Trujillo is a Colombian lawyer. She holds a master of advanced studies in transitional justice, human rights and the rule of law at the Geneva Academy of International Humanitarian Law and Human Rights.

Abstract
This article discusses the existence of an international obligation for the State of Colombia to guarantee access to abortion services for women and girls who are victims of conflict-related sexual violence in the context of the Colombian armed conflict. By examining international humanitarian law rules from an international human rights law lens, it sets out the interdependence between both frameworks from reproductive health and human rights perspectives. Furthermore, the article provides considerations on the recognition and redress of these violations in the transitional justice scenario in Colombia.

Keywords: forced pregnancy, abortion, reproductive violence, reproductive rights, international humanitarian law, international human rights law, transitional justice, victims’ rights, reparations.
Introduction

For more than half a century of armed conflict in Colombia, sexual and reproductive violence has been widespread among all armed actors, including guerrillas, paramilitary groups and governmental forces. Although armed actors have used sexual and gender-based violence against the entire civilian population, the most affected and impacted demographic groups are women, girls and LGBTQ+ people. One of the most understudied impacts of sexual violence in armed conflict, and a form of reproductive violence in themselves, are forced pregnancies and consequently forced motherhood resulting from the lack of access to sexual and reproductive health services, including abortion. Furthermore, the individual and collective impacts on women and girls who do not have the option to terminate their pregnancies if they want to, and the children born as a result, have yet to be comprehensively studied.

Between 1958 and 2020, 15,229 cases of sexual violence in the Colombian armed conflict had been documented according to data from the Memory and Conflict Observatory. Notably, between 1997 and 2005—which corresponds to the time period of the expansion and consolidation of the political and territorial project of paramilitarism in the country—8,242 cases of sexual violence were reported, representing an increase in that specific form of violence from armed actors during this period. The Victim’s Unit—the governmental institution in charge of the national administrative reparations programme—has reported that more than 30,000 persons have registered in the Victim’s Registry as victims of crimes against their physical and sexual integrity, which includes acts of rape,

---

1 Centro Nacional de Memoria Histórica, La guerra inscrita en el cuerpo: Informe nacional de violencia sexual en el conflicto armado, Bogotá, 2017.
3 Research on abortion and armed conflict in Colombia has mainly addressed three angles: (1) investigations focused on the relation between the weak presence of the State, the presence of armed actors and the consequent limited access to health services, which includes abortion services (see Médecins Sans Frontières, Acceder a la salud es acceder a la vida: 977 voces, Bogotá, 2010; Médecins Sans Frontières, Aborto no seguro, mujeres en riesgo, Bogotá, 2019); (2) investigations that have documented the barriers that hinder and, in some cases, prevent access to abortion services for women and girls in the country, and can disproportionately impact women and girls from conflict-affected areas (see Nina Chaparro, Annika Dalén, Diana Esther Guzmán and Margarita Martínez Osorio, El ejercicio de la interrupción voluntaria del embarazo en el marco del conflicto armado, Dejusticia, Bogotá, 2015; La Mesa por la Vida y la Salud de las Mujeres, Barreras de acceso a la interrupción voluntaria del embarazo en Colombia, Bogotá, 2017); and (3) emerging research, mainly from civil society organizations, on the forms of reproductive violence that have occurred in the context of the armed conflict in Colombia and their impacts on the victims (see Women’s Link Worldwide, Una violencia sin nombre: Violencia reproductiva en el conflicto armado Colombiano, Bogotá, 2020; Center for Reproductive Rights, Una radiografía sobre la violencia reproductiva, Bogotá, 2020).
5 Centro Nacional de Memoria Histórica, above note 1, p. 476.
6 Centro Nacional de Memoria Histórica, Memoria histórica con víctimas de violencia sexual: Aproximación conceptual y metodológica, Bogotá, 2018, p. 44.
forced pregnancy, forced abortion, sexual slavery and sexual abuse, among others.\textsuperscript{7} Although unwanted pregnancies can be an outcome of rape, official records establish that by 2016 only 533 persons had been registered as children born as an outcome of conflict-related sexual violence.\textsuperscript{8}

These numbers suggest that sexual violence and other forms of gender-based violence have been documented, prevalent practices in the context of the armed conflict in Colombia. While these figures might not represent the reality of the phenomenon due to underreporting issues (which will not be addressed in this paper), they reflect the fact that women and girls in the armed conflict in Colombia have been subject in a widespread manner to sexual and gender-based violence. Unwanted pregnancies have been one of the impacts and consequences for survivors.

Access to abortion services in Colombia was criminalized entirely until 2006. Then, a Constitutional Court ruling lifted the total ban on abortion under three circumstances: (1) when the continuation of the pregnancy poses a risk for the life or the health of the woman; (2) when the pregnancy is a result of sexual violence; and (3) when it is determined that there exists a foetal malformation that makes life outside the womb non-viable.\textsuperscript{9} However, today, years after access to legal abortion services was made possible under these three limited circumstances, women and girls, especially those living in conflict-affected areas, continue to face multiple barriers preventing their access to this health service.\textsuperscript{10}

Before 2006, women and girls who suffered sexual violence in the context of the armed conflict, and became pregnant as a result, did not have the right to access legal and safe abortion services if they so desired. What should have been the role of the State to protect and guarantee the rights of women in this context? How can the impacts of the lack of reproductive autonomy be addressed in a context where abortion services were completely criminalized? This article analyzes whether there was an international obligation under international humanitarian law (IHL) and international human rights law (IHRL) for the State of Colombia to ensure access to sexual and reproductive rights, including abortion services, for women and girls, in the context of the armed conflict before 2006. It argues that the State of Colombia, given the context of widespread conflict-related sexual violence, had, at least as a minimum, the duty to guarantee access to abortion services for women and girls affected by conflict-related rape. This analysis will allow the exploration of the opportunities for redress in Colombia under the Victims and Land Restitution Law and the transitional justice mechanisms created by the 2016 Peace Agreement for victims of forced pregnancy before 2006.

While this article focuses on Colombia, it contributes to broader conversations on the study of sexual and reproductive violence and reproductive

\textsuperscript{7} Unidad de Víctimas, Atención y reparación para las mujeres víctimas de violencia sexual, 24 May 2020, available at: https://tinyurl.com/8fx4tkx9.


\textsuperscript{9} Colombian Constitutional Court, Judgment C-355-2006 (Jaime Araujo, Clara Inés Vargas).

\textsuperscript{10} N. Chaparro et al., above note 3, p. 31.
health-care services in humanitarian and armed conflict contexts, by focusing on the obligation that States bear. Furthermore, the analysis links to larger debates in the field of transitional justice and reparations for victims of gender-based violence acts. Finally, the article contributes to discussions on the impacts of conflict-related sexual violence from a reproductive autonomy lens and the opportunities that transitional justice mechanisms offer for redress.

**Some considerations on reproductive violence and forced pregnancy**

In contexts of armed conflict, repression or war, women, girls and historically discriminated groups have long suffered violations linked to their reproductive capacity and bodily autonomy. In Colombia, reproductive violence has been a widespread practice by which all armed groups have targeted women, girls and LGBTQ+ people. Violations have included forced contraception and forced abortions as a policy within the ranks of armed groups, forced pregnancies as a consequence of conflict-related sexual violence by armed groups, and lack of access to emergency contraception and safe abortion services for victims of rape by armed actors.

Forced pregnancy as a form of gender-based violence and an international crime was a practice documented in the conflict in the former Yugoslavia and in the Rwandan Genocide. Even though forced pregnancy was not included in the list of crimes under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), these acts were explicitly mentioned in some rulings. The ICTY recognized the existence of rape camps that “were specifically devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often interned until it was too late for them to undergo an abortion”. The ICTR acknowledged that the deliberate impregnation of a woman by a man of another group, with the

---

11 Examples include the eugenics policy during Nazi Germany, under which between 70,000 and 350,000 persons were forcibly sterilized (see Stephen B. Saetz Marian Van Court and Mark W. Henshaw, “Eugenics and the Third Reich”, The Eugenics Bulletin, Winter 1985, available at: www.eugenics.net/papers/3rdreich.html; Dieneke De Vos, “Can the ICC Prosecute Forced Contraception?”, European University Institute Blog, 14 March 2016, available at: https://me.eui.eu/dieneke-de-vos/blog/can-the-icc-prosecute-forced-contraception/), and the practices of forced pregnancies and abortions against Yezidi women and girls in the context of the conflict with the so-called Islamic State (see Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, UN Doc. A/HRC/28/18, 27 March 2015, paras 37, 39, 41.


intention of preventing births within her group, could amount to the crime of genocide.\textsuperscript{14}

The Rome Statute of the International Criminal Court (ICC) was the first international instrument that expressly included forced pregnancy as a crime against humanity and as a war crime.\textsuperscript{15} Considerations on the effectiveness of the definition included in the Rome Statute, as well as the developments foregounded by the ICTY and the ICTR, go beyond the scope of this article. However, acknowledging that the development of the term has occurred primarily within international criminal law is important to understanding the limitations that such a definition might bring.

For the purposes of this paper, forced pregnancy will be understood under the category of reproductive violence as a distinct category from sexual violence that has been understudied by international law.\textsuperscript{16} By referring to forced pregnancy as a form of reproductive violence, the harms are not narrowly limited to impacts on sexual autonomy, but also include the individual’s freedom to determine their reproductive choices – that is, whether and in what circumstances to reproduce.\textsuperscript{17} As such, forced pregnancy describes the violation of reproductive autonomy that occurs when a person is forced to continue a pregnancy by any means of coercion, or when abortion services are denied when pregnancy is followed by rape.\textsuperscript{18}

An obligation for the State of Colombia to provide abortion services in the context of the armed conflict before 2006?

This section will set the IHL and IHRL standards that provide the basis for arguing that in the context of the long-lasting armed conflict in Colombia, the State of Colombia had an obligation to provide safe abortion services for victims of conflict-related sexual violence. Additionally, it will explore whether the existence of this obligation, derived from both IHL rules and IHRL developments at the international level, was applicable for the State of Colombia before the decriminalization of abortion

\textsuperscript{14} ICTR, \textit{The Prosecutor v. Jean-Paul Akayesu}, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 507.

\textsuperscript{15} Rome Statue of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, (entered into force 1 July 2002) (Rome Statute), Arts (7)(1)(g), 8(2)(b)(xxii). Per the ICC Elements of Crimes, each permutation of the crime requires that “[t]he perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law” (pp. 9, 29). An analysis of whether this is an ideal formulation is beyond the scope of this article.


in 2006. The analysis will focus on two factors: the existence of the obligation before the Constitutional Court decriminalized abortion in 2006, and the persistence of an obligation to provide abortion services that is still unfulfilled by the State after the ruling of the Constitutional Court and the normative developments at the national and international level.

Brief considerations on sources of international law

Article 38 of the Statute of the International Court of Justice (ICJ) is the authoritative referent regarding sources of international law.19 Under this provision, treaties and customary international law are the principal sources of international law. However, resolutions from international bodies, principles of international law and unilateral acts by States are also legitimate but secondary sources of international law.20

The existence, today, of a corpus of international law regulating the treatment and rights of women in contexts of armed conflict is a reality that emanates from the proliferation of norms in recent years.21 Still, the overlapping between legal frameworks can generate “uncertainty around who is bound by any given legal or normative instrument and the potential for self-serving selectivity by states and other parties to the conflict in their compliance with relevant norms and obligations”.22

IHL and IHRL, the regimes which will be discussed in this article, are composed of normative and legal obligations that have different binding value for States at the international level. IHL was the first framework to emerge within international law and finds its sources in both treaty and customary law; it is thus legally binding for all States party to the Geneva Conventions. The State of Colombia is a State party to the four Geneva Conventions since 1961, to Additional Protocol I (AP I) since 1993, and to Additional Protocol II (AP II) since 1995.

IHRL obligations derive from universal and regional treaties, treaty monitoring bodies and further treaties establishing enforcement procedures.23 IHRL’s foundational source is the 1948 Universal Declaration of Human Rights, whose content was translated into treaty obligations with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In IHRL, the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW) creates obligations for States regarding the treatment of women. There are currently ten

22 Ibid., p. 4.
23 Ibid., p. 49.
human rights treaty monitoring bodies, which supervise the States Parties’ compliance with their treaty obligations, settle disputes and provide interpretation on the scope, meaning and content of human rights obligations.\(^{24}\)

The State of Colombia is a State party to the ICCPR,\(^{25}\) the ICESCR,\(^{26}\) the CEDAW,\(^{27}\) the Optional Protocol to the CEDAW,\(^{28}\) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,\(^{29}\) the Convention on the Rights of the Child,\(^{30}\) the Inter-American Convention on Human Rights\(^{31}\) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).\(^{32}\) For some of these treaties, the State is required to report periodically to the treaty monitoring bodies, and to the Human Rights Council regarding the Universal Periodic Review. Colombia has also accepted the jurisdiction of the Inter-American Court of Human Rights (IACtHR).

The development of international standards on the protection and fulfilment of women’s rights, including sexual and reproductive rights, has been achieved mainly through soft-law instruments, including human rights treaty bodies’ general commentaries, concluding observations and other expert pronouncements such as those of the Special Rapporteurs. As such, these standards are non-legally binding for States. However, they interpret and add detail to the rights and obligations contained in the respective human right treaties, increase the density of international practice of the interpretation of the treaties, and contribute to the emergence of customary international legal norms.\(^{33}\)

Soft-law instruments remain a significant auxiliary source of normative value. They raise awareness about human rights issues and may influence the conduct of States while developing jurisprudence concerning the scope and content of international human rights obligations.\(^{34}\) Moreover, soft-law developments by human rights bodies at the international level can have a considerable influence on national legal orders, which improves the practical implementation of rights.

Furthermore, Article 31 of the Vienna Convention on the Law of Treaties, which establishes the general rules of interpretation of treaties, offers guidance on soft law’s value in the fulfilment of obligations emanating from treaties. As a

---


25 The State of Colombia ratified this treaty on 29 October 1969.

26 The State of Colombia ratified this treaty on 29 October 1969.

27 The State of Colombia ratified this treaty on 19 January 1982.


29 The State of Colombia ratified this treaty on 8 December 1987.


32 The State of Colombia ratified this treaty on 10 March 1996.


34 H. Keller and G. Ulfstein (eds), above note 24, p. 415.
minimum, good-faith interpretations of human rights treaties as required by Article 31 oblige States Parties to consider the commentaries carried out by human rights treaty bodies, as they are a product of an authoritative body established by the States Parties themselves to interpret the treaty and to monitor and promote compliance of it.35

Feminist scholars have criticized the fact that women have historically been excluded from spaces of international law-making due to a lack of representation in State leadership, and to structural discrimination.36 A feminist critical perspective on international law identifies how many of the developments on women’s rights at the international level were achieved through soft-law instruments; this has created a “compliance paradox”,37 meaning that even though the development and advancement of the recognition of women’s rights—primarily through soft-law instruments—has been made in more inclusive spaces with broader participation from civil society organizations and women’s groups, it has moved away from the formal process of international law-making,38 thus generating a more robust soft-law standards system but without the hard-law nature that obliges States towards compliance.

The “constitutionality block” in Colombia and its relation to the sources of international law

The Constitution of Colombia of 1991 includes explicit provisions that make direct reference to IHRL and IHL, which have been interpreted broadly by the Constitutional Court.39 These provisions have been applied by the Constitutional Court as sufficient grounds for incorporating binding IHRL and IHL provisions in its legal decisions.40 Additionally, the application of IHRL and IHL has been reinforced by the jurisprudential concept of the “constitutionality block”. The Court has held that the constitutional judicial review of the situations under its scrutiny must be carried out not only in reference to the Constitution itself but also in relation to

those norms and principles that, without formally appearing in the articles of the constitutional text, are used as parameters of the control of constitutionality of the laws, since they have been normatively integrated into the Constitution, by various means and by mandate of the Constitution itself.41

35 H. Keller and L. Grover, above note 33, p. 129.
37 C. O’Rourke, above note 21, p. 19.
Through the constitutionality block, the State’s compliance with provisions of human rights treaties to which Colombia is a party is mandatory and cannot be limited in states of emergency.\(^\text{42}\)

Regarding IHL norms, the Constitutional Court has held that regardless of whether they are peremptory norms or not, all the provisions of IHL—both substantial and procedural, both conventional and customary in origin or as general principles of law—are binding upon the Colombian State as part of the constitutionality block. They too are, consequently, a parameter of necessary reference for the constitutional judge in carrying out their judicial review.\(^\text{43}\)

The Constitutional Court has expressed that IHRL treaties which entered the constitutionality block were binding even when the Constitution of 1886 was in force.\(^\text{44}\) In addition, the Court has recognized that the case law of international human rights bodies, which have the function of interpreting IHRL treaties, constitute a relevant interpretation criterion for establishing the meaning and scope of constitutional norms regarding fundamental rights.\(^\text{45}\) In this sense, in its judicial review function, the Constitutional Court uses the relevant treaties that are part of the constitutionality block and the relevant interpretations that international human rights bodies have made concerning the scope of protection of certain human rights.\(^\text{46}\)

The notion of the constitutionality block in Colombia is relevant for this article when discussing the relationship between sources of international law and the incorporation of international law into the domestic legal system. Indeed, at the domestic level, the State bears the burden of complying with international obligations that it has consented to be bound by.\(^\text{47}\) Regarding Article 38 of the ICJ Statute, the Constitutional Court has stated that both international customary law and the general principles of law have the same position in normative hierarchy in the Colombian legal framework as international treaties, notwithstanding that customary international law can establish human rights and IHL rules. As such, they become part of the constitutionality block.\(^\text{48}\)

---

\(^\text{42}\) Colombian Constitutional Court, Judgments C-582-1999 (Alejandro Martínez), C-225-1995; Rodrigo Uprimny Yepes, El bloque de constitutionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal, Dejusticia, 12 December 2005, p. 16.

\(^\text{43}\) Colombian Constitutional Court, Judgment C-291-2007 (Manuel José Cepeda) (author’s translation).

\(^\text{44}\) Colombian Constitutional Court, Judgment T-477-1995 (Alejandro Martínez).

\(^\text{45}\) Colombian Constitutional Court, Judgment C-010-2000 (Alejandro Martínez).


\(^\text{47}\) Colombian Constitutional Court, Judgments T-568-1999 (Carlos Gaviria), C-067-2003 (Marco Gerardo Monroy).

\(^\text{48}\) Colombian Constitutional Court, Judgment C-1189-2000 (Carlos Gaviria).
The existence of an obligation for the State of Colombia to provide abortion services in the context of the armed conflict under IHL and IHRL

The relationship between IHL and IHRL has been a matter of debate among practitioners and scholars.49 Although IHL and IHRL share common principles around the protection of the human person, they are distinct legal frameworks. One of the main differences lies in the temporal scope of their application. While IHL applies only in times of armed conflict, IHRL applies at all times. Another fundamental distinction concerns the bearers of obligations. IHL must be complied with by the parties to the conflict, which may involve States but also non-State armed groups, while IHRL’s primary addressee is the State.50 However, and fundamentally, the ICJ,51 statements from the International Committee of the Red Cross (ICRC)52 and academic literature,53 inter alia, support the view that human rights law and humanitarian law both apply in contexts of armed conflict.

Discussions today centre around how IHL and IHRL can apply coherently and comprehensively in situations of armed conflict.54 Some literature considers the application of the lex specialis as a way of resolving the conflicts between IHL and IHRL,55 while others advocate the concept of systemic integration.56 Regarding


56 Vienna Convention on the Law of Treaties, 28 May 1969 (entered into force 27 January 1980), Art. 31(2) (c); C. Droege, above note 50, p. 521; Jean D’Aspremont and Elodie Tranchez, “The Quest for a Non-
the interactions of both frameworks in relation to women’s rights in conflict, the adequate protection that IHL provides to women depends on its relationship with, and simultaneous application of, IHRL.57 As the development of women’s rights under international law since the 1990s progressed, there has been a renewed feminist engagement with IHL, which has focused mainly on identifying the interactions between IHL and IHRL.58 In that context, the ICRC and its role in the interpretation and operational implementation of IHL has played a substantial part in incorporating a gender perspective into women’s situations in conflict.59

For this article, a complementarity approach will be applied to analyze the rules of IHL in the light of IHRL standards, starting from the consideration that IHL may be interpreted in light of IHRL following Article 31.3.c of the Vienna Convention on the Law of Treaties, which indicates that in interpreting a norm, “any relevant rules of international law applicable in the relations between parties” may be considered.

**IHL rules applicable in non-international armed conflict that lay down the protection of women’s and girls’ reproductive health**

The rules of IHL have been codified in the four Geneva Conventions and their Additional Protocols, which deal with the protection of victims of armed conflicts, and the Hague Peace Conferences of 1899 and 1907, which regulate the means and methods of warfare.60 Article 3 common to the four Geneva Conventions is the provision that regulates the situation of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those rendered hors de combat61 in cases of non-international armed conflict (NIAC). Furthermore, AP II and the evolution of customary international law have established more precise elements regarding the scope of application of common Article 3.62

Colombia has experienced one of the longest NIACs in modern times.63 Regarding the treaty and customary international law emanating from IHL, the
Constitutional Court of Colombia has established since its early jurisprudence that the norms and principles under this body of law are automatically incorporated into the Constitution, and as such have a binding force for all parties to the conflict.\(^64\)

The persons under the scope of protection of common Article 3 are “persons taking no active part in the hostilities”, which are “first and foremost the civilian population”.\(^65\) The scope of common Article 3 also includes “members of armed forces who have laid down their arms and those place hors de combat”. Moreover, the cornerstone of the protection granted to those under the scope of application of common Article 3 lies in the obligation of humane treatment as laid down in paragraph 1. As established in the ICRC Commentary to common Article 3,

> the meaning of humane treatment is context-specific and has to be considered in the concrete circumstances of each case, taking into account both objective and subjective elements, such as the environment, the physical and mental condition of the person, as well as his or her age, social, cultural religious or political background and past experiences.\(^66\)

The ICRC indicates that the differentiated ways in which women, men, girls and boys are affected by armed conflict must be assessed in order to understand the notion of humane treatment under common Article 3. Thus, “sensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment”.\(^67\)

Furthermore, common Article 3 emphasizes that the obligation of humane treatment is absolute and has no exceptions. Even though the application of the obligation—which can include, for example, the provision of adequate health care—might differ depending on the person’s and the armed conflict’s specific situation, the treatment must never be less than humane.\(^68\)

Common Article 3 introduces the prohibition against adverse distinction by stating that persons under its protection must be treated humanely in all circumstances “without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.\(^69\) The ICRC has stated that the listed grounds prohibiting distinctive treatment are not exhaustive but are illustrative. For example, adverse distinction founded in grounds such as “age, age, age, age, age...”

---

\(^64\) Colombian Constitutional Court, Judgments C-574-1992 (Ciro Angarita), C-088-1993 (Ciro Angarita), C-225-1995.


\(^66\) Ibid., para. 553.

\(^67\) Ibid., para. 553.

\(^68\) Ibid., para. 560.

\(^69\) 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) (AP II), Art. 2(1), which extends the prohibition against adverse distinction to the application of the Protocol as a whole. With respect to humane treatment “without any adverse distinction” of persons not or no longer taking a direct part in hostilities, see AP II, Art. 4(1).
state of health, level of education or family connections of a person protected under common Article 3 would therefore equally be prohibited”.

70 Article 2 of AP II states further prohibited grounds of adverse treatment.

Common Article 3 does not prohibit non-adverse distinctions that are “justified by the substantively different situations and needs of persons protected under Common Article 3”. Even though common Article 3 does not specify the possible grounds that justify differential treatment, the ICRC has indicated that a “person’s state of health, age or sex is traditionally recognised as justifying, and requiring, differential treatment”. Furthermore, a non-adverse distinction can be justified in considerations regarding the social, cultural or political context in a society that establishes differentiated needs for men and women of different backgrounds and ages.

The prohibited acts under common Article 3 are absolute and admit no exception. Despite the lack of an explicit prohibition against sexual violence in the wording of common Article 3, the prohibition against rape under IHL is part of customary international law. Moreover, the ICRC, drawing from other humanitarian rules and the case law of international criminal tribunals, understands that acts related to the reproductive functions of women and girls, such as forced pregnancy, forced sterilization and forced abortions, are included in the prohibition against sexual violence.

From the above, we can see that the content and scope of the obligation of humane treatment and adverse distinction laid out in paragraph 1 of common Article 3 protects women who do not participate in hostilities from being subjected to inhumane treatment and from being discriminated against. One could contend that the prohibition against cruel treatment, torture and outrages upon personal dignity established in paragraphs 1(a) and 1(c) of common Article 3, connected to the obligation of humane treatment and non-discrimination, includes allowing access to comprehensive health services for women that have been subjected to conflict-related sexual violence, including reproductive health services. Furthermore, this obligation is complemented by the consideration by

70 ICRC Commentary on GC I, above note 65, para. 569.
71 AP II, Art. 3.
72 ICRC Commentary on GC I, above note 65, para. 575.
73 Ibid., para. 577.
74 Ibid., para. 578.
75 Ibid., para. 582.
77 AP II, Art. (4)(2)(e); 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. 27; 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. 75(2)(b).
78 The Rome Statute, above note 15, Art. 8(2)(e)(vi), lists sexual slavery, forced pregnancy and enforced sterilization as war crimes.
79 ICRC Commentary on GC I, above note 65, para. 698.
human rights bodies that denying abortion services is a form of suffering that can amount to ill-treatment under IHRL, discussed subsequently.

With regard to paragraph 2 of common Article 3, which establishes a distinct obligation to care for the wounded and sick, it must be noted that the protection covers both members of armed forces and civilians.\(^{80}\) To qualify as a wounded or sick person for the scope of protection of humanitarian law, a person must fulfil two conditions: they must need medical assistance or care, and they must refrain from any act of hostility.\(^{81}\) With respect to the medical care that is owed to persons protected under common Article 3, the ICRC has recognized that “women, men, boys and girls of different ages and backgrounds can have different medical needs, be exposed to different risks hindering equal care, or face different social stigma connected to being wounded or sick”.\(^{82}\) On the obligation to care for the wounded and the sick under common Article 3, it can be stated that victims of conflict-related sexual violence in a context of NIAC are owed medical care, which must also be accommodated to their needs, and this includes reproductive health services.

From the above considerations, it remains clear that while IHL does not explicitly refer to women’s and girls’ reproductive health, its core principles are based on the obligation to provide humane treatment to all persons under the scope of its protection. Furthermore, fulfilling this obligation includes refraining from any discriminatory treatment, ensuring the provision of medical treatment considering women’s specific needs, and completely prohibiting any cruel treatment and other acts against human dignity. Moreover, the ICRC has held that women’s individual situations must be considered when operationalizing such provisions.

**IHRL standards that protect women’s and girls’ right to access reproductive health services, including abortion services, in armed conflicts**

Sexual and reproductive rights are not explicitly enunciated in most treaties.\(^{83}\) However, the interpretations on the content and scope that human rights treaty monitoring bodies, international tribunals and national courts have made on the right to life, to health, to be free from cruel, inhumane treatment and torture, to privacy, and to non-discrimination, among others, have made clear that such treaties recognize and protect sexual and reproductive rights.\(^{84}\)

\(^{80}\) *Ibid.*, para. 736.


\(^{82}\) *Ibid.*, para. 766.

\(^{83}\) The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2nd Ordinary Session, 1 July 2003, Art. 14(2)(c), expresses that “States Parties shall take all appropriate measures to … protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.

Feminist advocacy for women’s human rights at the international level gained momentum in the 1990s, and significant developments regarding the recognition of sexual and reproductive rights advanced during this and subsequent decades. Such developments have taken the form of general comments and recommendations from treaty monitoring bodies, and guidelines and recommendations from international human rights experts and civil society coalitions. However, these are considered soft law and can face resistance in their application by States. Nevertheless, they have been very relevant for advancing feminist agendas in relation to sexual and reproductive rights, and have been used by the Constitutional Court of Colombia as a relevant interpretation criterion for establishing the scope of fundamental rights protected by the Constitution.

The International Conference on Population and Development (ICPD) has recognized that unsafe abortions are linked to maternal deaths or permanent injury to women. Furthermore, States that subscribed to the 1995 Beijing Platform for Action—including Colombia—have committed to “reviewing laws containing punitive measures against women who have undergone illegal abortions”. It was also in the declaration of the Beijing Platform that the situation of women in conflict was considered and forced pregnancy was included as a violation of the human rights of women.

In 1992, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) issued its General Recommendation No. 19 on the issue of violence against women. In it, the CEDAW Committee underlined that gender-based violence impairs or nullifies women’s enjoyment of their human rights and fundamental freedoms, which include “the right to equal protection according to humanitarian norms in time of international or internal armed conflict”, as well as the right to the highest attainable standard of physical and mental health.

Moreover, the CEDAW Committee recognized that contexts of war and armed conflict often lead to increased sexual assaults on women, thus requiring specific protective and punitive measures. Concerning Article 16 of the CEDAW, which obliges States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, including the right to decide freely and responsibly on the number and
spacing of their children, the Committee held that practices such as compulsory sterilization or abortion could adversely affect women’s physical and mental health while infringing on their right to decide on the number and spacing of their children.\textsuperscript{93} Furthermore, in this General Recommendation, the CEDAW Committee urged States Parties to “ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control”.\textsuperscript{94}

The Special Rapporteur on Violence against Women, Its Causes and Consequences, in her first report from 1999 on the policies and practices that impact women’s reproductive rights and contribute to, cause or constitute violence against women, held that violence against women could occur within the context of a State’s reproductive policy:

Direct State action violative of women’s reproductive rights can be found, for example, in criminal sanctions against contraception, voluntary sterilisation and abortion. … Within the context of reproductive health policy, State policies contribute to violence against women, manifested in forced abortions, forced sterilisation and contraception, coerced pregnancy and unsafe abortions.\textsuperscript{95}

Moreover, the Special Rapporteur pointed out the varying and harmful impacts of sexual violence, specifically rape, in contexts of armed conflict.\textsuperscript{96} Thus, she acknowledged that the consequences for women impregnated by rape who cannot access abortion services on legal grounds include physical and emotional trauma.\textsuperscript{97}

The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health presented a report in 2003 which recognized that “reproductive health is an integral element of the right to health”.\textsuperscript{98} He held in another report that “[r]ape and other forms of sexual violence, including forced pregnancy, non-consensual contraceptive methods …, female genital mutilation/cutting …, and forced marriage all represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health”.\textsuperscript{99}

Additionally, in the 1990s, the CEDAW Committee and the Human Rights Committee issued concluding observations for Colombia, which identified that the prevalence of unsafe and illegal abortions was among the health problems requiring special attention from the State due to its relationship to maternal

\textsuperscript{93} Ibid., para. 22.
\textsuperscript{94} Ibid., para. 24(m).
\textsuperscript{96} Ibid., paras 19, 20.
\textsuperscript{97} Ibid., para. 21.
mortality rates. The CEDAW Committee raised concern regarding the lack of exceptions for accessing abortion services in Colombia – even when the woman’s life is in danger or to safeguard her physical or mental health, or in cases where the woman has been raped – and held that “legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the [CEDAW]”.

Thus, the Human Rights Committee expressed its concern in relation to the fulfilment of Article 6 of the ICCPR by the State of Colombia, given that

the existence of legislation criminalising all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. [The Human Rights Committee] is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures.

At the regional level, the Inter-American Commission on Human Rights (IACHR) referred to Colombia’s human rights situation in 1999. It recognized that abortion constituted “a very serious problem for Colombian women, not only from the point of view of the right to health but also of their rights as women, including the right to personal integrity and the right to privacy”.

Moreover, in the years that followed the ICPD and the Beijing Declaration, human rights monitoring bodies and courts recognized that access to abortion services is linked to the enjoyment of a wide range of fundamental rights. By 2005, human rights bodies had indicated that at a minimum, States must ensure that abortion is legal and accessible when a woman’s life or health is at risk, in cases of rape and incest, and in cases of foetal anomalies, and States should take measures to ensure that women are not forced to seek unsafe abortion procedures. Today, this minimum standard has been progressively recognized by different human rights monitoring bodies and regional human rights


103 IACHR, Tercer informe sobre la situación de los derechos humanos. Capítulo XII: Los derechos de la mujer, OEA/Ser.L/V/II.102, 26 February 1999, para. 49.


105 See, for example, CEDAW Committee, L. C. v. Perú, UN Doc. CEDAW/C/50/D/22/2009, 25 November 2011, para 12(b); CEDAW Committee, Concluding Observations: Bahrain, UN Doc. CEDAW/C/BHR/ CO/3, 10 March 2014, para. 42(b); Human Rights Committee, Concluding Observations: Ireland, UN
tribunals along with the obligation to provide post-abortion care to women independently of the legal status of abortion.106

The previous paragraphs illustrate the developments within the IHRL framework that took place starting from the 1990s regarding the need for States to ensure that women and girls who are victims of sexual violence have, at a minimum, access to abortion services as a measure to protect their rights. These developments are key when analyzed in relation to the fulfilment of the international obligations for the State of Colombia because they show that despite the advancement towards the recognition of reproductive autonomy for women and girls from a human rights perspective, the State still maintained a restrictive framework that criminalized abortion under all circumstances up until 2006. Thus, at the international level, the question may arise as to whether the State of Colombia could be held liable for not fulfilling its obligations related to the protection of the rights protected by the CEDAW and ICCPR—at the least—by forcing women and girls who are victims of conflict-related sexual violence to seek unsafe and illegal abortion procedures. However, it must be recognized that it is debatable whether the level of protection at the international level for victims of forced pregnancy whose victimization occurred before the development of the above-mentioned standards remains the same as for victims who suffered victimization after that.

The right to access a voluntary termination of pregnancy after ruling C-355 of 2006: The persisting barriers for victims of conflict-related sexual violence

In 2006, the Constitutional Court, through its Judgment C-355, declared that a total abortion ban was unconstitutional when women terminate their pregnancies if their lives are at risk, the pregnancy is the result of sexual violence, or the product of the pregnancy would not be able to survive after being born.

The Court determined that a complete abortion ban was in direct violation of dispositions contained in different international human rights treaties that protect the right to life and the right to health of women, including, but not

---

limited to, Article 6 of the ICCPR, Article 12.1 of the CEDAW and Article 12 of the ICESCR. The Court held that “the interpretation that different international human rights bodies have made in respect of the provisions contained in different international treaties …, in the sense that these provisions, which are part of the constitutionality block, bind the State to adopt measures that protect the right to life and the right to health” is relevant when analyzing the State's international obligations.107

In this landmark decision, the Court acknowledged that “the criminalization of abortion also violated the right to equality of women in relation to men, in cases in which they are victims of sexual violence and as a result of it, remain in a state of pregnancy”. Moreover, the Court recognized that, for example, women affected by forced displacement in the context of the armed conflict faced a higher risk of being victims of sexual violence by armed actors or other persons, and therefore of being disproportionately affected by the criminalization of abortion.

Since Judgment C-355, over twenty additional rulings from the Constitutional Court have been issued in relation to the fundamental right of voluntary termination of pregnancy.108 At the international level, further standards related to the obligation for States to provide access to abortion services in contexts of armed conflict and humanitarian settings as a measure to ensure the enjoyment of rights have been established. The CEDAW Committee, in its General Recommendation on women and armed conflict, urged States Parties to “ensure that sexual and reproductive health care includes access to sexual and reproductive health and rights information; … safe abortion services; [and] post abortion care”.109

Moreover, the Committee Against Torture (CAT) and the Human Rights Committee have expressed that, under certain circumstances, denying access to abortion services is a form of physical or mental suffering that can amount to ill-treatment.110 Moreover, the CAT has expressed that complete bans on abortion may constitute torture or ill-treatment.111 These considerations are also linked to the obligation of humane treatment under IHL.

107 Colombian Constitutional Court, Judgment C-355-2006.
108 The Constitutional Court has continuously stated in its decisions (see Judgments T-636-2007, T-585-2010, T-841-2011, T-627-2012, C-754-2015, T-301-2016, T-697-2016, C-327-2016 and SU-096-2018) that the fundamental right to voluntary termination of pregnancy protects the autonomy and freedom of decision of women who, being in one of the three grounds for decriminalization provided for in ruling C-355, resolve to put an end to the human gestation process. The right to voluntary termination of pregnancy belongs to the category of reproductive rights, and as such, shares the orientation, foundation and mandatory content of those rights. At the same time, as it is a fundamental right, it commits all servants and organs of the State, public and private social security providers, and individuals to respect and fulfil it.
109 CEDAW Committee, “General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations”, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 51(c).
At the regional level, a relevant international development on the right to life in the context of sexual and reproductive rights is the IACtHR ruling on the case of Artavia Murillo et al. v. Costa Rica. In this case, the IACtHR—the authorized interpretive body for the American Convention on Human Rights—specified the scope of the wording “conception” and “in general” of Article 4.1 of the American Convention that protects the right to life, as well as the term “human being” in Article 1.2 of the Convention. The Court stated that it is possible to conclude from the words “in general” that the protection of the right to life in accordance with said provision is not absolute, but is gradual and incremental according to its development because it does not constitute an absolute and unconditional duty, but rather implies understanding the origin of exceptions to the general rule.112

The recommendations, general comments and interpretations made by international human rights bodies, as well as international judicial decisions (which the Constitutional Court has held are relevant for the interpretation of the rights granted by the Constitution), have evolved since 2006 towards a more robust protection of the rights of women to life, health, privacy and autonomy, which include guaranteeing access to abortion services.113 Despite jurisprudential and normative progress at the national and international level, however, women still face multiple barriers when accessing abortion services in Colombia. The situation is particularly challenging for women living in conflict-affected areas or under the control of armed actors.114 Research in Colombia has shown that the conflict in that country not only reinforces structural barriers to accessing reproductive health services—e.g., the lack of information on contraceptive methods and sexual and reproductive rights, the reinforcement of gender roles that restrict women’s bodily autonomy, and the lack of availability of reproductive health services in rural areas—but also places women’s bodies at the centre of action of armed actors.115 In such circumstances, the exercise of reproductive autonomy for women, which includes accessing abortion services, is dependent on the will and limitations imposed by armed actors.116

The Constitutional Court has recognized that barriers to abortion services disproportionately affect women victims of conflict-related sexual violence and forced displacement. As some of the reasons for this, the Court identified the absence of health providers in remote areas where the violations occur, the enormous risk involved in requesting a legal abortion in areas that are still territorially and socially controlled by perpetrators and members of non-State armed groups, ignorance by public officials of the legal possibility of

113 Colombian Constitutional Court, Judgment SU-096-2018 (José Fernando Reyes).
114 N. Chaparro et al., above note 3.
115 Ibid., p. 44.
116 Ibid., p. 44.
voluntary termination of pregnancy, or appeal to conscientious objection by
health providers to deny the service.117

Despite the extensive development of national and international standards that
protect the right of women to access reproductive health services, including
abortion, women still face barriers in Colombia. This is especially difficult, and
has been recognized by the Constitutional Court as such, for women victims of
conflict-related sexual violence. Moreover, even though the State has had a
reinforced obligation to provide such services, the persistence of barriers to
accessing this service raises questions as to the State’s degree of compliance with
this obligation.

The impacts of denying access to abortion services in the context
of the armed conflict: Reflections on the transitional justice
scheme in Colombia

The previous sections have provided evidence of the developments in both IHL and
IHRL that protect women’s reproductive rights in contexts of armed conflict, with a
specific focus on the case of Colombia. Such standards were key in the landmark
ruling by the Constitutional Court that decriminalized abortion in 2006. Furthermore, the Constitutional Court has played a pivotal role in recognizing
the systematicity of gender-based violence and discrimination against women and
girls in the context of the armed conflict through its rulings,118 as well as
reiterating that victims of such crimes have the right to access justice, truth,
reparations and guarantees of non-recurrence.119

In relation to the right to reparation, the Victims and Land Restitution Law
(Law 1448/2011, Victims Law) was a milestone in recognizing this right for victims
of the armed conflict in Colombia. The Victims Law created a series of institutions
and mechanisms for granting access to comprehensive reparation measures for
victims of the armed conflict and recognized as victims all persons that had
suffered harm due to serious infringements of IHL or IHRL that occurred after 1
January 1985.120 As such, the Victims Law’s reparation system allows the

117 Colombian Constitutional Court, Decision A-009-2015 (Luis Ernesto Vargas).
119 Colombian Constitutional Court, Judgments SU-599-2019 (Cristina Pardo), T-083-2017 (Alejandro
Linieres), C-588-2019 (José Fernando Reyes), T-211-2019 (Cristina Pardo), T-004-2020 (Diana
Fajardo), SU-648-2017 (Cristina Pardo).
120 National Congress of Colombia, Law 1448/2011, 10 June 2011, Art. 3. Victims, for the purposes of this law,
are considered to be those persons who, individually or collectively, have suffered harm as a result of
events occurring on or after 1 January 1985, as a consequence of infractions of IHL or grave and
manifest violations of IHRL which occurred during the conflict. According to paragraph 2, members of
organized illegal armed groups shall not be considered victims, except in cases in which children or
adolescents have been demobilized from the organized illegal armed group when they were minors. It
must be noted that despite the explicit exclusion to the reparation programme of the Victims Law for
members of non-State actors who did not demobilize while being underaged included in paragraph 2,
a decision from the Constitutional Court changed this. Through Judgment SU-599-2019, the Court
adoption of reparation measures for victims of forced pregnancies for acts of sexual violence that occurred in the 1980s. Furthermore, the Law also recognizes children born from conflict-related rape as direct victims of crimes of a sexual nature.121 While the Victims Law does not include reproductive violence as a category of victimization, it includes under “crimes against sexual liberty, integrity and formation” acts that constitute forms of reproductive violence, including forced pregnancy. Paradoxically, with the Victims Law, the Colombian State puts in place a remedy for women who suffered such forms of victimization at least from 1985, when the international developments on violations occurring to women in the conflict were not mainstream or fully developed. In light of this, one could argue that the State, when allowing access to reparation measures to victims of conflict-related sexual violence in the context of the armed conflict, is implicitly recognizing forced pregnancies – and other gendered victimizations – as harms that are under the scope of application of the Victims Law and are subject to the fulfilment of the right to reparation. This offers a window of opportunity for redress by fulfilling the right to reparation for women that carried unwanted pregnancies as a result of conflict-related sexual violence at a time (if the act occurred within the temporary scope of the Victims Law) when international and domestic legal frameworks did not offer legal protection.

In the context of the transitional justice system created by the 2016 Peace Agreement, fortunately the issue of reproductive violence has not remained in the margins.122 The Truth Commission has been vocal about the importance of recognizing and investigating the modalities under which reproductive violence committed by all armed actors in the armed conflict operated.123 The broad scope of the Truth Commission’s mandate makes it an ideal space for inquiry on the violations of reproductive rights that women endured in the armed conflict long before the situation of and violations committed against women in armed conflicts were even recognized at the international and national level.

On the other hand, as of 2021 the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) has initiated investigations into seven macro-cases relating to criminal phenomena that occurred in the armed conflict recognized that combatant women who were subject to sexual and reproductive violence within the ranks of armed non-State actors have a right to reparation under Law 1448/2011.

121 Law 1448/2011, above note 120, Art. 181: “For the purposes of the present Title, children and adolescents conceived as a consequence of sexual violation during the internal armed conflict shall also be considered victims.”


and have impacted victims’ rights. However, no case has had an exclusive focus on sexual and gender-based violence. Within the JEP, there is a window of opportunity when it determines the scope of proper sanctions with a gender perspective that considers a restorative and transformative approach for victims of forced pregnancy and children born of conflict-related sexual violence. Such a perspective will enable the JEP to examine the structural inequalities that have hindered access to rights and services for women and girls, especially those living in conflict-affected areas who have suffered sexual and reproductive violence.

Conclusions

This article has set out the key interdependencies between IHL and IHRL on reproductive health services while identifying key implications for the obligations that the State of Colombia must uphold. For this analysis, the fact that feminist engagement within international law frameworks has not been dominant in the latter’s normative development is a relevant contextual factor. Moreover, while providing a critique of the lack of inclusion and diversity within the creation of international law was not the aim of this paper, such a perspective helps to provide an understanding of why the development of specific rules and standards that protect and make visible the situation of women did not arise until the end of the twentieth century, despite the historical and reiterative violations occurring in contexts of armed conflict, war and repression against women and girls.

The recognition of women’s experiences in armed conflict and the protection of their rights have significantly evolved in international law. However, the establishment of standards regarding reproductive autonomy within contexts of armed conflict remains underdeveloped. This article has provided evidence to consider that, under treaty and customary rules of IHL related to humane treatment, the prohibition against adverse distinction, the obligation to protect and care for the wounded and sick, and the prohibition against ill-treatment and degrading treatment, read through an IHRL lens, one could contend that the State of Colombia had an obligation to provide reproductive health services, including abortion, for victims of sexual violence before abortion was decriminalized. However, the analysis provided has acknowledged that international protection can vary depending on the time in which the victimization took place. In this regard, through the Victims Law, the State of Colombia recognizes and provides a remedy for violations occurring in the context of the armed conflict at least since 1985, thus making an implicit recognition of victimization related to reproductive health and rights.

For Colombia, an additional matter of relevance for the implementation of international standards is the relevance of the constitutionality block within the domestic system. The value of the provisions that enter the constitutionality

124 C. Claves, above note 122.
125 National Congress of Colombia, Law 1957/2019, Art. 21(1).
block, as having the same worth as the Constitution, must be upheld by all State institutions. In this sense, the Constitutional Court has been consistent in determining that soft-law pronouncements and standards are relevant hermeneutic parameters for determining the scope of fundamental rights protected by international human rights treaties and the Constitution.

Furthermore, this article hopes to ignite a broader discussion on acknowledging the nuances of conflict-related sexual violence that considers the multiple and intertwined individual and collective harms for women and children born from sexual violence. It has sought to reflect on the limitations that international law and its different frameworks have when structural gender discrimination persists and reproductive labour is borne only by women—and thus, on how access to reproductive health and rights for all persons is crucial for the fulfilment of a life project that denaturalizes gender stereotypes and imposed social roles.

The present analysis offers an additional contribution to the study of reproductive rights within contexts of armed conflict but leaves the space open for further questions to be resolved. These questions mainly revolve around the implications of failing to comply with a duty born by the State to guarantee access to safe abortion services for women victims of conflict-related sexual violence. For women that did not have the option to terminate their pregnancies in a context of total prohibition, with the threat of facing criminal prosecution if they sought an abortion procedure, what do the harms and impacts look like? Sexual violence affects the enjoyment of rights related to sexual freedom and, as such, entail harms of this nature. What, then, are the harms that victims of forced pregnancies face? What are the impacts of being denied the opportunity to freely decide over one’s life project and body because of a State-enforced policy that targets women specifically? What are the consequences for those children born of rape, and to what extent are these addressed by transitional justice mechanisms? All these questions go beyond the scope of this article but are of massive relevance in the post-conflict scenario in the context of ongoing armed confrontation that Colombia faces.

Confronting the historical lack of State presence, including precarious health services provision, in the rural and conflict-affected areas of the country is a debt still owed by the Colombian government. The provisions included in the 2016 Peace Agreement related to transitional justice measures offer the opportunity to include within the broader conversation of what happened to Colombians in the armed conflict the experiences of victims of forced pregnancy. Reproductive rights must be a central part of the peacebuilding stage, which is why it is important to tell the stories of all women that were subjected to rape in the armed conflict and were not given the option to terminate their pregnancies.
The redirection of attacks by defending forces

Tsvetelina van Benthenm*

Tsvetelina van Benthenm is a DPhil candidate at Merton College, Oxford, a Research Officer at the Oxford Institute for Ethics, Law and Armed Conflict, and Convenor of the public international law course of the Oxford Diplomatic Studies Programme.

Abstract

This article examines the redirection of incoming missiles when employed by defending forces to whom obligations to take precautions against the effects of attacks apply. The analysis proceeds in four steps. In the first step, the possibility of redirection is examined from an empirical standpoint. Step two defines the contours of the obligation to take precautions against the effects of attacks. Step three considers one variant of redirection, where a missile is redirected back towards the adversary. It is argued that such acts of redirection would fulfil the definition of attack under the law of armed conflict, and that prima facie conflicts of obligations could be avoided through interpretation of the feasibility standard embedded in the obligation to take precautions against the effects of attacks. Finally, step four analyzes acts of redirection against persons under the control of the redirecting State. Analyzing this scenario calls for an inquiry into the relationship between the relevant obligations under international humanitarian law and human rights law.

Keywords: international human rights law, international law, law of armed conflict, military technology, precautions against the effects of attacks, redirection, right to life.

* The author would like to acknowledge the helpful comments of the anonymous peer reviewers and of her colleagues Dr Miles Jackson, Mr Constantinos Giorkas and Ms Gayathree Devi Kalliyat Thazhathuveetil from the Oxford Law Faculty. The views expressed in this article remain those of the author alone.
Introduction

Military technology moves fast. Enhanced capacity to manage battlefield risks, increases in targeting precision and better traceability of outcomes are among the promises that new technology brings. For all their perceived benefits, however, these very capacities may trigger a sense of legal uncertainty. This is so for two main reasons. First, the way in which the applicable international legal regimes apply to such capacities may not be immediately evident and may require in-depth scrutiny. Second, and more fundamentally, inquiring into the way in which the law applies may point to areas where the contours of the rules—even foundational ones—remain pixelated and subject to interpretative contestation. Quite naturally, we want States to do “more” to protect in conflict, yet this “more” can challenge the legal framework, expose some of its own controversies and even lead to conflicts of obligations. What States can do today and what they will be able to do tomorrow therefore requires careful reflection.

The idea that defending forces may be able to hack into the systems of their adversaries and redirect incoming missiles may seem like a worry for a more distant future, but breakthroughs in the redirection of missiles in flight have already been reported.¹ Moreover, it is important to consider potential legal challenges preemptively—in the context of autonomous weapons systems, suggestions were made back in 2013 that such weapons had not even “left the drawing board”,² but in 2021, the report of United Nations Panel of Experts on Libya described an incident in which an autonomous weapons system had hunted down logistics convoys.³

This article will examine the practice of redirection when employed by defending forces to whom obligations to take precautions against the effects of attacks apply. The terms “defending forces” and “defenders” will be used subsequently as a shorthand to denote those to whom such precautionary obligations apply. The analysis will proceed in four steps. In the first step, acts of redirection will be examined from a historical and empirical standpoint. Step two will assess the obligation to take precautions against the effects of attacks. Step three will consider one variant of redirection, where a missile is redirected back towards the adversary. Finally, step four will analyze redirections against persons under the control of the redirecting State.

The possibility of redirection

Redirecting a missile away from those to whom we owe protective duties is undoubtedly a desirable option, and one that aligns with the obligations of defenders under the law of armed conflict. Questions surrounding the possibility of redirecting incoming projectiles are not new; what is new is the way in which such redirection can occur.

When Germany initiated the bombing of London in June of 1944, it deployed a new type of guided missiles known as V-weapons. As detailed by Burri in her excellent piece “Why Moral Theorizing Needs Real Cases: The Redirection of V-Weapons during the Second World War”, the British were faced with a difficult choice. Relying on double agents that they had recruited among German spies, the British could, by sending selective information on impact sites, have misled the Germans about the performance of the new weapons, and could thus have effectively led them to redirect their bombs away from Central London and towards the Southeast. This option, which according to estimates would have meant fewer overall civilian casualties, was ultimately not pursued, and the decision of the British War Cabinet not to redirect has since been the subject of intense academic debate.

While in the case of the V-weapons, the redirection would have occurred through the selective sending of information to the German military command, present-day capabilities may present more direct points of entry into an adversary’s systems. For years, the alarm bell has been sounded over the risk of hacking into weapons systems. This concern has been prominent in the discussions on autonomous weapons systems, but it is just as valid when it comes to manned systems, for whatever strides we make with the interconnectivity of military systems, we open more possibilities for intrusion and potentially loss of control. Thus, enhancing the capacity to redirect may come with the risk of opening up space for additional vulnerabilities.

In August 2019, the US Army successfully redirected a munition in flight in an A3I experiment by using smart sensors and artificial intelligence. And just as

6 Ibid., pp. 254 ff.
9 A3I stands for architecture, automation, autonomy and interfaces.
10 G. Sheftick, above note 1.
the interoperability of systems is making qualitative leaps, promising better feedback loops during combat engagements, the risks of losing control over the process due to the actions of external actors are starting to become apparent. Reports have emerged of States hacking into the systems of contractors to steal sensitive information around the development of particular weapons. It is not inconceivable that States and non-State actors may soon acquire the capacity to gain control over weapons in flight and redirect them to new locations. Quite aside from the questions around how to ensure the safety of weapons systems, this article starts from the premise that parties to conflict may be able to redirect incoming missiles. The question, then, is: how are we to assess the legality of such acts of redirection, and what are the rules that constrain such acts?

**Defending**

Contemporary international humanitarian law (IHL), while strongly anchored in the necessities of battlefield reality, has come to be enveloped by a panoply of protective obligations. As affirmed by the International Court of Justice in the Nuclear Weapons Advisory Opinion, the principle of distinction between combatants and civilians and the prohibition against unnecessary suffering are “the cardinal principles contained in the texts constituting the fabric of humanitarian law”. Additional Protocol I to the Geneva Conventions (AP I), in its Article 51(1), sets out an overarching frame for the specific protective obligations binding parties to conflict: “The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” There is thus a dual acknowledgment: danger to civilians and civilian objects may be inherent to armed conflict, but the management of danger and its reduction to a minimum fall within the duties incumbent on parties to conflict.

In addition to a range of prohibitive rules designed to protect civilians and civilian objects, IHL, both conventional and customary, contains rules that require positive action. The obligations to take precautions are an example of such positive obligations. Forming part of the general legal architecture of IHL, they operate in tandem with negative obligations and seek to ensure a reasonable decision-making process, whereby attacks are only directed against specific military objectives, the

---

13 AP I, Art. 51(1).
16 AP I, Art. 48.
means and methods of attack are constrained,\textsuperscript{17} and constant care is taken to spare the civilian population.\textsuperscript{18} Importantly, precautionary obligations do not lie exclusively with attackers. Defending forces are bound by their own set of obligations to take precautions, known as precautions against the effects of attacks, or passive precautions. The necessity of imposing precautionary obligations on defenders stems from an understanding that, to ensure the meaningful protection of the civilian population and civilian objects, both attacking and defending parties should be bound to undertake positive protective measures.\textsuperscript{19}

We read the relevant rule on precautions against the effects of attacks in Article 58 of AP I, a rule also reflected in customary international law:\textsuperscript{20}

The Parties to the conflict shall, to the maximum extent feasible:

\begin{itemize}
\item[a)] ... endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
\item[b)] avoid locating military objectives within or near densely populated areas;
\item[c)] take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.
\end{itemize}

These specific measures apply to the defender’s own territory or to territory under its control.\textsuperscript{21} As is immediately apparent from the first sentence of Article 58, the obligations are cast in relative terms.\textsuperscript{22} Conditioned by a standard of feasibility,\textsuperscript{23} the obligations set out in paragraphs (a) to (c) do not prescribe a particular result to be achieved in all circumstances.\textsuperscript{24} Neither do they mandate a particular way of discharging these three specific obligations, or a fixed set of measures that each defending force ought to take to fulfil them.\textsuperscript{25} What can be gleaned from the wording is a standard embedded in context, where the precise scope of what is “feasible” depends on a range of factors present in the circumstances prevailing at the time.\textsuperscript{26}

“Feasibility” is a standard that has been defined in a rather impressionistic way. According to declarations made by States at the time of ratification of AP I, “feasible” is “that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations”.\textsuperscript{27} On the one hand, this definition demonstrates that parties to a

\textsuperscript{17} Ibid., Art. 35(1).
\textsuperscript{18} Ibid., Art. 57.
\textsuperscript{19} ICRC Commentary on the APs, above note 14, para. 2241.
\textsuperscript{20} ICRC Customary Law Study, above note 4, Rule 22.
\textsuperscript{21} ICRC Commentary in the APs, above note 14, para. 2239.
\textsuperscript{24} Ibid.
\textsuperscript{25} T. Boutruche, above note 15, p. 17.
\textsuperscript{26} Ibid., pp. 15–16.
conflict are not required to do the impossible. On the other, it allows decision-makers to identify the types of considerations that, at each relevant time, give contours to the obligation. Importantly, the standard of “feasibility” is flexible enough to accommodate change, and, as noted by Quéguiner, it “acknowledges that the lawfulness of an attack will be judged according to relative standards of measurement, which will namely depend on the economic and technological development of each party to the conflict”. It has also been characterized as a standard that evolves through experience.

The obligations listed in paragraphs (a) and (b) of Article 58 address two separate and specific types of action. Paragraph (c), in contrast, does not require a particular type of action—rather, it is a general obligation to “take the other necessary precautions”. A number of examples for precautions under paragraph (c) are provided in the ICRC Commentary on AP I. These include “making available to the civilian population shelters which provide adequate protection against the effects of weapons” and the organization of well-trained and adequately equipped civil defence services. These examples are merely illustrative, and what is “feasible” is a moving target that changes with capacity and context. Given this, it becomes particularly important to consider the scope of this obligation in the context of evolving technological capabilities, including capabilities related to the redirection of incoming attacks. If necessity in paragraph (c) is understood as the only way of achieving a particular goal, and redirection is the only way to protect civilians from an incoming attack, could it be said that defenders must, if they can, redirect incoming missiles in order to discharge their precautionary obligation?

The following two sections will examine how we ought to think about such acts of redirection—first, when the redirection is carried out towards an adversary, and second, when it is towards persons under the defender’s control.

Redirection against an adversary

A missile is flying towards a densely populated area in the territory of the defending State. There are only minutes to act, and the defender has the capacity to hack into

---

27 This was the view expressed by a number of delegations upon ratification of AP I. See Julie Gaudreau, “The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims”, International Review of the Red Cross, Vol. 85, No. 849, 2003, pp. 156–157.
28 Marco Sassoli and Anne Quintin, “Active and Passive Precautions in Air and Missile Warfare”, Israel Yearbook on Human Rights, Vol. 44, 2014, p. 82. In the context of precautions in attack, we read in a report submitted to the International Criminal Tribunal for the former Yugoslavia (ICTY) that “[t]he obligation to do everything feasible is high but not absolute”. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 8 June 2000, para. 29.
29 Ibid., p. 83.
31 M. Sassoli and A. Quintin, above note 28, p. 87.
32 ICRC Commentary on the APs, above note 14, para. 2257.
the operating system of the missile and redirect it. Depending on, *inter alia*, the capacity available to the defending force, redirecting back towards the adversary may be the only option, or it may be the preferred option among many. Should the defender redirect, how will the act of redirection be assessed? And can an argument that this act was carried out as a way of discharging the defender’s precautionary obligations affect the qualification of the act of redirection?

Turning to the first question, the sharp-end issue is to determine whether such an act ought to be qualified as a new attack, such that the defender is treated as having mounted an attack of its own. Qualifying this act as an attack carries significant implications. It would trigger all attack-related IHL obligations on the conduct of hostilities, including the prohibitions on directing attacks against civilians and launching disproportionate attacks. This would, in turn, constrain the actions of the defender. To understand how the act of redirection ought to be characterized, then, it is necessary to understand the meaning of “attack” under the law of armed conflict.

A definition of attacks is found in Article 49 of AP I: attacks are acts of violence against the adversary, whether in offence or in defence. As noted by O’Keefe,

> an “attack” is an act of armed violence directed against military forces of an opposing party, provided those forces have not fallen into the power of the party directing the violence, or against persons or objects under the control of an opposing party.

If this definition is taken to denote a purely factual description of conduct, then the act of redirection seems to fall within its ambit without much difficulty. It entails an act of violence directed towards a target – it is, in this sense, an act of setting upon a target “with hostile action”, an act of “combat action”. It is also carried out against an adversary, be it combatants from the other party or persons under its control. And finally, it can also be classified as an act conducted in defence.

One outstanding question here, however, is whether the phrase “against the adversary” encompasses a subjective standard that requires more than the fact of violence against persons falling within the category of “adversary”. In their observations on the *Ntaganda* case, for instance, Corn *et al.* advance the position that the term “attack” incorporates an element of motive. They write:

> The motivation for executing the act must be to cause harm to the adversary or other persons or objects in the conduct of hostilities. … Accordingly, violent acts directed at harming the adversary … through physical injury or

---

33 AP I, Art. 51(2).
34 Ibid., Art. 51(5)(b).
36 ICRC Commentary on the APs, above note 14, para. 1879.
37 Ibid., para. 1880.
destruction, are “attacks” within the meaning of IHL. Conversely, without this motive the act is not an “attack”.38

While the phrase “against the adversary” can indeed be interpreted as implying acts that are directed as acts of violence intended to harm – that is, not acts that are, for example, designed to provide humanitarian assistance – it is doubtful whether any inquiry into the motive of the attacker is embedded in the notion of attack. A specific motive of “inflicting harm” has not been part of the inquiry of tribunals dealing with the interpretation of “attack” as understood in IHL.39 While the recent International Criminal Court (ICC) appeals judgment in Ntaganda did not engage with the existence of such a subjective element,40 Judge Eboe-Osuji’s partly concurring opinion does so, and leans towards a more factual standard in determining the scope of an “attack”. In his opinion,

[p]urpose or motive does not define a conduct as an “attack.” An essentially violent conduct or use of force of arms remains an “attack” notwithstanding that it is entirely gratuitous; or has a particular motive or purpose. … The purpose or motive – when present – only explains the reason for the violence or the use of force arms, and that reason may be considered on its own intrinsic merit, terms or value. But, it does not alter the fact that violence or force of arms had been brought to bear – in the nature of an “attack.”41

Recent academic initiatives, such as the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Tallinn Manual 2.0) and the Oslo Manual on Select Topics of the Law of Armed Conflict (Oslo Manual), similarly accept that motive is not required for the qualification of an act as an “attack”. According to the Tallinn Manual 2.0, “[a] cyber attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”,42 and under the Oslo Manual, in the context of outer space operations, “[t]he acts must be intended to cause – or must be reasonably

38 ICC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda, Submission of Observations to the Appeals Chamber Pursuant to Rule 103 by Geoffrey Corn et al., No. ICC-01/04-02/06 A2, 18 September 2020, paras 14–15. The authors provide a number of scenarios that distinguish between acts that would amount to an attack and acts that would not: “providing air-delivered supplies such as food or medical equipment may inadvertently cause injury or damage if the air-delivered material lands on a person or structure”, “maneuver damage to roads and fields”.

39 In the Galić case, the ICTY only reviewed subjective elements related to the direction of attacks against civilians as additional and separate from the term “attack”. ICTY, Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras 41 ff. See also ICTY, Prosecutor v. Pavle Strugar, Case No. IT-01-41-T, Judgment (Trial Chamber), 31 January 2005, para. 282. The International Criminal Court (ICC) has also left any analysis of subjective elements beyond the definition of “attack”: see ICC, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment (Trial Chamber), 8 July 2019, para. 916; ICC, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, para. 798.

40 The Appeals Chamber summarized the Trial Chamber’s reasoning, the submissions received, and the opinions of the individual judges without giving a unified or detailed view of the meaning of “attack”: see ICC, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment (Appeals Chamber), 30 March 2021, paras. 1149–1169.

expected to result in—death, injury, destruction or damage”.

Rather than inquiring into a motive to cause harm, this approach looks at the reasonable expectation of causing violent consequences. A similar direction of thinking was embraced by Judge Ibáñez Carranza in her dissenting opinion to the Ntaganda Appeals Chamber judgment, in which she found that the core of the test lies in whether “injury, death, damage or destruction are intended or foreseeable consequences” of the act.

This approach thus situates attacks in a deliberate decision-making process whereby a party to conflict decides on carrying out an act against the adversary with the reasonable expectation that this act will cause harm. And even if it moves away from a party’s motivations, this approach does not cast an unreasonably wide net. For instance, a main concern in the Corn et al. amicus submission is over “accidental” cases, such as air-delivered supplies accidentally causing harm to civilians. That they actually cause harm does not automatically characterize them as attacks; what is needed is a reasonable expectation that the act will cause such consequences, and such an expectation is indeed lacking in accidental cases. Such cases would also not amount to acts carried out in offence or defence.

Under this view of the term “attack”, it would be difficult to see how an act of redirection would not meet its elements. When redirecting, the defender selects a new target towards which the missile will be reoriented. Is there another way to argue that redirection would not constitute an attack under IHL? A related though distinct conversation under the heading of “shift cold” military tactics employed by attacking forces can be of help in considering the characterization of redirection. As explained by Schmitt and King,

[a] “shift cold” occurs when an operator … redirects a guided munition, such as a missile or guided bomb, away from its initially-intended point of impact to another location while the munition is in flight (that is, post-launch or release). This is generally done to avoid harm to civilians or to friendly forces in the target area who, at the time of weapon launch or release, were not expected to be there.

In the scenario considered by Schmitt and King, the act of redirection is one carried out by the attacker, and they consider such redirection to be “a paradigmatic example of an international humanitarian law-required ‘precaution in attack’”. Under their view, a shift cold does not constitute a new attack. Rather, the redirection of the munition into a new area is a continuation of an ongoing

44 ICC, Ntaganda, above note 40, para. 1166.
45 See, for instance, ICC, Ntaganda, above note 39, paras 916–917.
47 Ibid.
attack. As they write, “[s]ame aircraft, same weapon, and same personnel in control of the weapon, and the act can best be described as guiding the weapon away from a point”.48

This view has been challenged by Haque. First, he points out that, while it may seem prima facie satisfactory to think of shift cold tactics as not amounting to attacks where the redirection, in seeking to avoid civilian harm, is aimed at an area with fewer civilians at risk, the view becomes untenable where the redirection targets civilians or is done in anticipation of excessive civilian harm. Second, he clarifies that Schmitt and King’s description of shift cold being action guiding the weapon away from a point is inaccurate, as the tactics are performing the opposite – the weapon is in fact guided toward a point.49

A further argument is advanced by Haque. In his view, an act of redirection could be seen as the cancellation or suspension of an attack where “the operator seeks only to avoid or minimize harm to civilians”. This is because international law defines “attacks” as “acts of violence against the adversary, whether in offence or in defence”, and “if an operator redirects a missile solely to avoid or minimize harm to civilians, then this act, violent though it may be, is neither proximately nor ultimately directed against the adversary”.50 On reflection, however, the cancellation/suspension argument should also be rejected. In essence, it is a variant of the discussion on subjective elements inherent in the definition of attacks. As becomes clear from the passage cited, here the analysis would turn on what the operator was seeking to do – whether she sought solely to avoid or minimize harm to civilians. This reads too much into the phrase “against the adversary”. There is nothing problematic in accepting that the act of redirection can simultaneously amount to the cancellation or suspension of an attack and the initiation of a new one. Haque himself acknowledges that attempts to answer such questions by narrowly interpreting the relevant norms may do more harm than good. Indeed, carving out space for arguments on what exactly a party to conflict intended to achieve by directing an act of violence towards a selected target may significantly undermine the protection of civilians in conflict, and would hardly comport with the object and purpose of AP I.

Underlying these discussions is a twofold concern. In its first layer, it demonstrates a worry that certain interpretations of IHL may lead to absurd results – an attacker or defender would not be able to redirect a missile flying towards a residential building to even an empty parking lot without violating the prohibition on directing attacks against civilian objects. In its second layer, it highlights the emergence of complex conflicts of obligations, whereby an attacker or defender may be required to take precautions, including redirection as a method of cancellation, yet that obligation may conflict with a prohibitive obligation not to direct attacks towards certain persons and objects.51

48 Ibid.
50 Ibid.
When it comes to the obligations of defenders to take precautions against the effects of attacks, the answer to the second layer of concern may be simpler. It is important to note at the outset that the obligations to take precautions have an autonomous character, and compliance with their exigencies does not in any way relieve parties to conflict from fulfilling their other obligations under the law, including, importantly, the prohibitive rules found in Article 51 of AP I. If there is an apparent conflict between the obligation to take precautions against the effects of attacks and, for example, the prohibition on directing attacks against civilians, this conflict may, in fact, be easily avoided. As noted in the previous section, the obligations of defending forces are subject to a feasibility requirement. Feasibility is a notion capable of encompassing a range of considerations, including military and humanitarian ones. What is feasible in particular circumstances should also take into account legal considerations, such as the potential breach of other international obligations through the envisaged conduct. Such an approach finds support in the customary rules on interpretation, and in particular the interpretation of terms in their context. For AP I, the rules prohibiting attacks against civilians and civilian objects are part of the interpretative context for the obligations to take precautions against the effects of attacks. Under this approach, a norm conflict would be avoided, since a measure under Article 58 would not be “feasible” if it violates other rules of IHL.

The first layer of concern identified above may be more difficult to address. Even so, the answer ought not to rely on an ad hoc stretching of the interpretation of “attack”. With the sophistication of technology and the increasing capacity of parties to conflict to influence the direction of ongoing attacks, it may very well be that practice will be generated either for a narrow defence-like exception to the prohibitions on attacking certain objects, or perhaps even for a rethinking of whether all civilian objects are subject to the same protection. Both approaches carry significant risks for the protection of civilians, but a discussion of their viability would at least incentivize a head-on reckoning with the challenges that new technologies may pose for the regime of IHL. For now, the safest route may be to retain the current framework, as it affirms a strong protection of civilians and civilian objects, while at the same time to acknowledge that responsibility is unlikely to be invoked when all a party has done is to seek to avoid civilian harm.

51 This conflict of obligations would be a real concern for attackers, as attackers are required under Article 57 of AP I to cancel or suspend attacks if, inter alia, it becomes apparent that the objective is not a military one.
52 T. Boutruche, above note 15, p. 11.
53 AP I, Art. 57(5).
55 Ibid., pp. 465–466.
56 Consider, for instance, redirection towards an empty field. As Dinstein notes, “one result of the negative definitional methodology is that some objects are deemed ‘civilian’ – even when stricto sensu they are not civilian in the dictionary meaning of the word – simply because they are not military objectives”. Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, Cambridge, 2016, p. 381.
To conclude this section, acts of redirection towards an adversary carried out by defending forces are best characterized as “attacks” under IHL. If this characterization is made, it then conditions the scope of lawful conduct—for instance, the act of redirection could only be carried out towards specific military objectives, and it would have to comply with the rule on proportionality. As set out in the Oslo Manual, a party that achieves control over the adversary’s weapon system or munition (as would be the case with the scenario examined here) becomes responsible for its subsequent employment of the weapon.\(^{57}\) Importantly, this interpretation need not place us in a conflict of obligations. A way of avoiding a conflict of obligations between precautions and other rules of IHL is to adopt an interpretation of the “feasibility” standard in Article 58 that encompasses considerations of legality under other relevant rules.

**Redirection towards persons under the control of the defender**

Missiles can be redirected towards an adversary, but they could equally well be redirected towards areas and persons under the control of the defender. How would this scenario unfold? A missile is flying towards a busy civilian hub, and it is estimated that a hundred civilians will die from this attack. The defender has the capacity to redirect the missile—not back towards the adversary, but towards territory under its own control. The defender decides to redirect towards a rural area with five civilians present. These dynamics place the defender right within the “trolley problem”.\(^{58}\) In our scenario, utilitarian considerations clearly underpin the defender’s decision—a few would be sacrificed for the benefit of many.

This scenario raises a number of legal questions. The first question asks us to identify the legal framework(s) through which we ought to analyze the act of redirection. After identifying these frameworks, the second question requires us to consider the interaction between frameworks, if more than one applies to the act. Finally, the third question directs us to the elements of the relevant rules and to the analysis of redirection by reference to these elements. These questions will be examined in turn.

To begin with, who the missile is redirected towards is a question of fundamental importance. If the act of redirection is targeting the adversary, then the notion of attack and the rules on the conduct of hostilities will take centre stage. However, when the act of redirection is aimed at areas under the defender’s own control, the framework of attack is of no relevance—“[a]n ‘attack’ does not relate to where a person against whom or an object against which violence is directed is under the control of the party directing the violence”.\(^{59}\) This is not to say that IHL does not apply to the act of redirection—

---

\(^{57}\) Oslo Manual, above note 43, Commentary to Rule 45.

\(^{58}\) In the trolley problem, a trolley is heading towards a group of five people, and it will cause their death unless it gets redirected to another track, where only one person is present. See Judith Jarvis Thomson, “The Trolley Problem”, *Yale Law Journal*, Vol. 94, No 6, 1985, p. 1395.
after all, it can be argued that the obligation to take precautions against the effects of attacks may, depending on the circumstances, require the defender to redirect. At the same time, there is another legal framework that regulates the act. In the relationship between a State party to a conflict and those individuals under its control, international human rights law (IHRL) takes on a central function.

Thus, both IHL and IHRL have a bearing on the legal qualification of the act of redirection. But how these regimes interact is still a contested—and almost mysterious—matter.60 Defining the parameters of the relationship between IHL and IHRL when both regimes apply is a task that has been undertaken by many,61 and which has proven to be rather complex. Indeed, it is not only the applicable rules that may be pulling in different directions, but also the legal visions of those interpreting the rules.62 Disagreement continues to fester even on the framing structure of this question—that is, on whether the regimes are complementary or competing.63 What does seem clear at this stage is, first, that IHL does not displace IHRL (i.e., both regimes apply in times of conflict), and second, that the interaction analysis should proceed on a rule-by-rule basis,64 with due account given to the specific wording of the relevant provisions.65

This relationship is most often looked at from the perspective of how far the relevant provisions of IHRL can go to accommodate the standards under IHL.66 A

59 O’Keefe Observations, above note 35, pp. 3–4. See also ICRC Commentary on the APs, above note 14, para. 1890.
64 Nuclear Weapons Advisory Opinion, above note 12, para. 25: “In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” This approach is also followed by human rights bodies, including in European Court of Human Rights (ECtHR), Hassan v. UK, Appl. No. 29750/09, Judgment (Grand Chamber), 16 September 2014.
65 This is a point of particular importance, as provisions under IHRL may differ significantly across treaty instruments.
66 ECtHR, Hassan, above note 64, para. 102; but see criticism of the way the Court approached this “accommodation”, in ECtHR, Hassan v. UK, Appl. No. 29750/09, Judgment (Grand Chamber), Partly Dissenting Opinion of Judge Spano et al., 16 September 2014, paras 16–17; Lawrence Hill-Cawthorne, “The Grand Chamber Judgment in Hassan v UK”, EJIL: Talk!, 16 September 2014, available at: www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/.
less explored question is the extent to which obligations under IHL ought to be interpreted in light of requirements under IHRL. This is important because the fact of armed conflict and a State’s engagement in belligerent acts towards an adversary does not mean that, for any act related to that conflict, the dominant lens ought to be that of IHL. There are different ways to determine the framework which ought to take precedence for a particular context. Ohlin, for instance, suggests a distinction between States acting as “sovereigns” and as “belligerents”.67 Milanovic points out that the specificity of the rule matters: “in some cases it is IHRL that might be more specific and thus useful for the interpretation of more general IHL”.68 Standards under both IHL and IHRL could be filled with content through a form of interpretative renvoi to rules of the other regime.69 This, for instance, is true of the notion of “arbitrariness” under Article 6 of the International Covenant on Civil and Political Rights. What is “arbitrary” can, without much difficulty, embrace a standard under IHL.70 Similarly, “feasibility” under IHL precautionary obligations can be moulded to match the demands of IHRL. Interpreting these provisions by reference to other relevant applicable standards is already required under Article 31(3)(c) of the Vienna Convention on the Law of Treaties: any relevant rules of international law applicable in the relations between the parties “shall be taken into account”.

When redirecting missiles towards areas under its own control, the State is not acting as a belligerent. Rather, what can be observed is a sovereign decision-making process whereby risk is being reallocated from one group of individuals within the State’s jurisdiction towards another, and this raises issues under the right to life. Therefore, it is not the right to life that should be sculpted to match the standard under IHL. If any difference between obligations under IHL and IHRL arises, the IHL standard should be shaped around the IHRL one, through interpretation if possible – if not, a conflict of obligations will emerge. As noted above, the IHL obligation of precautions against the effects of attacks is capable of accommodating standards under other rules.

This, then, leads to the final question – what are the elements of the relevant rules, and how do they apply to acts of redirection? To answer this question, the following paragraphs will assess the right to life. Because of the specificity of its text, Article 2 of the European Convention on Human Rights (ECHR) will be the framework for the inquiry.

Under Article 2(2) of the ECHR,

---

67 Jens David Ohlin, “Acting as a Sovereign Versus Acting as a Belligerent”, in J. D. Ohlin (ed.), above note 63, p. 129: “[B]elligerent powers flow from actions that regulate the armed conflict between two co-equal belligerents, while sovereign powers regulate the subjects under the government’s control. The distinction between the modes of action might overlap in discrete situations – requiring a legal principle (such as lex specialis) to resolve the potential conflict.”


70 Human Rights Committee, General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 64.
[d]eprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence; … 71

As a starting point, the text of the provision and the jurisprudence of the European Court of Human Rights (ECtHR) make it clear that Article 2 covers “not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life”. 72 The ECHR only allows for such use of force in pursuit of three legitimate aims, of which the most relevant one for the present purposes is the “defence of any person from unlawful violence”. 73 Even if the State indeed acts in pursuit of one of those aims, its actions need to comply with a test of strict necessity.

At first glance, acts of redirection may be seen as an apt fit within Article 2 (2)(a) of the ECHR: there is a use of force against persons, this use of force is designed to protect others from violence and therefore pursues a legitimate aim, and there is no other way to protect those at risk from imminent violence. However, the jurisprudence of the ECtHR suggests a more limited approach to the aim in Article 2(2)(a). Uses of force have been accepted as pursuing a legitimate aim by the Court where there is something about the persons against whom force is used that makes them liable to the use of such force. This is the case where the person is the threat (or at least is perceived as being the threat). 74

The fact that force factually impacts innocent persons does not automatically mean that the operation was not pursuing a legitimate aim. Force can incidentally impact persons who are not the origin of the threat where they are part of the “threat” environment, and often where they are those for whose protection the State claims to be acting. In Finogenov, the ECtHR accepted “that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the ‘lesser evil’ in the circumstances”, 75 even though the use of force by the State led to the deaths of 125 hostages. In Isayeva, “the context of the conflict in Chechnya at the relevant time” was considered pertinent by the Court, and it accepted that the use of force could have been directed at an attack or a risk of attack from illegal insurgents, even though civilians were present in the vicinity. 76 In these cases, the innocent persons were not the target of the force but were incidentally impacted. A more controversial yet similar example would be the shooting down of a hijacked aeroplane with hostages on board. 77 It could be argued that the hostages have

72 ECtHR, Isayeva, Yusupova and Bazayeva v. Russia, Appl. Nos 57947/00, 57948/00, 57949/00, Judgment, 6 July 2005, para. 169.
73 The other aims being “(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained” and “(c) in action lawfully taken for the purpose of quelling a riot or insurrection”.
75 ECtHR, Finogenov v. Russia, Appl. Nos 18299/03, 27311/03, Judgment, 20 December 2011, para. 226.
become part of the weapon, and would therefore not act as a constraint on the use of force by the State.\textsuperscript{78} The situation with regard to redirection towards innocent persons is, however, fundamentally different. Those persons are not part of the threat environment and have not in any way made themselves liable to a use of force, and yet they become the State’s target. It is only through a utilitarian calculus of the State that they become enmeshed in the violence of the initial attack. And even if their killing or injury is not the desired outcome of the State, the use of force against them is intentional. Considering the jurisprudence of the ECtHR, it is unlikely that such redirection would be accepted as lawful under Article 2.

At the same time, what we observe in the Court’s approach is significant deference to States on the question of legitimate aims.\textsuperscript{79} Given this, it is worth briefly addressing the question of strict necessity, as the act of redirection may fall short of the requirements under this test. For instance, it would be relevant whether the State could have resorted to other means that would not entail such a risk to innocent persons. If available, a more viable option could be the missile neutralization technique employed by Israel’s Iron Dome. The Iron Dome is a mobile air-defence system which has been used by the Israeli military to intercept missiles coming from Gaza. Through the use of “fuse blast warheads” that explode in the proximity of the incoming rockets, the latter are destroyed in mid-air. Using this method neutralizes the rocket without giving it a new direction—in other words, the defender does not initiate a use of force of its own. Of course, some protective obligations under the right to life may still be operable, for instance when there is a foreseeability of debris causing a loss of life,\textsuperscript{80} but these obligations would not preclude the possibility of neutralizing the incoming attack. The inquiry will turn to, \textit{inter alia}, the methods used, the guarantees taken to avoid unintended injury, the supervision system in place, and investigative mechanisms.

A final point on the practice of redirection towards persons under the defender’s control needs to be made, once again militating against its use. This point combines legal and practical considerations. Article 2(2) of the ECHR provides for the defence of any person from unlawful violence. This means that any assessment of the legality of the use of force would have to take into account the legality of the source of the violence—i.e., the initial attack. It may thus be queried whether the lawfulness inquiry can reach back to IHL and test the legality of the attacker’s actions under the principles of distinction and proportionality, among others. It seems that it can. In Varnava, the ECtHR

\textsuperscript{77} See German Federal Constitutional Court, \textit{Aviation Security Act} case, 1 BvR 357/05, Judgment (First Senate), 15 February 2006.
\textsuperscript{79} ECtHR, Isayeva, above note 72, para. 178.
\textsuperscript{80} For example, if there is debris that imperils the life of individuals, obligations to protect persons from threats may become relevant: “The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.” Human Rights Committee, above note 70, para. 7.
accepted that Article 2 “must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law”. But such inquiries of legality under IHL are far from easy, especially when judgements have to be made about the proportionality of attacks. Given that decisions on redirection would have to be taken within very short time frames, it would seem that making such a judgement of legality would, in many cases, be virtually impossible. In addition, this could place defenders in a rather absurd situation – faced with the same incoming missile and the same potential harm to civilians, they may be either allowed to act or prevented from acting on the basis of the legality of another actor’s conduct. Matters would become even more complicated if compliance with the jus ad bellum is brought to bear on the “lawfulness” inquiry.

Ultimately, it seems that redirecting missiles towards innocent persons under the defender’s control would be hard to justify under the right to life provision of the ECHR. After all, intentionally using force against individuals who have in no way made themselves liable to attack, for the mere fact that their death or injury may save a larger number of other persons, seems problematic from all angles – legal, policy and moral. Many of the concerns underpinning such an act mirror those surrounding the possible redirection of German V-weapons in the Second World War. And, just as in that case, redirection through new technologies may either not be desirable at all, or at least it may not be desirable to codify it as a possibility as a matter of law.

**Conclusion**

This article has advanced the argument that acts of redirection may, depending on the circumstances, be required as a “feasible” precaution against the effects of attacks. At the same time, obligations under both IHL and IHRL impose certain constraints on the possibility of redirection, and these constraints stemming from other applicable rules should, through interpretation, be read into the standard of feasibility.

While redirection could be seen as an effective protective measure, it also hides a complex web of legal, policy and ethical controversies. Even as a matter of practicality, it should not be forgotten that this practice would entail decision-making within narrow temporal frames. In describing the context of war,

---

83 Similar concerns were raised in the *Aviation Security Act* case, above note 77, paras 125–129.
84 Human Rights Committee, above note 70, para. 70. Such thinking can already be found in individual opinions of judges at the ECtHR: see ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08, Judgment (Grand Chamber), Concurring Opinion of Judge Keller, 21 January 2021, para. 27. Of course, each side will argue that the other is breaching jus ad bellum, and therefore that there is unlawful violence.
Clausewitz wrote that “all action must, to a certain extent, be planned in a mere twilight, which in addition not unfrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and an unnatural appearance.”\(^{85}\) Caution ought to be exercised in considering resort to acts of redirection, especially since they entail the need for a careful case-by-case legality analysis. The twilight of uncertainty may magnify our perceptions of threat and overstate the feasibility and desirability of new forms of military responses, and this, in turn, may lead to rash decision-making and imperil protected persons and objects even further. To lay the foundations for a reasonable decision-making process, even in such high-pressure scenarios, it is crucial to at least have clarity over the relevant rules, their scope and their interactions.

Who is a civilian in Afghanistan?

Ioanna Voudouri*
Ioanna Voudouri is Head of the Legal Department at the International Committee of the Red Cross in Afghanistan. She holds an LLM from the Geneva Academy and a law degree from the University of Athens.

Abstract

Despite the existence of a definition of civilian status in international humanitarian law (IHL), differences in the application of this definition – both in theory and in practice – continue to be observed. One of the contexts where these differences remain palpable (and do so for various fighting parties) is Afghanistan, a country where civilian harm has remained high for several years. This article explores the legal concepts of civilian and civilian population, including how they have been formed and interpreted and, ultimately, what protection they afford to persons who belong in these categories. The second part of the article brings these questions into the Afghan context, one that is complex and where cultural and religious implications should not be overlooked. Public statements, reports and codes of fighting parties in the country which touch upon civilian status are presented, followed by the civilian experience in Afghanistan, particularly focusing on the reported harm. Ultimately, it is proposed that despite the factual and contextual confusion, the existing legal rules and interpretations, when applied in good faith, suffice to ensure both that those who are civilians under IHL are protected and

* This article was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC). The exception is where public ICRC positions are referred to. Whenever reports, opinion pieces or articles are reproduced in this article, this does not imply endorsement of their content. Thanks are extended to Ezat Gul, Francis Conway and Mario Zuazua for their help in the drafting process, as well as Abby Zeith and Thomas de Saint Maurice for their invaluable comments.
that the threats which some civilians’ behaviour might pose can be effectively addressed without a status change.

Keywords: international humanitarian law, Afghanistan, definition of civilian, principle of distinction, Interpretative Guidance on Direct Participation In Hostilities, protection of civilians, religion, culture, military necessity, good-faith interpretation.

Introduction

It might be easiest to begin and conclude this article by stating that a civilian is anyone who is not a combatant – i.e., anyone who is not a member of the State armed forces or organized armed groups that are party to the conflict. This is probably the most succinct, precise and direct answer to the question of who is a civilian in Afghanistan for the purposes of protection under international humanitarian law (IHL), particularly the principle of distinction, which dictates that civilians and civilian objects may not become the object of an attack. This, however, does not address why the question needs to be asked to begin with. In a conflict as protracted and complex as the one in Afghanistan, the protection afforded to civilians has been a key tenet of all discourse – military, political and humanitarian. However, the number of civilian casualties, reported by various sources, has consistently remained high. While that factor alone represents a worrying trend, its persistence may lead to an additional question: are the fighting parties engaging in combat with a clear idea of who is a civilian or of when civilians lose their immunity from attack? And, is there a way that is consistent with IHL to reconcile any possible misunderstandings? These are the questions that this article will attempt to explore, even though at times it may not be possible to offer straightforward answers.

The structure of the article will be as follows. First a presentation and analysis of the concepts of civilian and civilian population will be made, followed by how they have been developed and interpreted. One of the key questions this article will ask is whether the definition of civilian under IHL relies on conduct. The definition will also be analyzed in terms of the protection it affords. The second part of the article will bring this question into the Afghan context and summarize some parameters about the country that influence the answer. In

---

1 The same issue has been raised by the United Nations Assistance Mission in Afghanistan (UNAMA) in its 2020 Annual Report, but also in annual and thematic reports from previous years. See UNAMA, Afghanistan: Protection of Civilians in Armed Conflict; Annual Report 2020, February 2021, p. 124, available at: https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_report_2020_revs3.pdf (all internet references were accessed in November 2021).

2 This article will examine the notion of civilian within the framework of the armed conflict(s) that have existed in Afghanistan, and with the assumption that IHL is applicable, in particular with regard to, as parties to armed conflict, the Afghan government, the NATO forces (which include the United States) and the Islamic Emirate of Afghanistan (IEA), which is often referred to as the Taliban. For the entirety of this article, the acronym IEA will be used, unless the term “Taliban” is quoted directly from another source.
further developing the answer, the article will move on to the perception of civilian status as encapsulated in public statements of the fighting parties, followed by the civilian experience in Afghanistan, particularly focusing on the reported harm. The article will conclude with the proposition that the existing legal rules and interpretations, when applied in good faith, suffice to ensure both that those who are civilians under IHL are protected and that the threats which some civilians’ behaviour might pose can be effectively addressed without status change. Finally, it is important to add that this article was written before the 15 August 2021 regime change in Afghanistan, though in the author’s view, this does not affect the content of the analysis provided herein.

The concept of civilian under IHL

The definition of civilian

“Civilian” is a term that is defined negatively—by contrast. During wartime, a civilian is anyone who is neither a member of the armed forces of a party to the conflict, nor a participant in a levée en masse.\(^3\) The International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber, in the Galić judgment of 2003, reaffirmed this definition by deciding that “for the purpose of the protection of victims of armed conflict, the term ‘civilian’ is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict”.\(^4\)

A crucial element in the definition of civilian is the development of this meaning within international armed conflict (IAC) and non-international armed conflict (NIAC), considering the space that each of these frameworks has created for development of the law. There, one is confronted with two important affirmations: first, that NIACs form the overwhelming majority of armed conflicts nowadays, and second, that NIACs face the challenge of doubts about the sufficiency of the existing legal framework regulating them.\(^5\)

In IAC, States have agreed on rules (including individuals’ status definitions) from within the relative security of their mutually sovereign power. As a result, they have expressly granted each other’s fighters immunity from prosecution for participation in hostilities and prisoner of war status-related rights. This has made a global agreement on “combatancy” versus “civilianness”\(^6\)

---


4 International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para. 47.


6 These “unconventional” terms conveniently fill a linguistic gap and will be used throughout this article. The author thanks Rebecca Sutton for their use in academic scholarship. See Rebecca Sutton, The
easier, but only when State armed forces confront each other. According to Additional Protocol I to the Geneva Conventions (AP I), the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.7

The above provides us with a wide definition, whereby the only criterion that needs to be established is whether an individual is a combatant. If not, they are a civilian. For NIACs, things are not as straightforward. There is no binding definition of the construct of “civilians” (individually) or “the civilian population” (collectively) in NIACs.8 Since the definition of civilian is made a contrario to that of a combatant, the difficulty lies in agreeing upon who is a combatant in NIACs.

Additional Protocol II (AP II) foresees the protection of civilians (including the cessation of such protection when civilians take direct part in hostilities).9 The travaux préparatoires of AP II reveal that the omission of a definition of civilian was a deliberate choice rather than an accident. States’ concern not to create an equivalence between non-State armed groups and State armed forces10 – and thus “legitimize” the former – is perhaps the main reason behind this choice. The contemplated definition, which appeared in the States’ deliberations, foresaw a civilian as being “anyone who is not a member of the armed forces or of an organized armed group”.11

In case of doubt about a person’s status, they shall be presumed to be a civilian.12 This rule further underlines the protective scope of the definition but also that the burden of proof lies on establishing combatant status. Indeed, Article 50 of AP I concerns persons who may have not committed hostile acts, but whose status seems doubtful because of the circumstances. Such persons should be considered to be civilians until further information is available and should therefore not be attacked.13

Different scenarios have been considered wherein someone’s civilian status would not be as obvious. For instance, within organized operations of a larger scale (such as multinational operations), the International Committee of the Red Cross (ICRC) has provided that

---

7 AP I, Art. 43(1); ICRC Customary Law Study, above note 3, Rule 4.
9 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. 13.
12 AP I, Art. 50(1); ICRC Customary Law Study, above note 3, Rule 6.
civilian personnel involved in economic/political governance, the promotion/ 
protection of human rights or humanitarian assistance must be regarded as 
civilians for the purpose of IHL, irrespective of the fact that the multinational 
operation qualifies as a party to the armed conflict. The civilian component of 
a multinational operation must be distinguished from its military component.14 

Personnel accompanying the armed forces but without being incorporated therein 
(such as war correspondents and contractors) equally maintain their civilian 
status.15 

Incorporation into the armed forces as a cause for change of status has been 
examined by the ICRC. Contractors (in the form of private military and security 
companies) may no longer qualify as civilians if they become incorporated into 
military forces. Police forces may be mistaken for losing their civilian status (or 
not even having one in the first place), even when they carry out normal law 
enforcement activities. 

Even civilians who take direct part in hostilities remain civilians – they 
might lose immunity from direct attack while they do so, but they remain 
civilians nonetheless.16 The ICTY has highlighted that “the definition of a 
‘civilian’ is expansive and includes individuals who at one time performed acts of 
resistance”.17 

Persons protected by IHL (a category which includes civilians) are entitled 
to humane treatment once in the hands of a party to the conflict. However, the 
connotation of civilian status goes beyond that entitlement, as noted by the ICTY 
Appeals Chamber in the Galić case, which explained (and, in so doing, corrected 
the Trials Chamber decision18) that when fighters become hors de combat, they 
are entitled to humane treatment but do not thereby assume civilian status.19 

The definition of the civilian population 

The definition provided in Article 50 of AP I explains that the civilian population 
comprises all persons who are civilians. 

14 ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, October 
contemporary-armed-conflicts.
15 AP I, Art. 79; 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), Art. 4(A)(4); ICRC Customary Law Study, above 
note 3, Rules 4 and 24.
16 The same position was upheld in the famous (and in equal part criticized) Targeted Killings case in Israel, 
which stated: “A civilian who … commits acts of combat does not lose his status as a civilian.” Supreme 
Court of Israel, Public Committee against Torture in Israel v. Government of Israel (Targeted Killings), Case 
No. HCJ 769/02, 13 December 2006, para. 31.
17 ICTY, Galić, above note 4, para. 143.
18 The Trial Chamber held, when considering the chapeau requirement of a civilian population, that the 
definition of a civilian is expansive and includes individuals who at one time performed acts of 
resistance, as well as persons hors de combat when the crime was perpetrated.
19 ICTY, Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 
2006, para. 144.
The ICTY’s jurisprudence has dealt with the definition of the civilian population prior to Galić, maintaining that “the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic”. Likewise, the presence of soldiers does not necessarily deprive a civilian population of its civilian character, nor does the presence of persons hors de combat. The ICTY Appeals Chamber, in the Kordić and Čerkez appeals judgment, stated that “the civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.22

This “zoom out” from the definition of the individual civilian to that of the civilian population accentuates the preference given to maintaining the civilian status of a group, even when non-civilian elements may be found amongst it. While this does not change the definition of who is to be considered a civilian, it is illustrative of the protective “bias” favoured for the non-fighting part of the population. The 1987 Commentary on AP I adds that in protecting the civilian population, it is understood that “innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities”. The treaty and customary provisions for passive precautions – i.e., the obligation to “take necessary precautions to protect the civilian population … against the dangers resulting from military operations” – further support this point. Through these provisions, the ordinary meaning of “civilian population”, which equates to the need for protection for a group, is made explicit.

The ICRC Interpretive Guidance

When examining the concept of a civilian in both IACs and NIACs, the ICRC acknowledged and addressed the lacuna found in NIACs regarding civilian status and what it exists in contrast to. In its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretive Guidance), the ICRC affirmed the existence of a distinction between fighter and civilian for NIACs, explaining that both Article 3 common to the four Geneva Conventions and AP II use language which supports the existence of these two mutually exclusive categories.25

21 ICRC Commentary on the APs, above note 13, para. 1922; ICTY, Blaškić, above note 20, para. 115: “[I]n order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.”
22 ICTY, Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, para. 50.
23 ICRC Commentary on the APs, above note 13, para. 615. The word “innocent” was not defined when it was used, and indeed, all civilians are protected against attack. This will be discussed in more detail later in the article.
In the view of the ICRC—a view which emerged after contentious discussions and still remains criticized\(^{26}\)—organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).\(^{27}\)

According to the Interpretive Guidance, a good-faith interpretation of IHL\(^{28}\) leads to the conclusion that fighters do exist in NIACs and that deciding what makes a fighter requires examining their behaviour. In light of the increasing trend of civilian participation in armed conflict, and with a view to strengthening the implementation of the principle of distinction, the Interpretive Guidance looked at conduct for the purposes of the conduct of hostilities in only two ways: conduct determinant of one’s status in terms of membership of an organized armed group (as a fighter with a continuous combat function), and conduct determinant of a civilian’s “targetability” (taking direct part in hostilities).\(^{29}\)

What the Interpretive Guidance established was that a civilian remains a civilian unless they assume a continuous combat function. If, as a civilian, they take direct part in hostilities,\(^{30}\) they maintain their status but lose immunity from attack while that participation lasts—and in any event may be prosecuted for taking up arms (as is also the case for persons with a continuous combat function).

The Interpretive Guidance summarizes a threefold test\(^{31}\) to determine if an individual’s conduct amounts to direct participation in hostilities. Firstly, an act constitutes direct participation in hostilities when it is likely to—and specifically aims to—directly harm the enemy by inflicting damage to military objects or legitimate targets, or to cause destruction or harm to protected persons or property. Secondly, there must be a direct causation between the act and the expected harm, and thirdly, there must be a belligerent nexus between the act and the hostilities conducted between the parties to the armed conflict. By clarifying the constituents of such conduct, the Interpretive Guidance leaves no space for doubt about a person’s status for the purposes of the conduct of hostilities.

The notion of direct participation in hostilities as a determinant for who may be a target has been suggested as a reliable method for distinguishing civilians from


\(^{27}\) Interpretive Guidance, above note 25, p. 16.


\(^{29}\) The Interpretive Guidance states: “The present text interprets the notion of direct participation in hostilities for the purposes of the conduct of hostilities only. Thus, apart from providing guidance on when and for how long a person is considered to have lost protection from direct attack, it does not address the consequences of direct participation in hostilities once he or she finds himself or herself in the adversary’s hands. Other rules of international humanitarian law then govern, foremost among them being the already mentioned principle of humane treatment.” Interpretive Guidance, above note 25, p.7.

\(^{30}\) The Commentary on AP I uses the term “armed combat”; see ICRC Commentary on the APs, above note 13, para. 1942.

\(^{31}\) Interpretive Guidance, above note 25, p. 46.
the “rest”.\textsuperscript{32} Appraising the practicality of the Interpretive Guidance, Dapo Akande examined the following example. The Israeli Supreme Court opined that if a civilian has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, [he] loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.\textsuperscript{33}

Akande concludes that by applying the ICRC’s analysis, the conclusion would be similar, with the only difference being that on the ICRC’s analysis, the person would not be a civilian but rather a member of an organized armed group.\textsuperscript{34}

A different conclusion would be reached with regard to civilians who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis, or who assume exclusively political, administrative or other non-combat functions. Examples would include recruiters, trainers, financiers and propagandists who continuously contribute to the general war effort of a non-State party while not performing a continuous combat function.\textsuperscript{35}

Finally, it is worth examining what has been proposed as the starting period for a person’s direct participation in hostilities, as well as when membership of an organized armed group begins and ends. According to the Interpretive Guidance, “[a]s the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends”, and this, according to the Guidance, “remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis”.\textsuperscript{36} Conversely, “membership in an organized armed group begins in the moment when a civilian starts de facto to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function”.\textsuperscript{37}

The definition of civilian through treaty interpretation

In an additional effort to understand the constituents of the civilian definition, the article will now examine the term “civilian” as found in the Geneva Conventions and discuss how treaty interpretation rules may help in this effort. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth the basic rules

\textsuperscript{33} Supreme Court of Israel, Targeted Killings, above note 16, para. 39.
\textsuperscript{35} Ibid., p. 71.
\textsuperscript{36} Ibid., p. 72.
of treaty interpretation. According to these articles, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”.38 In the case of the Geneva Conventions, the ICRC has underlined that “the whole text of the Conventions, including the titles and annexes, has to be taken into account in ascertaining their object and purpose”.39 Here, the article will look at how the notion of civilian is understood through a good-faith interpretation of the Geneva Conventions as well as supplementary means of interpretation through the preparatory work of the relevant rules.

Good faith40

To say that the object and purpose of the Geneva Conventions and Additional Protocols is to reduce human suffering during armed conflicts would appear almost trite, but it begs recalling when one examines the application of each rule, including that relating to the definition of a civilian. “Interpreting a treaty in good faith means that even when the words of the treaty are clear, they must be interpreted in a way that would not render the meaning manifestly absurd or unreasonable.”41 Several preliminary statements to international treaties—even preceding the Geneva Conventions—recite the desire to “diminish, as far as depends on them, the inevitable evils of war”.42 It would follow that all “evils” that can be avoided should be avoided, which includes widening the protection afforded to civilians as widely as possible and acknowledging that much of the harm can, indeed, be evitable. Then again, an analysis of what would constitute “evitable” harm could be the subject of disagreement, but this author submits that at the very least, a thorough due diligence approach43 would require those implementing the law to seek actions that avoid civilian harm, including by offering the benefit of the doubt for civilian status (this is further affirmed by the

38 When a treaty is open to two interpretations, one of which enables the treaty to have appropriate effects and the other does not, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted. See 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, 12 August 1949 (ICRC Commentary on GC I), paras 28–32, quoting International Law Commission, Yearbook of the International Law Commission, Vol. 2, 1966, p. 219, para. 6.
39 ICRC Commentary on GC I, above note 38, para. 29.
40 Good faith is defined as that which “requires the parties to a treaty, contract, or any other kind of international transaction to deal honestly and fairly with each other. Each party shall act reasonably, taking into account the just expectations of the other party/parties, truthfully disclosing all relevant motives and purposes. Each party shall finally refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement”. Markus Kotzur, “Good Faith (Bona Fide)”, Max Planck Encyclopedia of Public International Law, Oxford University Press, Oxford, January 2009.
42 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, Preamble.
law later developing into assuming civilian status in case of doubt). Even though there is no consensus amongst scholars and practitioners regarding the precise scope of the object and purpose of the Geneva Conventions which is to be interpreted in good faith, the “balance between humanitarian considerations, on the one hand, and military necessity, on the other, is a hallmark of international humanitarian law”. Further to that, it has been submitted that the core of the Conventions was written “to protect individuals”. Voices underlining the value of good-faith interpretation have not ceased doing so, and this should come as no surprise given the fundamental role of this principle in treaty interpretation. This may be partly due to the high number of civilian casualties and grave humanitarian consequences seen in today’s conflicts. Some of those voices are replicated here, to underline not so much the legal principle but the need to be more conscious of it in legal interpretation, as well as to reconcile the “naiveté” that is at times attributed to “good faith humanitarian arguments” with the very core of the values that these rules were created to protect.

In a famous dissenting opinion to the International Court of Justice’s (ICJ) Nuclear Weapons Advisory Opinion, Judge Higgins wrote: “The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect.” More recently, Craig Jones wrote: “Good faith interpretations of IHL rules on the conduct of hostilities are needed all day, every day if civilians and others are to be spared the worst of urban warfare’s all-too-familiar ravages.”

**Drafting history**

Tracking the entire history of how IHL’s understanding of a “civilian” developed is not a straightforward task. While “civilian” is a word with an admittedly “simple” ordinary meaning, discussions, in some shape or form, have spanned decades and various instruments and fora.

To examine what preceded the adoption of a written definition in AP I, the deliberations of 1971 shed light on the concerns existing at the time. The impact of

---

44 M. W. Meier, above note 41.
48 Especially outside strictly legal discussions and amongst field and operational practitioners.
context on defining civilians was carefully considered, and it was pointed out that
the definition would make sense if associated with a particular protection
offered.\textsuperscript{51} Agreement was reached to codify such a definition in a subsequent
document. The ICRC—which was submitting the initial definition proposal—stated: “It would be erroneous to think that persons linked to the military effort
could be the objective of an attack mounted directly against them.”\textsuperscript{52} The ICRC
later submitted that

\begin{quote}
[t]he word “directly” … has the essential merit of drawing the distinction—and
how difficult it is!—between combatants who do not fulfil the conditions
and civilians linked to the military effort; it includes persons linked to the
military effort within the civilian population and combatants who do not
fulfil the conditions within military objectives. Indeed, “directly” establishes
the relationship of “adequate causality” between the act of participation and
its immediate result in military operations. According to this theory of
“adequate causality”, a person is only a “combatant”—and thus a possible
military objective—to the extent that his act, or activity, is a direct cause of
damage inflicted on the adversary, on the military level; that is to say, when
his act or activity is such as to cause damage of this nature in the ordinary
course of events and according to experience of armed conflicts.

Conversely, a person remains a civilian as long as his act or activity is not
responsible for immediate damage suffered by the adversary, on the military
level. Thus, a legal solution is found to the problem of “civilians linked to the
military effort”, who would not constitute a separate and distinct category of
the civilian population, for the reasons already given.\textsuperscript{53}
\end{quote}

The ICRC discussions in 1977 reveal an overall consensus over the definition of a
civilian and that of a civilian population, supported by the absence of reservations
made thereon. It has been stated that the reason the definition of civilian was
omitted from the final text of AP II at the last moment was a “package aimed at
the adoption of a simplified text”.\textsuperscript{54}

Some of the arguments presented (uncontested) in the deliberations above
indicate that concern existed for the civilian population to be protected from
“superficial” association with military efforts—even though the degree of these
associations did not and still does not enjoy equal consensus. The discussions
reveal that protection of the general civilian population was indeed the
predominant concern in the drafting process.

\textsuperscript{51} ICRC, \textit{Conference of Government Experts on the Reaffirmation and Development of International
August 1971, pp. 73–77.

\textsuperscript{52} ICRC, \textit{Conference of Government Experts on the Reaffirmation and Development of International

\textsuperscript{53} ICRC, above note 51, p. 28.

\textsuperscript{54} ICRC Customary Law Study, above note 3, Rule 5.
How much does the definition of civilian rely on conduct?

The definition of civilian itself does not leave room for relying on conduct in determining status. Being a combatant, and by extension, being a civilian, is determined by looking at categories—in other words, status. This is further evidenced by the fact that members of the armed forces who might not have a fighting role remain combatants, and conversely, civilians remain civilians if they take direct part in hostilities (but then lose protection against attack).

Be that as it may, looking at conduct to determine a person’s status and afforded protection is far from being a new question. Oppenheim famously wrote: “Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in it; they do not attack and defend; and no attack ought therefore to be made upon them.”55 The very essence of our shared, ordinary understanding regarding who is a civilian is, to some extent, shaped by one’s conduct. The ICRC Commentary on AP I explains that “in protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves”.56 This approach also finds support in the Trial Chamber judgment of the ICTY in Blagojević and Jokić, which reads: “The term ‘civilian’ refers to persons not taking part in hostilities.”57

The term “civilian” was meant to embody “innocence” (hence why it remains extremely common to encounter the phrase “innocent civilian”58), distance from the military activities and, overall, absence of threat. Sutton summarized this by saying that civilinness equals “innocence”, while combatancy equals “complicity” and “participation”.59 In reality, categories are never so neatly arranged. Besides, a legal definition needs to be concrete and to serve as a “label” that provides protection in combat.

In modern warfare, the whole population may be perceived to be participating in the war effort to some extent, albeit indirectly, and persons may slip into a “grey area”60 between being so-called “innocent civilians” and civilians who support the hostilities, take direct part in hostilities or, some might submit, cross the line into combatant status. Navigating this divergence requires us to understand why those who are civilians have that status.

56 ICRC Commentary on the APs, above note 13, para.1909.
There is little if any doubt that civilians may indeed undertake acts which support the political or military effort of one of the parties to the conflict. The Inter-American Commission on Human Rights has very clearly opined that civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

Civilians who support the armed forces (or armed groups) “by supplying labour, transporting supplies, serving as messengers or disseminating propaganda may not be subject to direct individualized attack, but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies.”

On account of the above, it stands to reason that civilians may indeed provide some form of support in the “war effort”, but this does not affect their status. Looking back at the initial definition, we note that a civilian is a person who is not a combatant/fighter. Consequently, conduct is relevant, because the assessment for a continuous combat function is fundamentally conduct-based. Having said that, while “conduct” may describe a different set of elements than “function”, it can also be argued that conduct is a *sine qua non* of the notion of function.

Persons with a continuous combat function are those who continuously take part in hostilities. To assume that function requires lasting integration into an organized armed group. Membership of the group cannot depend on abstract affiliation, family ties or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole – namely, the conduct of hostilities on behalf of a non-State party to the conflict.

To conclude on this point, the elements presented above illustrate that the risk which may be posed by an individual who is a civilian does not factor in the civilian definition. The “status” test only requires that a person meets the criteria for a fighter. Should that not be the case, the individual remains a civilian.

---

63 M. Bothe, K. J. Partsch and W. A. Solf, above note 61, p. 303.
64 Interpretive Guidance, above note 25, at p.33.
What protection is afforded to a civilian?

“What’s in a name? That which we call a [civilian] by any other name would sound as sweet.”65 With all due respect to Shakespeare, names matter in IHL. A name and its definition constitute the compass for determining whether a person may be the object of attack, may benefit from combatant immunity if captured, etc.

Conduct of hostilities

Most frequently, civilian status is associated with immunity from attack during hostilities, encapsulated within the principle of distinction: a civilian shall not become the object of an attack unless and for such time as they take direct part in hostilities. This fundamental privilege of “civilianness” is embodied in the principle of distinction.66 Among its many accolades, the principle of distinction has been described as “the foundation of the whole system of IHL”.67

The defining criterion for determining the rules governing the use of force against a particular individual under IHL is whether the person is a lawful target under the rules governing the conduct of hostilities. A person may be a lawful target because of their status (he or she is a member of regular State armed forces, as generally defined by domestic law), function (he or she is a member of irregular State forces or of a non-State armed group, by virtue of the continuous combat function performed) or conduct (he or she is a civilian directly participating in hostilities).68

Civilians and civilian objects also become the yardstick for the harm that may be caused even when attacks are directed towards military targets, by anchoring the proportionality assessment, but also in the precautions to be taken. In other words, civilian status often represents the “humanity” counterpart to military necessity in the “balancing act” of fighting.

Lastly, if there is an incorrect assumption about an individual’s status, and that individual were to make use of an object (e.g. a building), then that could influence that object’s classification and in rendering it a military target, expose it to attack.69

66 API, Art. 48.
69 Military objectives are those objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. See AP I, Art.52(2– (3); ICRC Commentary on the APs, above note 13, paras 2022–2023.
Investigations and compensation

Being a civilian who has sustained harm\textsuperscript{70} appears to be a frequent trigger for investigating an event for any violation— but also for considering some form of redress. IHL would require equal amounts of care and measures to be taken to investigate\textsuperscript{71} violations against other protected categories of persons (such as those placed \textit{hors de combat}), but the fact remains that being a civilian makes the initiation of this process considerably more likely.

Given that these processes are mostly context-specific, the inquiry options presented below are relevant to the Afghan context, which will be the context that the theoretical analysis presented so far will be filtered through. Certain practices of redress have been put in place by some actors which concern incidental harm during combat but which are distinct from compensation, since they do not require a confirmed breach of applicable law. They, too, refer to civilian harm as a prerequisite for entitlement.

The United States, in its annual assessment on civilian casualties, explains that the Department of Defense (DoD) investigates allegations of civilian casualties resulting from US military operations and that in the case of harm caused by an operation to a civilian, any \textit{ex gratia} payment or other assistance is provided to the civilian or the family of the civilian—even though this might, at times, exclude individuals who are not considered “friendly” to the United States. It then clarifies that “[f]or the purposes of such assessments, DoD does not include members of the civilian population who have forfeited the protections of civilian status by engaging in hostilities”\textsuperscript{72}

Civilians who have suffered conflict-related harm may claim monetary payment from the Afghan government. One of the options is a one-time payment through emergency budget Code 91 or Code 92, and monthly financial assistance to conflict-affected families of victims through the State Ministry for Martyrs and Disabled Affairs. However, it has been reported that over half of the civilian victims in Afghanistan “do not receive any payments or are unaware of programs to apply for assistance”,\textsuperscript{73} or, at times, enforcement of redress requires additional efforts.\textsuperscript{74}

One of the main challenges identified in this process is a requirement that asks the applicant to secure a signature from the Afghan National Directorate of Security in order to receive assistance. The signature is required to make sure the

\textsuperscript{70} In many cases, this holds true even when the civilian harm is lawful, e.g. when it is proportional to the expected military advantage.

\textsuperscript{71} AP I, Art. 85; ICRC Customary Law Study, above note 3, Rule 158.

\textsuperscript{72} DoD, \textit{Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020}, 2 June 2021, available at: https://tinyurl.com/xerptz5n. It is worth noting that the use of the term “engaging in hostilities” risks excluding a wider category of persons than those identified in the ICRC’s Interpretive Guidance.

\textsuperscript{73} Center for Civilians in Conflict (CIVIC), \textit{Unacknowledged Harm: Hurdles to Receiving Victims’ Assistance in Afghanistan}, December 2020, pp. 9–10.

applicant is not a member of an organized armed group. Persons living in areas controlled by armed opposition groups could face difficulties in securing this requirement.75

Similar requirements exist for the Conflict Mitigation Assistance for Civilians (COMAC) project, a USAID-funded programme assisting civilians harmed during the conflict. Civilians who apply for COMAC are told that they must obtain two signatures for their applications: “the first from the local police commander and a second from a village elder confirming the incident, as well as confirming that the applicant is not a member of any armed group and is not employed by the government.”76

**Who is a civilian in Afghanistan?**

In order to answer this question, we must first acknowledge and examine who is considered to be a civilian in Afghanistan.77 Bissonnette writes: “The meaning of the notion of ‘civilian’ cannot be defined in the abstract: any attempt to simplify it and to improve compliance towards it has to be based on reality and practice.”78

**Particularities of the Afghan context**

In considering the views expressed in Afghanistan, one can overlook neither the country’s history nor its religious and cultural intricacies. William Maley, in his article for the *Review* presenting a historical and geographical appraisal of Afghanistan, refers to the country as one that has been a victim of “decades of trauma”.79 Instability and turmoil run deep, both in intensity and in duration, while the causes of the conflict range from politics and ethnicity to culture and religion. All these elements show that classifying someone as a combatant may at times be too hasty a conclusion if these factors are not considered.80

This article does not intend to delve into a sociological, religious or political examination of the Afghan context. Nevertheless, when attempting to answer the

---

75 CIVIC, above note 73, p. 17.
76 Ibid., p. 21.
77 This section will examine the notion of civilian as enshrined in IHL, as opposed to violence against the life of civilians under law enforcement operations and international human rights law. Targeted killings are also considered within the IHL framework, albeit noting that those targeted are, at times, geographically far removed from hostilities, and/or not necessarily directly participating in hostilities at the time they are targeted.
78 C. Marquis Bissonnette, above note 10, p. 131.
80 The Interpretive Guidance states: “In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct amounts to direct participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place.” Interpretive Guidance, above note 25, pp. 41–42.
question of who is a civilian in Afghanistan, it is important to underscore certain elements which simply cannot be ignored.

Religion

Drawing together the Afghan understanding on laws which regulate Afghans’ conduct without considering religion would be a tremendous oversight. Various Afghan governments, as well as the armed opposition groups operating in the territory, apply Islamic law—albeit complemented by other man-made laws and regulations, all of which ultimately refer to and must not contradict divine laws. Arguably, for some of these laws, religion is the most important element in the interpretation of targetability.

Under Islamic rules of warfare, non-combatants were designated as protected and not to be harmed. Al-Dawoody writes that *al-muqāṭīlān* (combatants) are understood as follows: “They must be taking part in the fighting; anyone who is willing or prepared to fight cannot be described as a combatant, except in metaphor, until they enter into combat.” He further explains that Islamic law indicates some protected categories of persons (e.g. women, children, the elderly, and monks or religious hermits), and concludes with the inference that “Muslims must fight those who attack them, but not those who do not attack them.”

In order not to surpass this article’s insufficient capacity to deal with religious law, this point will not be elaborated further. As a final remark, Ken Guest, in his very comprehensive review of the interplay between religion and armed conflict in Afghanistan, wrote that “the arenas of both religion and armed conflict are primarily battles for perception”. Respect for the faith and the instructions provided about the protected status of those who are non-combatants are an important factor of the conflict in Afghanistan.

Culture

Khushhal Khan Khattak is regarded as the national poet of the Pashtuns. One of the verses attributed to him reads: “I despise the man who does not guide his life by honour.”

---

81 Guest makes an interesting remark regarding the adaptation of pre-Islamic fighting patterns to the new, divine rules which “went into uncomfortable nitty-gritty detail”. He describes the initial implementing process as “embracing the broad concept but cherry-picking the details”. See Ken Guest, “Dynamic Interplay between Religion and Armed Conflict in Afghanistan”, *International Review of the Red Cross*, Vol. 92, No. 880, 2010, pp. 887–888.


84 K. Guest, above note 81, p. 896.

Tradition, customs and culture – including poetry – shape the communal architecture of Afghanistan, which also varies according to region, ethnicity and tribe. An illuminating example is that of the Pashtun, who follow a centuries-old customary code called *Pashtunwali*\(^{86}\) which sets out values and rules of behaviour. Tribal loyalty, family honour, hospitality towards strangers, courage in battle and revenge for unjust incursions form the foundations of this code.\(^{87}\) Defending the values enshrined therein is categorically important – failing to do so leads to dishonour and shame. Male members of the family are particularly singled out as being those who must contend with the insults, lest they lose their honour.

Loyalty and kinship amongst the Pashtun may materialize in various manners. For instance, women are expected to support the men in their families, including when they are engaged in combat – *Pashtunwali* specifies that this support could include the provision of “food, water and other necessities to the trenches”.\(^{88}\)

Equity and reciprocity as dictated in *Pashtunwali* are not unique to that group – indeed, Guest describes Afghanistan as “a ‘reciprocal’ society in which exchanged favours and barter practice are the norm between communities that must compete and co-operate with each other”.\(^{89}\) Solidarity among persons linked by kinship and tribe is another characteristic of Afghan society. In a sense, the solidarity and reciprocity expressed by Afghans fuel both the kinship which an honourable act is asked to defend and the retaliatory spirit which governs that defensive action.

Solidarity and kinship find essence in the concept of *badal*; this concept conveys the demand for compensation without condition, which is intrinsic to dignity and honour. It is often interpreted as “compensation and retaliation”, but as Lutz Rzehak points out, *badal* also embodies the obligation to thank others for the provision of help and to provide compensation as soon as possible.\(^{90}\) This belief may lead to the creation of “pending” acts of reciprocation.

Why is it important to consider these factors? Because it will allow for a different reading of certain acts which may be perceived by parties to the conflict as hostile, even to the point of being interpreted as depriving an individual of their civilian status.\(^{91}\) For instance, hosting a fighter at someone’s home might equally be a sign of hospitality or the return of a favour, or some act otherwise


\(^{87}\) Guest explains that the social concept of honour (*nang*) is shared by non-Pashtuns, as is *melmastya* (hospitality). See K. Guest, above note 81, p. 886.


\(^{89}\) K. Guest, above note 81, p. 880.

\(^{90}\) L. Rzehak, above note 86, p. 14.

motivated by the desire to preserve one’s honour. Further, certain violent acts may be a result of *badal*, intended to defend the potential insult and loss of honour, rather than having a link to the ongoing conflict. Research has also highlighted the risks in intelligence-gathering resulting from cultural factors, suggesting that “vetting intelligence to mitigate tribal, familial and other biases from informants is essential to ensuring the right military target is engaged and civilians are not targeted”.

*Protracted conflict and arms proliferation*

It would be next to impossible, and in any event beyond the scope of this article, to enumerate all the ways in which decades of conflict in Afghanistan have shaped common conscience, lack of trust, the instinct for survival, and the permeation of security concerns into daily life. But certain facts stand out as being closely linked with the war legacy, such as the proliferation of weapons in Afghan households. An anecdote that the author experienced in Kabul in April 2021 is revealing – on the evening of 11 April, loud gunfire sounds erupted all over the city. The sounds indicated intense fighting, with the use of various types of firearms, and could be heard coming from all parts of town. The revelation that the firing was celebratory, marking the occasion of an Afghan martial arts match victory, while reassuring, also acted as a stark demonstration of how heavily armed Kabul’s houses (including civilian houses) really are.

Armed persons often raise valuable grounds for security concerns, but arms possession alone should not lead to the illation of combatant status or even of the intention to participate in hostilities beyond self-defence, in line with the requirements for conduct to amount to direct participation in hostilities, as explained above. To quote Guest, “Afghan pragmatism is the lifeline that enables them to survive. In their harsh and unforgiving natural environment, Afghans endure with fortitude whatever the world has to throw at them.”

The harsh and unforgiving Afghan mountains have also given way to harsh and unforgiving urban centres. The behaviour of a person who might resort to a violent act which does amount to belligerent nexus could – given what we have seen about the specificities of the Afghan context – be merely motivated by individual self-defence.

Finally, another undisputable remnant of the perdurable conflict is what Maley refers to as “patronage and alliances”. This, he claims, is a way to frame the influence exercised, to various degrees, on the fighting parties by elements of the global community, both at a collective and individual level. External influences underline the “politics of struggle”.

---


94 K. Guest, above note 81, p. 881.

95 W. Maley, above note 79, p. 875.
Various commentators have described the conflict in Afghanistan as being “asymmetric” – i.e., “characterized by the imbalance between the military capacity of the warring parties (e.g. in terms of weapon technology, equipment, intelligence information and number of troops)”\textsuperscript{96} This imbalance, at least at the early stages of the conflict, affected the choice of methods of warfare. As a consequence, fighting drew nearer civilian settings, often densely populated. The evolution of the conflict followed this pattern; several fighting parties adapted to this proximity\textsuperscript{97} leading to the current prevalence of areas with civilians and fighters in close coexistence. This follows a more generalized trend of increasingly involving civilian actors in conflicts\textsuperscript{98}. Finally, the coexistence of civilians and fighters creates a high risk of association of non-civilian status to individuals due to proximity\textsuperscript{99}.

How do fighting parties\textsuperscript{100} in Afghanistan perceive civilian status?

Fighting parties – the ones with whom the responsibility to respect IHL lies – merit examination in our efforts to decipher the perception of civilian status in Afghanistan. The factual fluidity with which status can be assigned to individuals calls for a closer look.

Before anything else, it is important to acknowledge that there is no (known) statement from any of those who fight in Afghanistan which questions the fact that civilians ought to be protected. Indeed, many Afghan fighters promote the protection of civilians and condemn incidents that cause civilian harm (albeit usually those brought about by enemy forces).\textsuperscript{101} What is less clear is who they mean by that term – and, by extension, who they exclude. Although


\textsuperscript{99} Further, Section 81 of the Layeha provides that fighters should keep their “hair style, clothing, shoes and other things just like the local people [because] this will allow the mujahideen to protect the local people and will enable them to move freely in any direction”.

\textsuperscript{100} This refers to actors who have been publicly known to participate, in some form or another, in fighting in Afghanistan.

the examples mentioned below cannot claim to be exhaustive, they are nevertheless indicative of key perceptions expressed.

**Reports**

The Inspector-General of the Australian Defence Force’s (ADF) *Afghanistan Inquiry Report* (Brereton Report)\(^{102}\) sought to understand the applicable rules of engagement of the Australian forces in Afghanistan in order to assess their conduct. It provided that “[i]n Afghanistan, the Taliban’s military forces were one of the ADF’s designated enemy forces”, adding that someone’s membership in the enemy fighting force – Islamic Emirate of Afghanistan (IEA) fighters – would suffice to render them targetable.\(^{103}\)

In trying to diversify the practical examples that a soldier might encounter and to help clarify who should be considered a civilian, the report explained:

[The ADF Force Element] may have been deployed to assist ANSF [Afghan National Security Forces] to apprehend a “drug baron” who was not a member of the Taliban, but simply a criminal. The reason for apprehending that individual or for carrying out an operation to shut down that drug baron’s facilities may still have been linked to the armed conflict – for example, the drug trade was in general financing Taliban operations. However, the drug baron in question had no links to the Taliban or to the hostilities against the ADF. … In this case, that person – although clearly a criminal – is for LOAC purposes a “civilian” who cannot be made the target of attack.\(^{104}\)

The Brereton Report proceeds to explain the criteria that would render an individual a legitimate target due to status (as opposed to conduct/direct participation in hostilities). Referring to “requirements for satisfaction of the OAG [organized armed group] test”, the Report lists the need to identify those organized armed groups that are taking part in the hostilities against the ADF and friendly forces, and then to check whether a proposed target is a member of one of those groups and whether they have a targetable role (for example, planning, commanding, or taking part in military operations are targetable roles; being a political spokesperson or propagandist for an organized armed group, who never takes part in planning, conducting or facilitating military operations, may not be a targetable role). The exhaustiveness of the examples stops there, with the

---


104 *Ibid.*, p. 290, paras 16–17. The acronym LOAC stands for law of armed conflict and is interchangeable with IHL for the purposes of this article.
statement that “there are a range of factors and indicia that can be used to assist in this identification process”.105

**Codes, instructions and manuals**

The examples in this category are perhaps some of the strongest indications of the parties’ understanding of the definition of a civilian, since they constitute the compass for action. The code of conduct for IEA fighters, known as the Layeha,106 highlights avoiding civilian casualties: “care should be taken to prevent the deaths and casualties of common people”.107

In the Layeha, the representatives of the Islamic Republic of Afghanistan, its army, police and workers are referred to as “the opposition”, while foreigners are referred to as “infidels”. “Drivers and contractors whose guilt is well-known to the mujahedeen can also be attacked directly”,108 although the Layeha suggests that they may be legitimate targets only while working. Interestingly, for the same category persons, if not “well-known”, punishment is foreseen only if they are captured and found guilty by the provincial judge. Further to the categories of persons who, according to the Layeha, would fall outside the protective scope of “common people” would be organizations that are close to the enemies of the IEA. For example, in May 2019 an attack on the offices of the US NGO Counterpart was justified *inter alia* on the basis that the NGO was funded by USAID to implement the aims of the “invaders” in Afghanistan, that it had an active involvement in the election process, that it trained ANSF fighters, and that it encouraged gender-mixing and promoted “moral corruption in Afghanistan”.109

Although not a written code designed for combat, *Pashtunwali* provides essential guidance regarding the status that certain categories of people attain. It embraces the protected civilian status of

women, children, as well as members of castes with a socially inferior status, like barbers or musicians. Mullahs as well as Sayyids, i.e. males who are accepted as descendants of the Islamic prophet Muhammad, Hajjis, i.e. persons who have successfully completed the pilgrimage to Mecca, spiritual leaders of Sufi

---


107 Layeha, Art. 57(3). “Common people” is one of the ways in which civilians are referred to. Other terms include: Art. 2: *aam kas* (common person); Art. 48: *wolosi khalk* (normal people), *aam wagrey* (normal citizens), *walis* (the populous); Art. 65: *aam khalk* (common people), *mulki khalq* (people); Arts 72, 73: *khalk* (of the people); Art. 81: *mahali khalk* (the local people).

108 Layeha, Arts 23–25.

brotherhoods and other dignitaries should be excluded from military actions due to their holiness.\textsuperscript{110}

The United States, in the DoD \textit{Law of War Manual}, presents the term “non-combatant” to mean military medical and religious personnel, but this term can also include those combatants placed \textit{hors de combat}.\textsuperscript{111} The Manual follows the \textit{a contrario} definition of a civilian, by offering a detailed description of categories of combatants. Other than those who are clearly members of the armed forces, the Manual includes the category of so-called “unprivileged belligerents”\textsuperscript{112}. Unprivileged belligerents generally are “subject to the liabilities of both combatant and civilian status, and include: persons engaging in spying, sabotage, and similar acts behind enemy lines; and private persons engaging in hostilities”.\textsuperscript{113} The latter is explained to refer to “private persons” instead of “civilians” \textit{inter alia} “because private persons who engage in hostilities are liable to treatment in one or more respects as combatants”, and also because “non-military personnel belonging to a State (e.g., persons authorized to accompany the armed forces), who are often called ‘civilians,’ raise a different set of issues that merit special consideration as opposed to the general case of a private person who decides to engage in hostilities”.\textsuperscript{114}

\textbf{Statements}

Beyond the codified guidance, \textit{ad hoc} statements by fighting parties, either issuing orders or reacting to the occurrence of an attack, can also be enlightening sources. Various such statements have been made publicly, either aimed at the fighters directly or as questions posed by various enquirers (media, researchers, etc.).

In 2019, the IEA issued a Weekly Commentary identifying those individuals and groups considered to be legitimate targets by its fighters:

[T]he IEA always endeavours only to aim at those targets which are directly linked to the invaders or the hireling administration and are considered enemies according to Shariah: community facilities, the staff of those facilities, health centres, educational facilities and international charitable humanitarian organisations, all come within those benefactors which the IEA not only does not permit attacks upon but also assists in their provision of services to society. … Overall, all of those individuals and organisations

\textsuperscript{110} L. Rzehak, above note 86, p. 11.
\textsuperscript{112} The ICRC believes that loss of entitlement to combatant privilege or prisoner-of-war status does not necessarily lead to loss of membership in the armed forces: see Interpretive Guidance, above note 25, p.22.
\textsuperscript{113} DoD, above note 111, p. 101, para. 4.2.3.3.
\textsuperscript{114} Ibid., p. 155, para. 4.18.1.
which do not have political or military affiliation and do not harm society, are at peace [i.e., protected].

The IEA, addressing one of United Nations Assistance Mission in Afghanistan’s (UNAMA) civilian casualty reports, declared:

[A]ttacks on key [Afghan] regime targets by the Mujahideen have been labeled as attacks on civilians in the UNAMA report and their numbers inflated. For example, if off-duty officers and security personnel were targeted by the Mujahideen, these were called civilian fatalities .... Targeting government workers involved in martyring, harassing, detention, passing prison terms on Mujahideen and even adjudicating death sentences upon them were labelled as attacks on civilians in the UNAMA report.

In statements, the IEA has acknowledged various groups of persons as those who should not be attacked, such as religious students, health workers, and common villagers. It has also explained that it refrains from attacking non-military and unarmed personnel but only targets “enem[ies] that [are] actively engaged in fighting or carrying out espionage activities”. One more statement that helps complete the image of the notion of civilian applied by the IEA, its response to the 2020 UNAMA Annual Report, reads: “We are against those who do not behave as civilians, who are armed or have armed persons with them. According to your definition, if the mentioned persons—who you refer to as civilians—are armed, then they cannot be called civilians.”

Turning to government or pro-government forces, operational planning officers at the Operations Directorate of the Ministry of Defense were interviewed and revealed that they conduct “collateral damage estimates” and “pattern of life” analyses in order to identify civilians in the area in the hours or days prior to planned attacks. Dynamic targeting, however, would take place over a one- or two-hour period, during which identification, intelligence vetting and risk assessments for civilians must happen in real time, which increases the likelihood of mistakes.

120 UNAMA, above note 1.
121 CIVIC, above note 92, p. 13
The United States has explained that it imputes the “hostile intent” of a non-State organized armed group to all of the group’s members, regardless of whether they are performing a combat function. US Forces Afghanistan (USFOR-A) considered all personnel inside some alleged drug-processing labs to be targetable on the basis of their purported membership. According to the United States, indications that someone is a member of a non-State organized armed group include “following directions issued by the group’s leaders, [and] performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role”.

What is the civilian experience in Afghanistan?

Much ink has been spilled over the civilian harm experienced in Afghanistan. Even though there are as many opinions on the data as there are sources, there is a commonly agreed conclusion that civilians experience high levels of harm as a result of the conflict. Interestingly, despite the plethora of civilian casualty reporting, there is no expressis verbis clarification of how said civilians are defined, with the exception of those reports that explicitly refer to IHL. A fair assumption would be that these clarifications are absent due to a likely assumption over who civilians are.

UNAMA is probably the most widely cited source for numbers of civilian casualties. In its first-quarter report for 2021, UNAMA found that “extraordinary levels of harm inflicted on civilians in the Afghan conflict [continue] unabated, with UNAMA finding that the number of civilians killed and injured during the first three months of 2021 [was] significantly higher than a year ago”. UNAMA identifies ground engagements and non-suicide improvised explosive devices as

Note that “hostile intent” is not a term found in IHL. For more on this topic, see Erica Gaston, When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent, Global Public Policy Institute, June 2017.


Email communications between UNAMA and a USFOR-A Legal Adviser on 5 August 2019 (on file with UNAMA).


For example, UNAMA explains that “[i]nternational humanitarian law defines ‘civilians’ as those persons who are not members of military or paramilitary forces or fighters of organized armed groups of a party to a conflict. Civilians may lose protection against attacks for such time as they take direct part in hostilities.” UNAMA, “Frequently Asked Questions”, available at: https://unama.unmissions.org/poc.

However, UNAMA states that it does not document casualties where the civilian was directly participating in hostilities at the time of death or injury.

the leading causes of civilian harm, followed by complex attacks, targeted killings, explosive remnants of war, aerial operations, summary executions and shelling.

The bleak list of victims of the Afghan conflict includes members of the media,\textsuperscript{130} educational facilities,\textsuperscript{131} civil society activists, members of the judiciary and members of the civilian government administration.\textsuperscript{132} The UN Security Council has further highlighted “healthcare and humanitarian workers, including women in prominent positions, those who protect and promote human rights, and ethnic and religious minorities”.\textsuperscript{133}

UNAMA, when explaining who is a civilian, underlines that it documents attacks against categories of people whose regular activities do not amount to direct participation in hostilities, including public servants and government workers, teachers, health clinic workers, election workers and others involved in public service delivery, political figures and office-holders, and employees of NGOs, as well as civilian police personnel who are not directly participating in hostilities and are not involved in counter-insurgency operations.\textsuperscript{134}

A few attacks have received particular attention due to their impact on what appeared to be civilians; no one has assumed responsibility for these attacks. One such attack was the 12 May 2020 attack against a Médecins Sans Frontières (MSF)-supported maternity clinic in Kabul,\textsuperscript{135} which led MSF to cease its support to the clinic. Twenty-four women, children and babies were reported to have lost their lives in that incident.\textsuperscript{136} Another attack which attracted much attention due to its grim bilan was the 8 May 2021 attack against a primary school,\textsuperscript{137} which reportedly caused some ninety casualties,\textsuperscript{138} predominantly children.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} UNAMA, above note 127.
\item \textsuperscript{135} MSF, “‘They Came to Kill the Mothers’ in Kabul Maternity Hospital Attack”, 14 May 2020, available at: \url{www.msf.org/they-came-kill-mothers-kabul-maternity-hospital-attack}.
\end{itemize}
\end{footnotesize}
The case of the police remains complex. Police have been described as civilians, but at the same time, in many of the reports counting and assessing the loss of life in Afghanistan, police casualties are set apart from “other” civilian casualties.

At times it could also be said that civilians become the object of attack because they have been liable to some “ethical” harm, in accordance with revisionist just war theory. There is no known statement which would demonstrate that such practices indicate a perception of fighter status.

Undoubtedly, it is very difficult to ascertain all the facts regarding a person’s exact conduct at the time of an attack, such as whether the person was taking direct part in hostilities at the time of the attack, whether they were considered to be victims of lawful incidental harm in an attack with a legitimate military target, or whether they were a member of an organized armed group by virtue of their continuous combat function. Nevertheless, one point to be made here is that, absent of incorporation into armed forces or membership of the armed wing of an armed group, civilian status is to be assumed. However, this does not preclude addressing the various other forms of threats or criminal activity that these persons might engage in (and which, sometimes, targeting aims to address).

Reconciling the definition

The numbers of civilian casualties, as explained above, have traditionally shown disparities between different sources. One of the main reasons for this is that those who are keeping track of civilian casualties in Afghanistan use “different methodologies to track civilian harm and differ on legal interpretations of who is a civilian under IHL.”

The analysis of the Afghan context and the opinions expressed by fighting parties regarding said legal interpretations are telling. If one conclusion is to be drawn from all the different parameters, it is the following: the parties tend to consider as civilians those who in no direct or indirect way would support,

---

139 A. De Lauri and A. Shurke, above note 74, p. 503.
140 See, for example, the New York Times “Afghan War Casualty Reports”, above note 126.
141 Founded on religion, culture or otherwise.
142 Contemporary just war theory is divided into two broad camps: revisionists and traditionalists. Traditionalists seek to provide moral foundations for something close to current international law, and in particular the laws of armed conflict. Revisionists argue that international law is at best a pragmatic fiction – it lacks deeper moral foundations. Philosopher Seth Lazar believes that “killing civilians typically involves an especially objectionable mode of harmful agency – their suffering is used as a means to compel their compatriots and leaders to end their war. Combatants, by contrast, are typically killed in order to avert the threat that they themselves pose.” Seth Lazar, “Just War Theory: Revisionists Versus Traditionalists”, Annual Review of Political Science, Vol. 20, 2017, p. 51.
143 Notably the NATO Resolute Support mission, the Afghan Independent Human Rights Commission and UNAMA.
endorse or be involved in the enemy’s “war efforts”. Things start getting more complicated when one’s behaviour is perceived as supporting, endorsing or being involved in such efforts – essentially, that person’s conduct is labelled as hostile and, in the eyes of the fighting parties, that changes the person’s status.

The ultimate aim of parties to an armed conflict is to prevail over the enemy’s armed forces. For this reason, the parties to a conflict are allowed to attack (or at least are not prohibited from attacking) each other’s military objectives or individuals not entitled to protection against direct attacks. The general war effort and war-sustaining activities also include activities that merely maintain or build up the capacity to cause such harm – as opposed to the actual conduct of hostilities, which is designed to bring about harm.

But then, if causing harm is allowed, what is wrong with a person’s status changing due to their support for the war effort? IHL cannot stop the fighting – but its aim is to limit the destruction and suffering. The Commentary on AP I provides the sentiment that permeates IHL’s application: “There is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum.” That minimum is defined with the help of military necessity. Civilian casualties, in the form of death and injury, have long been considered one of the main causes of suffering. It would then follow that practices resulting in death and injury should be reduced to a minimum. Civilian populations have been known to be attacked on the pretext of claimed military necessity.

IHL does not see “innocent” or “guilty” civilians, but rather a uniform category which is distinct from that of combatants/fighters. If an individual’s behaviour would not render them a fighter (under the continuous combat function test) or a civilian taking a direct part in hostilities, but that person might have committed a crime under applicable rules or in some way poses a security threat, then there are still other appropriate, non-lethal ways to address the risk. These could include detention and conferral of a fair trial.

---

146 Interpretive Guidance, above note 25, p. 52.
147 ICRC Commentary on the APs, above note 13, para. 1936.
148 The principle of military necessity permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL. The notion of military necessity has been understood to require that the measure be taken primarily for some specific military purpose, that it is materially relevant for the attainment of the military purpose, that it is the least injurious of those that were reasonably available, and that the injury that it would cause is proportionate to the gain it would achieve. Finally, the military purpose for which the measure is taken, as well as the measure itself, need to be in conformity with IHL. See Nobuo Hayashi, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law”, Boston University International Law Journal, Vol. 28, No. 1, 2010, pp. 62–93, 120–121.
150 The argument has already been made that there is an obligation in IHL to use the least harmful means in conducting hostilities, and in particular in targeting persons, when possible and when such means will achieve the same military advantage. See Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, European Journal of International Law, Vol. 24, No. 3, 2013, quoted in Anne Quintin, The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?, Edward Elgar, Cheltenham, 2020, p. 263.
An alternative option is to let fighting parties decide *ad hoc* on the basis of conduct who is a target, for some abstract military purpose, but this could lead to a dangerous slippery slope.\textsuperscript{151}

A moral and humanitarian argument can be added to the legal aspect: “just as the dissemination of humanitarian law contributes to the promotion of humanitarian ideals and of a spirit of peace among nations, the faithful application of such law can contribute to reestablishing peace, by limiting the effects of hostilities”.\textsuperscript{152} It has been posited that IHL functions as an overall restrictive regime,\textsuperscript{153} supported by opinions such as that “the law of war does not confer rights upon states but only places limitations on their actions in the interest of humanity”.\textsuperscript{154}

### Conclusion

In the first half of 2021, the UN claimed that civilian casualties in Afghanistan had reached unprecedented highs.\textsuperscript{155} The so-called “fog of war”, among other reasons, could be blamed for this concerning record – as well as, at times, disregard for IHL in favour of perceived military gains. In the author’s experience, perceptions of civilian status in Afghanistan are often fluid, and this is one of the contributing factors to the sad reality. What this article has aimed to do is to stir reflection on this topic in the hopes that the parties engaged in conflict in Afghanistan will adopt an approach to determining civilian status with more consideration for IHL and its more humane interpretation.

The fact of belonging or not to the armed forces or an organized armed group attributes status to an individual: combatant or civilian. In case of doubt, an individual is to be perceived as a civilian. If their conduct appears hostile, the question needs to be posed as to whether the individual is taking a direct part in hostilities. If they are, they can be attacked, but remain a civilian.

Ultimately, targetability in IHL is not there to adjudicate whether a person is involved in some way in the conflict. Calling someone a civilian does not render them a 100% neutral, politically apathetic entity. Targetability in IHL is also not there to determine whether an individual has committed a crime – under national

\textsuperscript{151} Bissonnette carried out an analysis on armed groups’ perception of the concept of civilians in NIAC. She found four different approaches: the specific-act approach, the membership approach, the functional non-privileged combatancy approach, and the direct participation in hostilities approach with extended temporal scope in light of the commitments and undertakings of various armed groups. She concluded, however, that all approaches are challenged by their feasibility when transposed into the midst of an armed conflict and their acceptability by the participants thereof. C. Marquis Bissonnette, above note 10.

\textsuperscript{152} ICRC Commentary on the APs, above note 13, para. 20.

\textsuperscript{153} A. Quintin, above note 150.


or international law – or to determine whether an individual could constitute some form of security threat. These issues can be handled in more humane, non-lethal ways, and still achieve the goal. Status and targetability in IHL are only meant to offer the fighting parties the ability to neutralize a specific, concrete and direct military threat. At the end of the day, the war can be won with few, if any, civilian casualties.
Jus ex bello and international humanitarian law: States’ obligations when withdrawing from armed conflict

Paul Strauch and Beatrice Walton*

Paul Strauch is a graduate of Yale Law School (JD), Yale School of Management (MBA) and Dartmouth College (AB).

Beatrice Walton is a graduate of Yale Law School (JD), the University of Cambridge (MPhil) and Harvard College (AB). She recently served as a Judicial Fellow at the International Court of Justice.

Abstract

This article considers the international legal obligations relevant to States when withdrawing from situations of armed conflict. While a growing literature has focused on precisely when armed conflicts come to a legal end, as well as obligations triggered by the cessation of active hostilities, comparatively little attention has been paid to the legal implications of withdrawals from armed conflict and the contours of the obligations relevant to States in doing so. Following in the wake of just war scholarship endeavouring to distil jus ex bello principles, this article examines States’ obligations when ending their participation in armed conflicts from the perspective of international humanitarian law (IHL). It shows that while it is generally understood that IHL ceases to apply at the end of armed conflict, this is in reality a significant simplification; a number of obligations

* The views expressed in this article are solely those of the authors and do not necessarily reflect those of any current or former employers.
actually endure. Such rules act as exceptions to the general temporal scope of IHL and continue to govern withdrawing States, in effect straddling the in bello and post bellum phases of armed conflict. The article then develops three key end-of-participation obligations: obligations governing detention and transfer of persons, obligations imposed by Article 1 common to the four Geneva Conventions, and obligations relating to accountability and the consequences of conflict.

Keywords: international humanitarian law, end of armed conflict, temporal scope of application, end of application, cessation of hostilities, withdrawal, common Article 1, prosecution and investigation, detention, foreseeability.

Introduction

The problem of seemingly endless war—or “forever war”, in more colloquial terms—has perhaps never received more attention.1 While the problem exists globally, recent decade-long campaigns by Western States have shed new light on it. As lessons are learned about the need to avoid deadly and destructive conflicts at the outset, increased attention has focused on the necessity of putting an end to participation in conflicts currently under way. In the United States, three recent presidents struggled to extricate coalition forces from Afghanistan before a final exit was achieved in September 2021. In France, President Macron has repeatedly suggested his intention to pursue withdrawal of forces from Mali, where his country has been mired for over eight years. January 2021 also saw a near-complete withdrawal of US ground forces from Somalia, where those forces had been supporting counterterrorism operations against Al-Shabaab and the so-called Islamic State, while October 2019 saw President Trump’s call for the exit of US forces from Syria. Also in the Middle East, the United Arab Emirates announced in July 2019 its military withdrawal from Yemen, where it had supported Saudi Arabian forces, though reports differ as to that withdrawal’s completion.

This article focuses on the international legal obligations relevant to States when withdrawing from situations of armed conflict. When and how States end situations of armed conflict are questions no less vexing and important to the individuals and societies impacted by those decisions than questions of when and how States go to war. At the same time, the obligations applicable to States2 as

---

1 The research in this article was finalized for publication in September 2021. In the literature, see, generally, the thematic issue of the International Review of the Red Cross on “Protracted Conflict”, Vol. 101, No. 912, 2019.

2 This article focuses on the obligations owed by States when withdrawing from international and non-international armed conflicts. As indicated in Section 2.C, some of the obligations discussed in this article may also apply to non-State armed groups (NSAGs), although we leave this issue for future scholarship.
they wind down their participation in armed conflict have not yet received significant scholarly or practical attention. While a growing literature has focused on precisely when armed conflicts come to a legal end,3 as well as obligations triggered by the cessation of active hostilities,4 comparatively little attention has been paid to the situation of States withdrawing from contexts of armed conflict generally, and indeed the contours of the obligations relevant to States in doing so. Perhaps one explanation for this gap is that, at least for some, the notion of legal regulations attending to the end of armed conflict may not be initially intuitive. Any end to war, looked at from one perspective, will always justify the means.5 At the same time, recent examples nonetheless show that the means by which States end armed conflicts also matter. When States extricate themselves from conflict with little care, significant and unnecessary suffering can result, as well as breaks in even the most basic metrics of accountability. Moreover, in many, though perhaps not all, cases, leaders make deliberate choices about how to withdraw, rendering analysis of the relevant rules and their consequences hardly theoretical.

This article therefore considers States’ obligations when withdrawing from armed conflicts from the perspective of international humanitarian law (IHL). In recent years, just war scholars have aimed to develop the moral principles applicable to the termination of war. Moellendorf has referred to these principles as “jus ex bello”,6 and Rodin has referred to them as “jus terminatio”.7 Picking up on these developments, a few IHL scholars have begun to consider jus ex bello from the perspective of ascertaining “when” a State must justly discontinue prosecuting an armed conflict, a question which may hinge on jus ad bellum and the reasons bringing a State to war in the first place.8 However, IHL scholars

3 See Section 1.A.
6 Moellendorf defines jus ex bello as “the set of considerations that govern whether a war, once begun, should be brought to an end and if so how”. Darrel Moellendorf, “Jus ex Bello”, Journal of Political Philosophy, Vol. 16, No. 2, 2008, p. 123. Moellendorf and Rodin distinguish between two jus ex bello considerations, namely “whether” and “how” a conflict should be brought to an end. See ibid.; David Rodin, “Ending War: A Response to Richard W. Miller”, Ethics & International Affairs, Vol. 25, No. 3, 2011, p. 360. The focus of the present article, however, is only on the “how” question. See also D. Moellendorf, above note 5; Darrel Moellendorf, “Jus ex Bello in Afghanistan”, Ethics & International Affairs, Vol. 25, No. 2, 2011.
7 Rodin describes jus terminatio as pertaining to questions of “when it is obligatory to terminate a state of war and how this can be done in the morally best way”. D. Rodin, above note 6, pp. 359–360. See also David Rodin, “The War Trap: Dilemmas of Jus Terminatio”, Ethics, Vol. 125, No. 3, 2013.
have not yet focused on the other core question framed by *jus ex bello* thinkers – namely, “how” a State should discontinue its involvement in a conflict. For instance, while Moellendorf has suggested minimizing civilian harm as a counterweight to the moral principle of “all due haste” when ending an unjust war, such principles, and others deriving from moral philosophy, have not been concretely studied in the context of existing IHL. By engaging, then, the question of “how” States should exit an armed conflict from the perspective of IHL, this article thus begins efforts to divine the *legal* content of those principles, ideally so as to inform further critical analysis and debate. While international human rights law and other bodies of law may also form part of the *jus ex bello* applicable to a State’s withdrawal, this article limits its scope to IHL.

In distilling these relevant IHL rules, this article focuses on the factual situation of a State’s exit from armed conflict, or what we refer to as a State’s decision to “end its participation” in armed conflict. Focusing on the factual situation of a State’s end of participation in armed conflict pays several dividends. First, it enables an analysis of the various types of obligations that States must consider as they exit an armed conflict – indeed, the IHL requirements corresponding to *jus ex bello* – as well as the challenges they may face in complying with them. In doing so, the article aims to provide a basic road map for States to consider when withdrawing from armed conflict, as well as to open up discussion about the sufficiency of the current IHL regime with regard to exits from armed conflicts, and the practical difficulties of operationalizing and conceptualizing the boundaries of obligations within that regime.

Second, focusing on States’ obligations at the end of their participation in armed conflict provides needed doctrinal clarification. At one level, considering a State’s exit from armed conflict in its entirety shows how a State’s withdrawal interacts with multiple legal and temporal triggers that are already well known in the literature, such as the end of armed conflict and the cessation of hostilities. Considering these temporal benchmarks together, and alongside additional under-appreciated obligations that are relevant as States end their participation in conflict, also provides insight into those IHL rules which continue to apply in the post-conflict period, even after a State may have withdrawn from an armed conflict, and the legal mechanics by which such rules continue to apply. Indeed, while it is commonly understood that IHL ceases to apply at the end of armed conflict, this article explains that this is in reality an over-simplification; a number of obligations actually endure. Moreover, while certain other IHL obligations are triggered at the “end of hostilities”, we show that these are not the only obligations which continue to take effect as a conflict winds down, and which continue to apply in the post-conflict period.

The article proceeds as follows. Part 1 begins by explaining contemporary approaches to the end of armed conflict and the applicability of IHL, focusing on the literature concerning the end of armed conflict and the temporal scope of IHL. Part 2 then offers a proposal for analyzing the obligations applicable to States as

9 D. Moellendorf, above note 5, p. 670.
they exit armed conflict as obligations governing the “end of participation” in
armed conflict. Doing so accounts for the fact that the end of a State’s
participation – for example, a withdrawal of forces – may not always coincide
with the legal end of armed conflict, or at least it may not do so immediately. In
many instances, whether the conflict continues will be unclear. More
importantly, it also reflects the fact that a number of IHL obligations governing
withdrawals in effect straddle the in bello and post bellum phases of conflict, which exiting States must take into account as they withdraw, regardless of
where the conflict stands. Against this background, the article then develops
three key end-of-participation obligations: obligations governing detention and
transfer of persons, obligations imposed by Article 1 common to the four
Geneva Conventions (common Article 1, CA 1), and obligations relating to
accountability and the consequences of conflict. In doing so, the article shows
that under some rules, States have duties to consider the foreseeable effects of
their withdrawal, and potentially take pre-withdrawal precautionary measures.
In other circumstances, States will need to take specific post-withdrawal
remedial measures as factual situations require. Overall, however, the article
suggests that these rules are relatively limited in nature and that further
exploration and development are needed.

1. Enduring obligations and the end of armed conflict

Before turning to the substantive IHL rules relevant to States as they withdraw from
situations of armed conflict, this part of the article first considers the applicability of
IHL, or what is known as the “temporal scope” of IHL, focusing on the applicability
of IHL towards the end of an armed conflict. This part and the next then elaborate
on the various IHL rules relevant to a State’s withdrawal from an armed conflict.
Included in our discussion are those rules with specific temporal triggers, as well
as those rules which operate as explicit or implicit exceptions to the general
temporal applicability of IHL – that is, by continuing to apply even after an
armed conflict has ceased.

1.A. Armed conflict and the “end” of IHL’s applicability

As is well established in treaty and custom, the existence of an armed conflict
triggers the application of the vast majority of IHL rules. In contrast to earlier

10 For more on jus post bellum, see, for example, Jens Iverson, Jus Post Bellum: The Rediscovery, Foundations,
and Future of the Law of Transforming War into Peace, Brill, Leiden, 2021. As is relevant in the context of
this article, Moellendorf distinguishes jus ex bello from jus post bellum by explaining that jus post bellum
is primarily concerned with post-conflict order and responsibilities, whereas jus ex bello concerns the
conditions for ending a conflict. D. Moellendorf, “Jus ex Bello”, above note 6, pp. 130–131. Rodin
similarly distinguishes his term jus terminatio from jus post bellum, noting that the latter “governs
conduct in the subsequent postwar state” while the former “governs the transition from a state of war
back into a state of peace”. D. Rodin, above note 6, p. 360.
IHL treaties, the Geneva Conventions and their Additional Protocols consider the existence of an armed conflict a factual matter, meaning that a formal declaration of war, or recognition of a state of war, is not needed in order for the Conventions and Protocols to apply.\(^{11}\) Indeed, with respect to international armed conflicts (IACs), Article 2 common to the four Geneva Conventions provides that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”\(^{12}\). Article 6 of Geneva Convention IV (GC IV) further specifies that the Convention “shall apply from the outset of any conflict … mentioned in Article 2”. Additional Protocol I (AP I) takes a similar approach, with Article 3 providing that the Protocol “shall apply from the beginning of any situation” constituting an IAC.\(^{13}\)

As with IACs, most rules applicable in non-international armed conflicts (NIACs) are also understood to apply from the onset of an armed conflict of this character. In this way, the temporal reach of the IHL rules pertaining to NIACs follows that of IACs in the sense that both sets of rules are understood to typically apply from the outset of a corresponding armed conflict. Notably, Article 3 common to the four Geneva Conventions (common Article 3, CA 3) provides for the application of certain IHL rules to “armed conflict … occurring in the territory of one of the High Contracting Parties”, thus making the presence of a NIAC the key trigger.\(^{14}\) While the identification of NIACs has given rise to some debate, under the prevailing test, which finds expression in the famous Tadić decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber, a NIAC exists where there is “protracted armed violence between governmental authorities and organized groups or between such groups within a State”.\(^{15}\) Along similar lines, Additional Protocol II (AP II) applies from the onset of a qualifying armed conflict under that Protocol,\(^{16}\)

---

12 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); 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).
13 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 7 December 1978) (AP I).
15 ICTY, The Prosecutor v. Duško Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. AP II Article 1 sets a similar, albeit higher, threshold.
specifically one taking place between a State Party and non-State armed groups “which, under responsible command, exercise such control over a part of [the State Party’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

As is relevant in the context of this article, however, there is markedly less consensus with respect to the termination of IHL’s applicability. The most express articulation of the end of IHL’s application in IACs comes under GC IV Article 6, which states that “[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations”. This formulation is also followed in AP I Article 3, though neither treaty defines the terms “general close” or “military operations”, much less their relationship to “armed conflict”. Indeed, while AP I, like AP II, explicitly refers to the “end of armed conflict”, it does not explain the relevance or meaning of that term in relation to the application of the Protocol’s provisions, and specifically the term “general close of military operations”. For its part, the International Committee of the Red Cross (ICRC) has described the general close of military operations in its Commentary to the Geneva Conventions as typically “the final end of all fighting between all those concerned”, where “military operations” are defined as “movements, manoeuvres and actions of any sort, carried out … with a view to combat”. Commentators have nonetheless come to understand the “general close of military operations” as essentially coincident with the end of “armed conflict”, thus making the end of armed conflict the critical switch-off point for IHL.

For a variety of reasons, the question of exactly when an armed conflict ends, legally speaking, has in turn attracted significant controversy in recent years. As just noted, determining the end of an armed conflict under prevailing understandings means determining when, in general, IHL does and does not apply. Milanovic mentions the most basic conceptual approach to the end of armed conflict, and its relationship to the application of IHL. As he explains, “if a

16 AP II, Art. 1(1).
17 Emphasis added. See GC III, Art. 5; GC II, Art. 2; GC I, Arts 2, 5.
18 See AP I, Arts 75(6), 99(1); AP II, Arts 2(2), 25(1).
20 While the 1958 Commentary on GC IV interpreted the general close of military operations as the “final end of all fighting between all those concerned”, the updated Commentary explains that “evidence that there has been a ‘general close of military operations’ is the only objective criterion to determine that an international armed conflict has ended in a general, definitive, and effective way”. See 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 (1958 Commentary on GC IV), p. 62; 2016 Commentary on GC I, above note 19, paras 277–278. See also Marko Milanovic, “The End of Application of International Humanitarian Law”, International Review of the Red Cross, Vol. 96, No. 893, 2015, p. 174. For more on the temporal applicability of IHL, see Julia Grignon, L’applicabilité temporelle du droit international humanitaire, Schulthess Éditions Romandes, Geneva, 2014, pp. 207–408.
particular situation can no longer be qualified as an IAC, a NIAC, or an occupation, the application of IHl will end”.21 By contrast, historically, the main approach to determining the end of an IAC and the application of IHl focused on the existence of a peace treaty or declaration among belligerents,22 not, as today, on the presence of facts on the ground, such as the existence of any combat-related manoeuvres. In the Gotovina case, the Trial Chamber of the ICTY embraced such a factual approach to determining the end of armed conflict and the application of IHl. As it explained, it would “consider whether at any point during the Indictment period the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict”, and in particular “whether there was a general close of military operations and a general conclusion of peace”.23 Contemporary commentators have considered similar factors, such as whether hostilities have ended with a degree of “stability and permanence”, when assessing whether an IAC has concluded.24

The challenge of determining the end of armed conflict is even more pronounced for NIACs. In comparison with references to the “general close of military operations” for IACs, the Geneva Conventions and AP II provide virtually no guidance regarding the temporal scope of IHl in NIACs, and in particular, the end of IHl application in NIACs. In the absence of such guidance, commentators have focused on the criteria giving rise to a NIAC, namely the intensity and organization thresholds in CA 3 and AP II.25 Milanovic has suggested that this approach appears “logical from a purely IHl standpoint” as it “take[s] into account the heightened NIAC intensity threshold when compared to IACs”.26 In the international criminal context, tribunals have suggested that IHl should extend in NIACs beyond the cessation of hostilities until a “peaceful settlement” has been achieved,27 although the meaning of “peaceful settlement” remains unclear. Along similar lines, the ICRC has advocated a more generous understanding of the application of NIAC rules, cautioning that NIACs should not be understood to conclude until there is a “complete cessation of all

21 See M. Milanovic, above note 20, p. 170. Milanovic notes the general rule on IHl applicability as well as a few of the exceptions to this general position.
22 2016 Commentary on GC I, above note 19, para. 275.
23 ICTY, Prosecutor v. Gotovina, Case No. IT06-90-T, Judgment (Trial Chamber), 15 April 2011, para. 1694 (emphasis added).
27 ICTY, Tadić, above note 15, para. 70; International Criminal Court (ICC), Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Rome Statute (Trial Chamber), 21 March 2016, para. 141.
hostilities” and no “real risk of resumption”. Accordingly, uncertainty remains over the appropriate standard for determining the end of NIACs and how to apply it. The Commentary to AP II adds further confusion by noting that “rules relating to armed confrontation are no longer applicable after the end of hostilities”. Whether this suggestion is better read as meaning that IHL ceases to apply when a situation no longer constitutes a NIAC, as described above, or as its own standard, has been debated.

1.B. Exceptions to the general temporal scope of IHL applicability

As the previous section has recounted, the existence of an armed conflict is commonly understood as the starting point for the onset of the applicability of IHL. For similar reasons, it is equally common to find suggestions with respect to the end of IHL’s applicability that IHL ceases to apply upon the end of an armed conflict or the close of military operations, whenever those legal criteria are met in the circumstances. Nevertheless, qualification is needed, as in reality this position with respect to IHL’s termination is a significant simplification. A number of exceptions, some explicit and others more implicit, extend the applicability of IHL outside of the strict confines of an armed conflict.

At the most basic level, it is well understood that one important exception to the general suggestion that IHL applies in circumstances of armed conflict relates to peacetime obligations. Article 2 common to the four Geneva Conventions


30 The former view, that IHL ceases to apply at the end of armed conflict, is more consistent with prevailing understandings, particularly given the absence of such language in the text of AP II, and the Commentary’s note that the Protocol applies to qualifying NIACs from the “moment when the criteria laid down in [Article 1] are objectively fulfilled”, thus meaning that application of the Protocol is tethered to the existence of armed conflict. Ibid., para. 4491. For more on this issue, see J. Grignon, above note 20, pp. 334–338.

31 See, for example, Emily Crawford, “The Temporal and Geographic Reach of International Humanitarian Law”, in Ben Saul and Dapo Akande (eds), The Oxford Guide to International Humanitarian Law, Oxford University Press, Oxford, 2020, pp. 60–65; R. Kolb and R. Hyde, above note 24, pp. 73 (“[T]he LOAC [law of armed conflict] is designed to apply only in a time of armed conflict and not in peacetime”), 74 (“[T]he applicability of the LOAC depends on the existence of an armed conflict. This is true for [IACs and NIACs] even if the definition of ‘armed conflict’ is not absolutely identical in both branches of the LOAC”); Jan K. Keffner, “Scope of Application of International Humanitarian Law”, in Dieter Fleck (ed.), The Handbook of International Humanitarian Law, Oxford University Press, Oxford, 2021, p. 69, para. 3.23; Sandesh Sivakumaran, The Law of Non-International Armed Conflict, Oxford University Press, Oxford, 2012, p. 253 (“Ultimately, the applicability of the law of non-international armed conflict turns on whether or not a non-international armed conflict continues to exist at the relevant time. … Just as the law of non-international armed conflict commences upon the existence of certain facts (an armed conflict) so too should it cease to apply upon the non-existence of certain facts (the lack of an armed conflict”). These sources recognize exceptions to the general position on IHL termination to varying degrees.
(common Article 2, CA 2) makes explicit that even as the Conventions are generally oriented towards the regulation of armed conflict, they also set forth several obligations with which parties must comply during peacetime. In its precise formulation, CA 2 states that the Conventions apply with respect to situations of armed conflict “[i]n addition to the provisions which shall be implemented in peacetime”. The Geneva Conventions do not, however, specify directly what those peacetime obligations are. Several such peacetime obligations are in any case easily identified, including the obligation to disseminate the text of the Conventions and to include study of IHL in military and civilian instruction, as well as obligations concerning restrictions on the use of the emblems of the Red Cross and other markings, identification of medical aid societies, and preparations in relation to hospital zones.32 In relation to each of these, the text of the relevant Convention explicitly states that the rule applies “in time of peace”. However, identifying the full extent of obligations considered to apply in peacetime poses challenges.33 Indeed, not all peacetime obligations contain such explicit language, nor is their complete identification made in either the travaux34 or the Commentaries. The updated Commentaries, in comparison with the Pictet Commentaries, more comprehensively recognize the role of peacetime obligations, particularly in relation to the general rule of IHL applicability.35 According to the updated Commentaries, such obligations include the obligations to implement legislation providing penal sanction for grave breaches and to suppress violations of the Conventions, as well as to implement legislation to prevent misuse and abuse of emblems.36 Identifying the relevant peacetime obligations under the Additional Protocols presents further challenges, specifically in regard to AP I, which makes a caveat in its Article 3 that the Protocol applies from the beginning of armed conflict, “[w]ithout prejudice to the provisions which are applicable at all times” (emphasis added). While AP I, like the Geneva Conventions, explicitly identifies (on a rule-by-rule basis) certain rules as applying during times of “peace”,37 and thus “at all times”, not all rules understood to apply during peacetime are clearly identified in the text. The Commentary suggests a lengthy list of obligations under AP I which are understood to be applicable “at all times”,38 including rules pertaining to the development of new weapons, the activities of the Red Cross, legal advisers, precautions against attacks, the protection of land works and

32 See GC I, Arts 23, 26, 44, 47; GC II, Arts 44, 48; GC III, Art. 127; GC IV, Arts 14, 144.
34 Ibid.
36 2017 Commentary on GC II, above note 11, para. 221.
37 AP I, Arts 6, 18, 60, 66, 83 (concerning, for example, training qualified personnel, emblems, demilitarized zones and dissemination of IHL).
38 ICRC Commentary on AP I, above note 29, para. 149.
installations containing dangerous forces, and measures for the protection of journalists.\textsuperscript{39} The Commentary notes that these provisions can be categorized as either applicable from the entry into force of the Protocol, and thus in peacetime, or at least as “grounds” for taking proactive and precautionary measures prior to the outbreak of hostilities in line with obligations spelled out in the Protocol.\textsuperscript{40}

As is particularly relevant to this article, there are two other critical exceptions to the general temporal rule for IHL which extend the applicability of certain IHL provisions even after the termination of an armed conflict. These exceptions are explicitly provided for in the Geneva Conventions and Additional Protocols.\textsuperscript{41} The first exception relates to protected persons deprived of their liberty. In relation to prisoners of war (PoWs), Article 5 of Geneva Convention III (GC III) states that the Convention shall continue to apply to protected persons “until their final release and repatriation”, a formulation followed in relation to protected persons in GC IV Article 6.\textsuperscript{42} Article 5 of Geneva Convention I (GC I) provides that for “persons who have fallen into the hands of the enemy”, IHL continues to apply, while AP I Article 3 likewise states that application of the Protocol ceases on the general close of military operations “except” with respect to persons whose “final release, repatriation or re-establishment takes place thereafter”. AP II Article 2(2) also provides protections “[a]t the end of the armed conflict” for “all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict”, or whose liberty is restricted after the conflict for reasons related to it. As will be further explored in Part 3 below, these provisions are critical to guard against gaps in protection, particularly in light of what can often be severe delays in release and repatriation following the cessation of hostilities.

The second exception pertains to occupation. Under GC IV Article 6(3), “application of the present Convention 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 a number of provisions of the Convention. AP I Article 3 omits mention of a one-year extension but nonetheless applies the Protocol until “termination of the occupation”, except in relation to “persons whose final release, repatriation or re-establishment takes place thereafter”.

At the same time, it is clear that these two exceptions—for protected persons deprived of their liberty and for situations of occupation—are not the only exceptions to the general proposition that IHL “ceases” to apply at the end of armed conflict.\textsuperscript{43} Indeed, the more recent Commentaries to the Geneva Conventions and Additional Protocols appear to recognize the possibility that

\textsuperscript{39} AP I, Arts 36, 56, 58, 79, 81, 82.
\textsuperscript{40} ICRC Commentary on AP I, above note 29, para. 149.
\textsuperscript{41} See E. Crawford, above note 31, pp. 63–64.
\textsuperscript{42} See also AP I, Art. 75(6).
\textsuperscript{43} See M. Milanovic, above note 20, p. 170 (recognizing exceptions to the general statement that IHL ceases to apply at the end of armed conflict); N. Derejko, above note 25, pp. 10–11 (explaining that “neither the ‘end of hostilities’ nor the ‘end of NIAC’ necessarily equate to the termination of IHL’s applicability”).
certain other, often unspecified, IHL obligations may also continue to apply after an armed conflict has terminated. For example, while the Pictet Commentary did not as explicitly suggest that possibility or identify such exceptions, the updated Commentaries to the Geneva Conventions now indicate with respect to the general temporal scope of the Conventions that “[t]he end of an armed conflict does not mean that humanitarian law will cease to apply entirely” and that “[s]ome provisions continue to apply after the end of armed conflict”, though they do not identify such provisions specifically. Meanwhile, while the Commentary to AP I provides a more lengthy list of “articles whose application in relation to a conflict may continue beyond the termination of this conflict”, it does not purport to provide a full list. It notes that such obligations may include obligations pertaining to missing persons, the remains of the deceased, the reunion of dispersed families, the evacuation of children, the repression of breaches of the Protocol, the duties of commanders, mutual legal assistance, and others.

Outside of the Commentaries, scholars have not yet considered in depth the existence or features of such obligations extending into the post-conflict period. When discussing the end of IHL’s applicability, many commentators focus only on the exceptions for detention and occupation, or the relevance of “peacetime” obligations. As will be explored, such a characterization of the rules applicable in the aftermath of armed conflict may be incomplete. A number of the obligations which remain relevant cannot easily be categorized as purely peacetime or conflict rules. Some rules begin to apply during armed conflict and continue to apply into the post-conflict period, while others are more obviously suited to post-conflict application.

2. Obligations at the “end of participation”

Having recalled that certain IHL rules may extend after the end of armed conflict, the remainder of this article considers the rules which apply in relation to a State’s end of participation in an armed conflict. Doing so illustrates the ways in which various IHL obligations relevant to a State’s end of participation become relevant during armed conflict, and even after the cessation of hostilities or the end of armed conflict. By considering these obligations together, despite their differing temporal anchors, we aim to identify and analyze the obligations pertinent to a State’s end of participation more collectively.

2.A. “End of participation” as a factual scenario

First, we must explain what we mean by the “end of participation”. A State’s end of participation in a situation of armed conflict may have a number of legal

44 2017 Commentary on GC II, above note 11, para. 306; 2020 Commentary on GC III, above note 35, para. 317; 2016 Commentary on GC I, above note 19, para. 284. See also 2016 Commentary on GC I, above note 19, para. 941 (noting that while “some provisions of the Conventions and Protocols may cease to be applicable at the end of a conflict”, “many continue to apply even after that time”).

45 ICRC Commentary on AP I, above note 29, para. 149.
consequences. At the most basic level, considering States’ obligations as they withdraw from situations of armed conflict in relation to the term “end of participation”, as opposed to the end of “armed conflict”, makes sense because many obligations relevant to States as they withdraw are not actually triggered by the legal end of “armed conflict”. Of course, the fact of a withdrawal may in some cases mean the legal end of an armed conflict. In such a case, the withdrawing State will no longer benefit from IHL rules applicable during conflict. Bombing enemy targets and killing enemy soldiers is permitted in times of armed conflict, for example, but not in “peacetime”. At the same time, whether or not an armed conflict has ended may often be unclear in the immediate post-withdrawal period. A close assessment of the facts is required, including of any ongoing operations continued by the withdrawing State. And particularly as many contemporary armed conflicts involve complex constellations of bilateral or trilateral adversarial relationships, whether a withdrawing State continues to support another actor may affect the status of armed conflict.

In any case, divining the precise end of armed conflict is not entirely relevant to the question of how a State must carry out its withdrawal and what obligations it may continue to possess after that withdrawal. Notably, an important category of end-of-participation obligations are instead triggered by the “cessation of hostilities”. While none of the relevant treaties define this term, the “cessation of active hostilities” may often precede the “general close of military operations” and thus the end of armed conflict, as described earlier. At the same time, distinguishing between the cessation of hostilities and the end of armed conflict is admittedly often difficult from a factual perspective, and in some cases, the two may coincide. As will be shown, States ending their participation in armed conflict will therefore need to consider whether their withdrawal causes an end of active hostilities in order to determine their responsibilities. In addition, focusing on a State’s “end of participation”, as opposed to the end of conflict, makes sense as some obligations relevant to a State’s withdrawal actually arise while a State is still participating in a conflict, and may continue to apply even after it has ended. Still other IHL rules are triggered on account of the potential foreseeable ramifications of the State’s end of participation, such as its withdrawal of forces or other forms of support.

Additionally, orienting States’ obligation around this term helps clarify the legal implications of a State ceasing to be a “party” to an armed conflict. A key application comes in relation to “third States”. Where States provide a sufficient level of support to parties to an armed conflict, it has been suggested that IHL

46 Ibid., para. 153; see also J. Grignon, above note 20, pp. 245–275 (discussing the cessation of hostilities in relation to both IACs and NIACs).
48 Ibid., pp. 173–174; N. Weizmann, “The End of Armed Conflict”, above note 4, p. 233 (explaining that the cessation of hostilities and the end of a NIAC may coincide if the test for determining the end of a NIAC is taken to be the inverse of the test for its existence). Cf. J. K. Kleffner, above note 31, pp. 70, 77–78 (commenting on the relationship between ceasefires and the end of armed conflict).
applies to those States by extension.\textsuperscript{49} When such a third State in turn withdraws support to the conflict party, it no longer itself constitutes a “party” to the conflict, and IHL ceases to apply.\textsuperscript{50} In commenting on this situation, Weizmann has suggested that the third State will at that point be required to release any detainees it has collected as part of its involvement in the conflict, just as if it were a primary party to the conflict.\textsuperscript{51} At the same time, the question of whether States remain bound by a broader corpus of obligations beyond releasing detainees remains. Accordingly, in referring to “end-of-participation” obligations, our aim is to address those obligations which any State incurs by having been a party to an armed conflict, and which that State owes at the temporal benchmarks specified in relation to each obligation.

\section*{2.B. Extension of end-of-participation obligations into the post-conflict period}

Concretely, there are several types of rules which are relevant to a State’s end of participation in an armed conflict. While these categories are not necessarily exclusive, it is helpful to identify key features of these obligations, particularly in relation to when they take effect, and the ways in which they apply in the post-conflict period.

As noted, the first and perhaps most obvious type of end-of-participation obligations are those triggered by the “cessation of active hostilities” or the “close of hostilities”. For example, GC III Article 118(1) states that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”.\textsuperscript{52} Similarly, Article 10(1) of amended Protocol II to the Convention on Certain Conventional Weapons (CCW) calls for minefield removal “without delay after the cessation of active hostilities”.\textsuperscript{53} Such rules tethered to the cessation of hostilities are relevant not only at that point in time, it is argued, but instead can only reasonably be interpreted as continuing to apply after a conflict has concluded, particularly as provisions of this type do not contain any express temporal limitation. Indeed, as mentioned previously, reading each as \textit{not} applying after the termination of armed conflict essentially leads to an absurd

\textsuperscript{51} N. Weizmann, “The End of Armed Conflict”, above note 4, p. 232.
result, particularly as the cessation of hostilities can, in some instances, coincide with the end of armed conflict.

Another category of end-of-participation obligations which are similar to those triggered by the cessation of hostilities includes those which take effect during an armed conflict, but which, often under a functional interpretation, continue to apply even after it ends. These rules most clearly straddle the in bello and post bellum phases of armed conflict: States are clearly required to attempt to carry them out during hostilities, and before the cessation of hostilities, though implementation may sometimes prove most feasible in the immediate post-conflict period. Examples include obligations pertaining to investigating and prosecuting breaches of IHL, searching for missing persons, and the repatriation and transfer of persons. In some cases, these rules make no mention of the end of armed conflict or hostilities (for example, obligations relating to investigation and prosecution), while in other cases they reference the cessation of hostilities as the latest point at which a State may undertake efforts to fulfil them (for example, the obligation to search for missing persons under AP I). A related, third type of end-of-participation obligations are those which are in effect always applicable, as is the case with CA 1, but which may become increasingly relevant as a State undertakes preparations for withdrawal on account of the foreseeable consequences of doing so. Other examples include rules relating to assisting children who are separated from their families and reuniting dispersed families, which States incur by virtue of participating in an armed conflict, but which are said to be owed by States in all circumstances. Such end-of-participation obligations thus may be distinguished from obligations more genuinely considered “peacetime” in nature or focus, such as dissemination. That is to say, in contrast to rules which always apply regardless of armed conflict, States incur such end-of-participation obligations, it is submitted, precisely because of their involvement in an armed conflict, and these rules then in turn continue into post-conflict peacetime.

Finally, another type of obligation falling under the “end of participation” umbrella and applying even after the end of armed conflict are those IHL rules which might be described as inherently “post-conflict” or “end-of-conflict” in nature. Such obligations include those regarding perfidy and surrender, reparations, gravesite maintenance, and obligations specifically tethered to the conclusion of “peace”. Each of these obligations logically extends into the post-conflict period by virtue of the issues that it pertains to.

54 For a similar take on this point, see J. Grignon, above note 20, p. 367.
55 See the references at above note 48.
56 See Parts 3 and 5 of this article. For more on a functional approach to the temporal scope of IHL rules applicable in NIAC, see N. Derejko, above note 25, pp. 11–29.
57 See, for example, GC I, Art. 47; GC III, Art. 127; GC IV, Art. 144; AP I, Art. 83.
58 See, for example, 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), 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”).
Parts 3, 4 and 5 of this article discuss three substantive areas of such end-of-
participation obligations, focusing on the ways by which they become relevant
during, and after, the end of armed conflict.

2.C. IAC and NIAC Rules

Before moving on, one aside is needed with regard to conflict classification, which is
particularly important for determining which rules apply. As is well appreciated,
apart from CA 3 and AP II, IHL treaties are addressed primarily to States and
specifically to IACs. Nevertheless, efforts have been made to develop those rules
which apply in both IAC and NIAC—for example, through the comprehensive
study of customary IHL undertaken by the ICRC. Accordingly, where a treaty
obligation relevant at the end of participation qualifies as customary, as many
discussed in this article do, it could regulate a State withdrawing from a NIAC.

A related issue is the extent to which IHL obligations bind non-State armed
groups (NSAGs). This article focuses on the duties incumbent on States, though we
highlight as an issue for further scholarship the extent to which certain end-of-
participation obligations may apply to NSAGs. CA 3’s application to NSAGs is
indicated by the textual reference to “each Party to the conflict”, and although
the text of AP II is not as explicit in this regard, its provisions are generally
understood by scholars and the ICRC as applying to NSAGs as well. Various
legal theories have been suggested as to why such groups may be bound by NIAC
law, such as through the binding effect of customary rules or general principles.
At the same time, whether NSAGs retain the capacity to carry out a particular
duty designed for a State has been regarded as relevant in determining the scope
of their obligations. This latter issue has been the subject of focus in discussions
of NSAG duties relating to prosecution and internment, both of which are
relevant at the end of participation.

59 See, generally, ICRC Customary Law Study, above note 52. See also ICTY, Tadić, above note 15, para. 134;
S. Sivakumaran, above note 31, pp. 101–152; Marco Sassoli, “Taking Armed Groups Seriously: Ways to
Improve Their Compliance with International Humanitarian Law”, Journal of International
Humanitarian Legal Studies, Vol. 1, No. 1, 2010, pp. 16–17; Marco Sassoli and Marie-Louise Tougas,
“International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan”,

60 ICRC Commentary on AP II, above note 29, paras 4442–4444; M. Sassoli, above note 59, p. 12.

61 See M. Sassoli, above note 59, pp. 12–14 (summarizing predominant approaches); Andrew Clapham,
“Focusing on Armed Non-State Actors”, in Andrew Clapham and Paola Gaeta (eds), The Oxford

62 See A. Clapham, above note 61, pp. 781–782; M. Sassoli, above note 59, p. 16. See also Ezequiel Heffes,
“Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized
Non-State Armed Groups in Light of the Principle of Equality of Belligerents”, Yearbook of
International Humanitarian Law, Vol. 18, 2015 (focusing on the issue of equality of belligerents in
determining NSAG IHL obligations).

63 See, for example, A. Clapham, above note 61, pp. 781–782; Hannes Jobstl, “Bridging the Accountability
Gap: Armed Non-State Actors and the Investigation and Prosecution of War Crimes”, Journal of
3. Rules Relating to Detention and Internment

A first set of obligations relevant as a State ends its participation in armed conflict pertains to persons deprived of their liberty, including both detainees and civilians. As discussed below, the Geneva Conventions and Additional Protocols set forth a number of obligations in relation to detainees and internees which provide a minimum standard of treatment across the *in bello* and *post bellum* phases of armed conflict. In IHL, “detention” is commonly defined as the custodial deprivation of liberty, whereas “internment” is the non-criminal deprivation of liberty by order of the executive branch, often referred to as “administrative detention”. While most detainee- and internee-related obligations have been articulated in treaties only in respect to IACs, the principles and rules in these treaties have been understood as providing guidance in determining State obligations in certain situations of NIAC as well.64

3.A. Duties regarding protection and release

An important issue which withdrawing States may need to first consider accordingly concerns the obligation to release and repatriate detainees and internees, as well as obligations to continue providing protections to such persons deprived of their liberty regardless of conflict status. In the first instance, obligations to release and repatriate such persons arise during the course of the armed conflict. They in turn become particularly relevant to withdrawing States at the cessation of hostilities, and are subsequently not extinguished by the termination of armed conflict.

With respect to civilian internees, GC IV Article 132 provides that interned persons “shall be released by the Detaining Power as soon as the reasons which necessitated [their] internment no longer exist”.65 At the latest, civilian internees must be released “as soon as possible” following the close of hostilities.66 Nevertheless, as GC IV Articles 132 and 133 make clear, the cessation of hostilities is an outer bound, and States should “endeavour *during* the course of hostilities … to conclude agreements” (emphasis added) for the release and repatriation of “certain classes of internees”, such as children, pregnant women, and the wounded and sick, as well as “internees who have been detained for a long time”. AP I Article 75(3) similarly requires that with respect to persons “arrested, detained or interned for actions related to the armed conflict”, such persons “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”, except in cases of penal offences. Moreover, under AP I, the failure to release and repatriate persons is a serious matter, with unjustifiable delay amounting to a grave breach.67

---

64 As examples, see the discussion relating to release obligations and transfer duties in Sections 3.A and 3.B.
65 See also ICRC Customary Law Study, above note 52, Rule 128(B).
66 GC IV, Art. 133(1); see also GC IV, Art. 46(1).
67 AP I, Art. 85(4)(b).
With respect to PoWs, the cessation of active hostilities marks a critical temporal benchmark for the obligation to release and repatriate.68 Under GC III Article 118, prisoners “shall be released and repatriated without delay after the cessation of active hostilities”. Although there is less certainty regarding the laws relating to persons deprived of their liberty in NIAC as compared to IAC, such persons must be released “as soon as the reasons for the deprivation of their liberty cease to exist” under the customary rule.69 And while somewhat less clear, the close of hostilities is often taken as being the latest trigger point for release as well.70

For a withdrawing State, a critical first question, then, is whether as a result of the withdrawal, or related circumstances, the reasons justifying internment no longer exist. As Pejic observes, “[i]n view of the rapid progression of events in armed conflict, a person considered to be a threat today might not pose the same threat after a change of circumstances on the ground”.71 A second critical question for a withdrawing State is whether an act of withdrawal contributes to or coincides with the end of hostilities, thus prompting release obligations.72 And as a third point, a withdrawing State should also be aware that the obligations to release and repatriate remain in force after the end of hostilities, or even after the end of armed conflict.73 As mentioned previously, obligations tethered to the cessation of hostilities extend even into the post-conflict period, in part because interpreting them otherwise would not make sense in light of the close relationship between the cessation of hostilities and the end of armed conflict.74

While the rules governing detainees and internees call for release no later than the end of hostilities, they explicitly contemplate that some persons will not be released at that point, or even immediately thereafter. Indeed, the fact that such persons are afforded protections until the point of release, regardless of conflict status, is perhaps the clearest manifestation of the end-of-conflict (and even post-conflict) orientation of detainee- and internee-related rules. As noted previously, under the Geneva Conventions, persons deprived of their liberty

---

68 At the same time, some prisoners, in particular certain wounded or sick prisoners, may need to be released and repatriated during hostilities. See GC III, Arts 109, 110, 114. In addition, an exception to the release rule exists for prisoners facing criminal proceedings for an indictable offence or serving a sentence. See, for example, GC III, Art. 119(5); ICRC Customary Law Study, above note 52, Rule 128.
69 ICRC Customary Law Study, above note 52, Rule 128(C).
70 See, for example, N. Weizmann, “The End of Armed Conflict”, above note 4, p. 248; ICRC Commentary on AP II, above note 29, para. 4493 (“In principle, measures restricting people’s liberty, taken for reasons related to the conflict, should cease at the end of active hostilities … except in cases of penal convictions”).
71 Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, International Review of the Red Cross, Vol. 87, No. 858, 2005, p. 382. See also GC IV, Arts 42 (specifying that a person may only be interned if “the security of the Detaining Power makes it absolutely necessary”), 43 (regarding review of internment decisions); AP I, Art. 75(3).
74 See the references at above note 48.
remain protected until repatriation, release or re-establishment. AP I Article 75(6) similarly specifies that certain “fundamental guarantees” apply until “release, repatriation, or reestablishment”, even if this occurs “after the end of the armed conflict”. The extension of these protections therefore safeguards persons in cases where it might not be clear whether the conflict has continued, and thus, generally, whether IHL applies. It also ensures protection in light of challenges in the post-conflict application of these rules. As Crawford notes, for example, some detainees held in the aftermath of the Iran–Iraq War were not ultimately repatriated for decades. And while States’ concern with ensuring reciprocal release has led to significant delays by States in returning PoWs, the ICRC has emphasized that a State’s obligation to release does not depend on the compliance of the other party.

Tethered to the obligation to release is the obligation to repatriate, which is understood as prohibiting States from simply releasing PoWs without assisting in their return home or to the State in whose forces they served. Under GC III Article 118, repatriation must take place pursuant to a plan that typically specifies the means of repatriation, the detained persons involved, and a timeline. Krähenmann points to Iraq’s release of Kuwaiti PoWs at the end of the Second Gulf War, in which it simply sent prisoners home through the desert, as a clear breach of this obligation. In discussing this obligation, the Eritrea–Ethiopia Claims Commission has suggested that “repatriation cannot be instantaneous” and that “[p]reparing and coordinating adequate arrangements for safe and orderly movement and reception … may be time-consuming”. Accordingly, a withdrawing State should be prepared to consider how it will ensure safe return in practice, and how it will abide by these obligations.

75 GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6; see also 1958 Commentary on GC IV, above note 20, pp. 64, 271, 515; 2020 Commentary on GC III, above note 35, para. 1093.
76 E. Crawford, above note 31, p. 64.
78 GC III, Art. 118; ICRC Customary Law Study, above note 52, Rule 128(A); see also GC IV, Art. 134 (regarding civilian repatriation).
79 S. Krähenmann, above note 73, pp. 445–446; M. Sassòli, above note 77, pp. 1040, 1057.
80 See 2020 Commentary on GC III, above note 35, paras 4474–4480. In NIACs, AP II Article 5(4) requires that where a State decides to release persons deprived of liberty, the State must take “necessary measures to ensure [the] safety” of these persons. See ICRC Commentary on AP II, above note 29, para. 4596 (suggesting that such safety measures should remain in place “until the released persons have reached an area where they are no longer considered as enemies, or otherwise until they are back home, as the case may be”). See, generally, Cordula Droge, “Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, International Review of the Red Cross, Vol. 90, No. 871, 2008, pp. 675–676.
81 S. Krähenmann, above note 73, p. 445.
82 Eritrea–Ethiopia Claims Commission, Partial Award: Prisoners of War – Eritrea’s Claim 17, 1 July 2003, para. 147.
3.B. Transfer obligations

Another rule that may become particularly relevant as a State withdraws from armed conflict, and which also continues to apply in the post-conflict period, pertains to the transfer of detained persons. Under IHL, States are permitted during hostilities to transfer PoW’s to co-belligerent, non-belligerent or neutral parties under certain circumstances, and when ending participation, States commonly seek to relieve themselves of detention-related duties by transferring detainees to other powers. Under GC III Article 12(2), PoW transfers may only be performed where the State “has satisfied itself of the willingness and ability of such transferee Power to apply the Convention”. Compliance with this provision accordingly requires withdrawing States to undertake, at a minimum, a “prior assessment” of how prisoners will be treated by the receiving State. While States often approach this obligation by seeking to conclude agreements regarding detainee treatment, such agreements and assurances, though important, may not be sufficient to prove compliance, particularly where “there is a systematic practice of non-compliance in the receiving country”. GC IV Article 45 imposes a similar obligation with respect to civilians, as well as adding that “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”. The GC IV Commentary further elaborates that States may not transfer persons where they “have serious reason to believe that economic difficulties will prevent the receiving Power from providing for [the detainees’] maintenance” or where detainees “may be subjected to discriminatory treatment”.

Transfer-related obligations apply during armed conflict and may continue to apply even afterwards. At the simplest level, the post-conflict continuation of such obligations can be said to stem from the fact that the Geneva Conventions and Additional Protocols make an exception to the general scope of IHL applicability for protected persons deprived of their liberty, as explained above. While the

84 The ICTY, in the Vukovar Hospital case, considered this article in relation to obligations arising in NIAC. In addition, some States involved in NIACs have expressly assumed transfer obligations based on special agreements or declarations applying GC III. See M. Sassòli and M Tougas, above note 59, pp. 965, 975–981; K. Okimoto, above note 83, p. 973; see also C. Droege, above note 80, p. 675 (“[T]he humanitarian principle underlying these provisions, namely that a detaining power should ensure that the ally to whom it transfers detainees treats them according to the standards of the Geneva Conventions, should also be taken into account in non-international armed conflict”). In NIACs, transfer of a detainee of a non-State party to its own party would more properly qualify as a repatriation, and different rules, for example non-refoulement, may apply. See M. Sassòli and M. Tougas, above note 59, p. 979.
85 2020 Commentary on GC III, above note 35, para. 1535; see also K. Okimoto, above note 83, pp. 968–969; M. Sassòli and M. Tougas, above note 59, pp. 980, 998.
86 2020 Commentary on GC III, above note 35, para. 1537. Canada and Afghanistan, for instance, entered into agreements in 2005 and 2007 to abide by GC III PoW obligations, but these did not “foreclose the knowledge of Canadian forces members that the transfer would lead to the commission of the crime of torture by Afghan authorities”. See M. Sassòli and M. Tougas, above note 59, p. 1008.
87 1958 Commentary on GC IV, above note 20, p. 268.
88 See Section 1.B of this article.
text of the relevant treaties does not directly link transfer obligations to this exception, it makes sense that States cannot simply discharge their obligations in relation to protected persons at the end of armed conflict by transferring them without the safeguards afforded by GC III Article 12(2). Other aspects of transfer obligations extending the reach of these obligations after the end of armed conflict are more subtle. For instance, one feature of GC III Article 12 which notably continues to apply post-conflict is found in Article 12(3), which provides that if a receiving State “fails to carry out the provisions of the Convention in any important respect” following the transfer, the transferring State, upon being “notified”, shall “take effective measures to correct the situation or shall request the return of the prisoners of war”. This rule thus applies even after a transfer has taken place, regardless of whether the transfer occurs during or after armed conflict. Another instance concerns the transferee State, which continues to be bound to afford GC III obligations to persons transferred to it, even if the State which made the transfer no longer remains in a state of armed conflict.89 An interesting discussion of this rule, involving its potential relevance in the post-conflict period, can be found in the case of General Manuel Noriega, who was captured during the US invasion of Panama in 1989, classified as a PoW, convicted in US federal court, and extradited to France in 2010.90 In approving his extradition, the US Court of Appeals for the Eleventh Circuit considered the requirements of Article 12—well after the termination of the IAC in Panama—among other Convention provisions, in response to arguments raised by General Noriega’s defense team.91

Lest liability for violation of these obligations with respect to transfer appear purely academic (particularly in the context of withdrawals), the Vukovar Hospital case before the ICTY encourages caution. The judgment paints in sharp relief armed forces’ obligations to consider the impact of troop withdrawal on the risk of harm to protected persons. The facts can be briefly summarized as follows. The indictment charged Colonel Mile Mrkšić and Major Veselin Šljivančanin of the Yugoslav People’s Army (Jugoslovenska Narodna Armija, JNA) with war crimes, including murder, for their role in the 1991 evacuation of 194 Croat prisoners from the Vukovar Hospital to a hangar in Ovčara, where the prisoners were transferred to the custody of Serb paramilitary forces. After JNA forces departed from Ovčara, the paramilitaries mistreated and killed the prisoners. While the Trial Chamber acquitted Šljivančanin on the charge of murder on the basis that he ceased to be responsible for the prisoners after Mrkšić’s withdrawal order, the Appeals Chamber held that Šljivančanin had aided and abetted murder through his failure to act, clarifying that his obligations had not concluded with

89 See K. Okimoto, above note 83, p. 970 (“[E]ven when an IAC between state A and state B has ended, state C, which holds POWs transferred by state A or B, must apply GC III until their final release and repatriation”). See also 2020 Commentary on GC III, above note 35, paras 1546 (temporal scope of duties for transferee State), 1550 (temporal scope of duties for transferring State).
90 See K. Okimoto, above note 83, p. 968.
the withdrawal order. Indeed, according to the Appeals Chamber, citing Article 12 (2–3), Šljivančanin remained obliged “not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed”.92 While the case did not involve the issue of whether the armed conflict had ended, the Appeals Chamber’s characterization of Šljivančanin’s duty as “an ongoing duty to protect the [PoWs] at Ovčara” irrespective of the withdrawal order and JNA troop presence, suggests that transfer duties, while taking effect prior to withdrawal, persist after it.93

Similarly significant is the distinction drawn by the Appeals Chamber between Šljivančanin’s knowledge prior to the withdrawal order and after it.94 The mens rea requirement was satisfied post-withdrawal order because Šljivančanin “knew that following the withdrawal … the killing of the prisoners of war was probable and that his inaction assisted the TOs [territorial defence forces] and paramilitaries”.95 In the case against Mrkšić, the Appeals Chamber likewise upheld the Trial Chamber’s determination that Mrkšić knew the withdrawal order “left the TOs and paramilitaries with unrestrained access to the prisoners of war and that by enabling this access, he was assisting in the commission of their murder”.96 Accordingly, decision-makers engaged in prisoner transfer during a withdrawal must consider not only the likelihood of harm but also the effect of withdrawal on prisoner treatment.

In addition to clarifying the content of transfer obligations, Vukovar Hospital calls into focus the relevance of other international law doctrines—in particular, aiding and abetting and omission liability—in determining responsibility at the end of participation. Although the scope of omission liability remains underdeveloped in international criminal law, an omission can give rise to liability where an underlying duty to act is not fulfilled, and indeed an omission can also constitute a wrongful act for purposes of State responsibility.97 Many of the duties discussed in this article could be violated by an omission, and it is possible for third States to be responsible for complicity on the basis of them.

92 ICTY, Prosecution v. Mile Mrkšić and Veselin Šljivančanin (Vukovar Hospital Case), Case No. IT-95-13/1-A, Judgment (Appeals Chamber), 5 May 2009, paras 71–75. See M. Sassoli and M. Tougas, above note 59, pp. 1005–1008 (summarizing key facts). The Appeals Chamber appears to have understood the customary international law applicable in NIACs, reflected in CA 3, as including obligations in relation to transfer similar to those expressed in Article 12. See ibid., pp. 980–981.

93 ICTY, Vukovar Hospital, above note 92, para. 75 (emphasis added).

94 Ibid., paras 57–63.

95 Ibid., para. 101.

96 Ibid., paras 333–334.

In assigning liability based on complicity, knowledge regarding the possibility of harm is often determinative. Whereas *Vukovar Hospital* concerned criminal *mens rea*, States may be responsible under Article 16 of the Draft Articles on State Responsibility where, among other requirements, they provide aid or assistance while being “aware of the circumstances making the conduct of the assisted State internationally wrongful”, and where the aid or assistance was “given with a view to facilitating the commission of the act”.98 Though uncertainty remains as to the precise content of this standard, consistent with the plain text of Article 16, it may be satisfied by “knowledge of the circumstances of the internationally wrongful act”.99 Along similar lines, depending on the facts and precise test adopted, a withdrawing State’s awareness of impending harm precipitated by withdrawal could supply a basis for responsibility. For instance, as Jackson has suggested, complicity by omission can arise in circumstances where a State is provided with a clear and strong warning of impending harm to persons under its control.100 While we do not aim here to provide a full account of the relevance of omission liability at the end of participation, it is submitted that, consistent with *Vukovar Hospital*, omission liability could work to regulate the manner by which States engage in withdrawal efforts.

3.C. Human rights law and enduring obligations

Another manifestation of States’ enduring detention and internment obligations comes via certain IHL rules’ reference to international human rights law (IHRL). Through these references, such rules in effect anticipate the problem that, for persons affected, the end of armed conflict often will not immediately result in a return to safety, as well as IHL’s unclear application towards the end of armed conflict.

It is well established that IHL and IHRL are not mutually exclusive in application,101 and commentators have indicated that, particularly with respect to detainees and internees, IHRL may serve a complementary and protective role.102 In the present context, the link to IHRL drawn by certain IHL provisions operates to provide a minimum standard of protection that bridges *in bello* and *post bellum* regimes, in effect reducing the importance of conflict status for certain State obligations. As an example, AP I Article 72 specifies that obligations pertaining to the “treatment of persons in the power of a party” are “additional to … other applicable rules of international law relating to the protection of

102 See, for example, J. Pejic, above note 71, pp. 378–379.
fundamental human rights during international armed conflict”. 103 In addition, AP I Article 75 provides certain “fundamental guarantees” that exist “as a minimum” and which continue to apply “even after the end of the armed conflict”. 104 With respect to NIACs, CA 3 imposes obligations aimed at ensuring a minimum standard of humane treatment “at any time and in any place whatsoever”, and the Commentary to CA 3 refers to human rights law in describing the content of CA 3’s prohibitions. 105 More expressly, preambular paragraph 2 of AP II links IHRL and the Protocol, stating that “international instruments relating to human rights offer a basic protection to the human person”. 106 As the Commentary notes, AP II is designed to include those “irreducible rights” which cannot be derogated from, and which accordingly “[correspond] to the lowest level of protection which can be claimed by anyone at any time”. 107

These rules thus recognize that certain IHRL principles supply a minimum standard of protection that is always applicable, including where IHL may not otherwise govern. Moreover, because States’ obligations may be assessed prior to withdrawal under human rights and State responsibility regimes, withdrawing States may be obligated to consider, as part of their positive human rights duties, certain foreseeable effects on internees and detainees. 108

4. The duty to ensure respect

A second source of obligations relevant as States end their participation in conflict is CA 1, which requires States to “undertake to respect and to ensure respect” for the Geneva Conventions. While CA 1 obligations are understood to in some sense always apply, thus including in peacetime, they are likely to become particularly relevant as a State discontinues its involvement in an armed conflict, particularly where fighting remains ongoing and where withdrawal may precipitate certain abuses. CA 1 is commonly regarded as imposing obligations on States in respect to NIACs as well as IACs. 109

103 See ibid., p. 378 (suggesting that AP I Article 72 therefore “allows recourse to human rights law as an additional frame of reference in regulating the rights of internees”, and that the “minimum” mentioned in Article 75, read in light of Article 72, “is supplemented by other provisions of humanitarian and human rights law”).

104 AP I, Arts 75(1), 75(6).


106 The Commentary specifies that such instruments include UN human rights treaties as well as regional instruments. ICRC Commentary on AP II, above note 29, paras 4428–4430.

107 Ibid., para. 4430.


As indicated by a plain reading, CA 1 contains both a negative aspect—a requirement “neither [to] encourage, nor aid or assist” IHL violations—and a positive aspect—a requirement to “do everything reasonably in [the State’s] power to prevent and bring such violations to an end”, i.e., to stop ongoing breaches and prevent future ones. In terms of whose IHL compliance States must ensure, CA 1 applies to a State’s armed forces, civilian authorities and the general population. More debated is the extent to which CA 1 requires States to take steps to ensure IHL compliance by other entities, under what is referred to as the article’s “external dimension”. While the ICRC has suggested that under the “prevailing view” States are indeed required to take measures in relation to other forces (a view supported by scholarly commentary, legal developments and subsequent practice), the precise scope and content of the obligation remains subject to some uncertainty. In practice, positive obligations under CA 1 have been circumscribed based on a State’s degree of influence over other parties, the foreseeability of violations, the gravity of the breach, and “the means reasonably available to the State”. Often focused on is a State’s control over such forces, including ties in the form of “financing, equipping, arming or training”, which place a State in a “unique position to influence the [other forces’] behaviour … and thus to ensure respect”.

Viewed from this perspective, it might seem that because withdrawal naturally coincides with the loss of traditional indicators of control (fewer troops on the ground and less resource expenditure, for example), exiting an armed conflict means cutting off responsibility. However, a full reading of CA 1 cautions against that view. Indeed, particularly relevant to withdrawing States is the obligation to “prevent violations when there is a foreseeable risk that they will be committed” or recommenced. The International Court of Justice (ICJ) has described similar duties in regard to prevention in the Bosnian Genocide case as dependent on essentially a “knew or should have known” standard of...
knowledge. Scholars have emphasized the likelihood of harm, the relevance of foreseeable risk, and the “certain degree of predictability” of the “prospective inobservance of IHL”. In addition, in regard to the negative obligation, the ICRC Commentary on GC III refers to the ICJ’s recognition in the Nicaragua case of the obligation “not to encourage” other parties to commit violations, where the ICJ emphasized the circumstances of the alleged breach and particularly whether “the commission of [unlawful acts] was likely or foreseeable”. Accordingly, in order to comply with CA 1, a departing State may well need to consider the prospective effects of its withdrawal and undertake efforts to minimize particularly foreseeable and severe harms.

In terms of the nature and extent of measures required by the withdrawing State, the positive aspect of CA 1 is a duty of due diligence, meaning an obligation of means. A State is not required to achieve specific outcomes. In this respect, as indicated in the ICRC Commentary, the duty has been understood as deriving content from the ICJ’s holding that a due diligence obligation is “one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances”. Rather, States are obliged “to employ all means reasonably available to them, so as to prevent [a breach] so far as possible”. Commentators have also carefully circumscribed the external obligation’s scope, emphasizing the importance of a State’s capacity to prevent or halt the breach, and the seriousness of the breach. Kessler has noted, for instance, that positive action may only be required in “rare” cases to stop “severe” IHL breaches.

In the context of withdrawals from armed conflict, exactly what is foreseeable may be difficult to determine. At the same time, where a withdrawal obviously precipitates substantial and clear risks of severe breaches, certain measures could be required. One example where due diligence obligations could

119 See ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, para. 431 (“[A] State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed”). See also 2020 Commentary on GC III, above note 35, para. 199 (comparing the positive obligation under CA 1 to the duty to prevent genocide under Article 1 of the Genocide Convention).


123 2020 Commentary on GC III, above note 35, para. 191; ICJ, Nicaragua, above note 109, para. 220.

124 ICJ, Nicaragua, above note 109, paras 255–256.

125 2020 Commentary on GC III, above note 35, paras 198–199.

126 ICJ, Bosnian Genocide, above note 119, paras 430, 438.

127 Ibid.

128 See, for example, K. Dörmann and J. Serralvo, above note 110, pp. 724–725. See also B. Kessler, above note 113, p. 506 (suggesting that “[t]he intensity of the treaties’ violations is another element that is important for obliging the States to take further steps to ‘ensure respect’”).

129 B. Kessler, above note 113, p. 506.
be incumbent upon a withdrawing State as a result of the foreseeability of impending IHL violations comes in the context of joint detention or internment operations. In such circumstances, where a withdrawing State A abruptly removes support for partner State B, with the foreseeable result being the inability of State B to provide protections to persons previously held under both States’ jurisdiction, withdrawing State A may have an obligation to undertake measures to prevent offences, depending on the degree of predictability and severity. Another, more challenging case is potentially posed by the United States’ abrupt removal of support for the Kurdish-led Syrian Democratic Forces (SDF) in Northern Syria in October 2019. To the extent that the severe deterioration of SDF detention centres, which the United States had been supporting, and the related release of ISIS prisoners were foreseeable consequences of withdrawal, an appropriate step under CA 1 may have been for the United States to ascertain at the time of departure the minimum amount of assistance needed to help prevent such breaches.

Other obligations stemming from CA 1 that might be regarded as more generally relevant at withdrawal concern the transfer of arms. When exiting a situation of armed conflict outside of its own territory, a State may aim to sell its weapons or provide them to a local partner State or NSAG that remains engaged in conflict. In such circumstances, CA 1 obligates the withdrawing State to make an assessment of the recipient’s past compliance with IHL and its intention and capacity to ensure use of the weapons consistent with IHL. As the ICRC has explained, “States that transfer weapons can be considered particularly influential in ‘ensuring respect’ for international humanitarian law owing to their ability to provide or withhold the means by which violations may be committed”. It has even been suggested that where concerns remain after an examination of the risk, CA 1 creates a presumption against transfer authorization. Less well established, but perhaps equally important in terms of real-world consequences, is the situation where an exiting State hastily abandons weapons or leaves them to an entity that will predictably lose them to an IHL offender, as has become an issue in withdrawals. Given the recognized role of CA 1 in the context of transfer, it

131 See, generally, O. A. Hathaway et al., above note 113 (discussing the 2016 ICRC Commentary and State obligations to prevent violations of CA 3 by non-State actors).
132 See 2020 Commentary on GC III, above note 35, paras 189, 195 (noting the reference to the duty to ensure respect in the 2013 Arms Treaty, and explaining that CA 1’s negative obligation requires States “to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions”). CA 1’s relevance to arms transfer also has a positive dimension. See K. Dörmann and J. Serralvo, above note 110, pp. 732–734.
134 Ibid.
135 See, for example, “U.S. Military Left ‘Thousands’ of Weapons ‘Vulnerable to Loss or Theft’ During Fight Against ISIS in Syria”, Newsweek, 2 February 2020, available at: www.newsweek.com/us-military-
could potentially be argued that a State’s CA 1 obligations extend to the issue of abandoned weapons. Any such obligation would of course be in addition to relevant treaty duties, in particular those pertaining to removal or destruction of mines and explosive remnants, as mentioned in Section 2.B of this article.

Following from the previously-identified limitations inherent to CA 1, it is important to mention that in light of the wide range of compliance measures available to States to satisfy CA 1,136 military commitment is not required.137 Indeed, States “remain in principle free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect”.138 Under CA 1, commonly identified measures include diplomatic pressure, public denunciation, and restrictions on commercial relations or public aid, all of which could be relevant in certain withdrawal scenarios.139 The Commentaries also suggest specific measures—namely “addressing questions of compliance within the context of a diplomatic dialogue”, “offering legal assistance” and supporting “training”—that are specifically geared towards promoting compliance via partners, which could be relevant to withdrawing States to the extent that their partner forces remain engaged in conflict.140 Cooperation with international organizations and humanitarian efforts offer additional means of enforcement,141 as of course does financial assistance to relevant parties. Accordingly, in our view, compliance with end-of-participation obligations does not require States to continue to prosecute a conflict, and indeed the Commentaries indicate that the need to comply with CA 1 obligations cannot constitute a justification for a use of force otherwise not permitted by international law.142

The array of options available to States in relation to ensuring respect for IHL is particularly important in the context of withdrawals, where States have decided (and for good reason) to depart from another territory and end a conflict. France, during its attempted wind-down of military operations in Mali, might consider, for example, supporting various international organizations and local partners that remain involved in stabilization and anti-terrorism-related efforts, as part of its compliance...
with CA 1. Similarly, in Afghanistan, the United States might have considered continued financial, intelligence and other support to the Afghan security forces, and particularly those holding detainees, to support CA 1 compliance.

5. Obligations to investigate and prosecute and other accountability-related rules

A third set of obligations that States need to consider when withdrawing from armed conflict consists of rules that can be categorized, generally, as pertaining to accountability for the consequences of armed conflict and actions taken during it. Such obligations are often inherently “end-of-conflict” in orientation, as they include duties to search for missing persons, account for the dead and provide information to families, investigate war crimes, prosecute offenders and make reparation. Although their continued applicability is not always specified expressly by the relevant treaties, these duties take effect during an armed conflict and continue to be owed after a conflict has ended. Indeed, the purpose of many of these rules is to address the consequences of armed conflict and offer redress for wartime conduct. This goal is often implementable at the near-end of conflict, or even after it, and is thus of particular relevance for withdrawing States. In other cases, as with, for instance, the removal of materials such as mines and explosive remnants, the obligation is more explicitly tethered to the “cessation of hostilities”.

5.A. The duty to investigate and prosecute

A first duty of this type incumbent on withdrawing States is the duty to investigate and prosecute war crimes committed during the conflict. Under the Geneva Conventions, States must search for persons alleged to have committed grave breaches of the Conventions and bring such persons before their national courts. Rule 158 of the ICRC Customary Law Study, described as applying to both NIACs and IACs, similarly 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”, and that they must investigate other war crimes over which they have jurisdiction. Unlike the exceptions to the general

144 See M. Milanovic, above note 20, pp. 174–175 (discussing in relation to IACs). Some have expressed doubt regarding the ability of obligations to extend past the end of a NIAC specifically. Nevertheless, other commentators emphasize a more functional approach, for instance by taking into account the triggering of the obligations during the conflict. See, for example, N. Derejko, above note 25, p. 11. Further, it is notable that the ICRC Customary Law Study rules relevant to the obligations in this section have no express temporal restriction.
145 See GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts 86, 88.
146 ICRC Customary Law Study, above note 52, Rule 158.
temporal scope of IHL specified for occupation or the continued protection of detainees, the obligation to investigate and prosecute is not mentioned as an exception to the end of IHL’s application in the provisions circumscribing the Conventions’ temporal scope; instead, its extension into the *post bellum* context is implicitly provided by the rule itself and supported by its underlying purpose.

While in one sense this obligation is a “peacetime” obligation, in that it requires a State not party to a conflict to prosecute persons on its territory who it learns have committed IHL offences, the obligation applies with particular force to parties which have taken part in a conflict. Indeed, conflict parties are likely to have more extensive knowledge of the events that transpired and better access to relevant evidence. As the GC I Commentary explains, a State “should take action *when it is in a position* to investigate and collect evidence, anticipating that either it itself at a later time or a third State, through legal assistance, might benefit from this evidence”.

The principle of complementarity underlying international criminal law is in a related sense tethered to this idea that States which are closest to the action triggering a violation should be the ones to carry out an investigation and prosecution in the first instance. The duty to investigate also applies with particular force to States ending their participation in a conflict on account of its connection to in-conflict duties related to violation prevention. As an example, in the field, AP I Article 87(3) requires commanders who are aware of breaches “to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof”. In a similar vein, IHL obligations to take precautions in attack, for example, are not limited “to the avoidance of war crimes” but are instead “governed by the need to take constant care to spare the civilian population” and to avoid collateral damage—considerations which are specific to States participating in conflict.

As for the outer temporal scope of the obligation to investigate and prosecute, it is generally understood that the obligation remains even after a State has ended its participation in a conflict. While the AP I Commentary identifies the duty to investigate and prosecute as one that “applies at all times”, the GC I Commentary suggests that the obligation to investigate and prosecute grave breaches “does not contain a specific time frame for the performance of the [obligation]”, but instead that “it is implicit in the text that States Parties should act within a reasonable time”. In terms of methods of implementation, provisions in peace agreements are one common way by which States effectuate

---

147 2016 Commentary on GC I, above note 19, para. 2871 (emphasis added).
148 See, for example, ICC Office of the Prosecutor, “Informal Expert Paper: The Principle of Complementarity in Practice”, 2003, para. 1 (“The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings”).
150 ICRC Commentary on AP I, above note 29, para. 149 (referring to Arts 85–87).
151 2016 Commentary on GC I, above note 19, para. 2868.
the duty to investigate and prosecute – a practice reflective of how such obligations, in some cases, might realistically be expected to take effect once a conflict has abated. For instance, the 2016 peace deal between the Colombian government and the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) established the Special Jurisdiction for Peace tribunal, in which FARC leaders are being prosecuted for their role in killings, sexual violence, kidnappings and other crimes.¹⁵²

Other clues to the post-conflict application of this obligation come in relation to IHL rules on amnesties and statutes of limitations for war crimes. With respect to grave breaches, all four Geneva Conventions provide that a State may not absolve itself or any other State Party “of any liability incurred by itself or by another High Contracting Party in respect of [such] breaches”.¹⁵³ It has also become clear in recent years that amnesty provisions in peace agreements cannot preclude prosecution for war crimes, as such would amount to an abrogation of IHL obligations. As the ICRC has articulated, “amnesties … would be incompatible with States’ obligation to investigate and, if appropriate, prosecute alleged offenders”.¹⁵⁴ Indeed, the ICRC Customary Law Study includes various examples of States issuing amnesties for crimes committed in NIACs, with the ICRC emphasizing that “these have often been found to be unlawful by the [States’] own courts or by regional courts and were criticized by the international community”.¹⁵⁵ Along similar lines, statutes of limitations for war crimes are also understood to be customarily prohibited.¹⁵⁶ Moreover, in terms of implementation, commissions of inquiry are often set up during or even after a State ends its participation in a conflict. As Cohen and Shany point out, after serious allegations of war crimes were made against Canadian forces participating in the Unified Task Force in Somalia between 1992 and 1993, an independent public inquiry was concluded in 1997.¹⁵⁷ Similarly, after the war in Yugoslavia reached an end in 1995, the Netherlands commissioned a study of Dutch involvement in the Srebrenica massacre.¹⁵⁸

Nevertheless, as indicated by recent practice, compliance challenges remain. The United States’ withdrawal of the majority of troops from Somalia in early 2021, with armed conflict still under way, has prompted questions about whether the United States will continue to investigate and address the

¹⁵³ GC I, Art. 51; GC II, Art. 52; GC III, Art. 131; GC IV, Art. 148.
¹⁵⁵ ICRC Customary Law Study, above note 52, Rule 158.
¹⁵⁶ Ibid., Rule 160.
¹⁵⁸ Ibid.
consequences of certain air strikes. And in relation to the conflict in Afghanistan, in March 2020 the International Criminal Court (ICC) Appeals Chamber authorized the commencement of an investigation into alleged war crimes by US, Afghan and Taliban forces. In the wake of the ICC’s Afghanistan inquiry, which began in 2006, as well as public pressure, other States have undertaken investigations into the conduct of their own forces.

5.B. Duties related to missing persons, the dead and others

In addition to the duty to investigate and prosecute, other end-of-participation obligations which function similarly are the obligations to search for missing persons, assist with the reunion of families and maintain gravesites. Indeed, as with the duty to investigate and prosecute, these obligations are not explicitly mentioned within the general articles describing the temporal scope of the Geneva Conventions and Additional Protocols. Instead, their post-conflict relevance appears to stem from the application of each rule in light of its underlying purposes. That said, some related obligations contain more explicit references to their temporal scope. For example, GC IV Article 24 requires States to take measures “in all circumstances” to assist children who are separated from their families, while AP I Article 74 obligates States to “facilitate in every possible way” the reunion of dispersed families.

Compared with such provisions, the obligations to search for missing persons, as set forth in multiple provisions of the Geneva Conventions and the Additional Protocols, are more implicitly ongoing in nature as no temporal restriction as to their application is explicitly provided in relation to them. Under the Geneva Conventions, the obligation to search for missing persons is understood to be provided somewhat indirectly, as the Conventions call on parties to, for instance, establish an information bureau to collect and relay knowledge about protected persons, as well as to respond to enquiries.

A clearer formulation of the obligation to search for missing persons is found in AP I Article 33(1), which specifies that parties must commence searches for missing


162 See GC I, Art. 16; GC II, Art. 19; GC III, Arts 122–123; GC IV, Arts 136–140. Further, although neither CA 3 nor AP II contain explicit rules regarding missing persons, many obligations relating to missing persons and the dead have been understood to apply in NIACs by virtue of customary law. See Anna Petrig, “Search for Missing Persons”, in A. Clapham, P. Gaeta and M. Sassoli (eds), above note 14, p. 272; ICRC Customary Law Study, above note 52, Rule 117. Obligations to search for and collect the dead are also understood to be customary in nature and applicable in NIACs. See ICRC Customary Law Study, above note 52, Rule 112; A. Petrig, above note 33, pp. 343–344.
persons “[a]s soon as circumstances permit, and at the latest from the end of active hostilities”.

While AP I Article 33(1) thus provides a beginning point for the obligation to search, the provision is not limited in temporal scope, and nor is the ICRC’s corresponding formulation of the customary obligation on States to search for missing persons. Indeed, as Petrig has explained in describing missing persons obligations, such obligations “regulate phenomena originating in or resulting from an armed conflict or occupation, but the effects of which extend beyond the conclusion of these situations”.

Notably, with respect to AP I Article 33(1), a draft proposal stating that search activities must continue without temporal limit was rejected because such a provision was believed to be “implicit in the paragraph”.

While they are sometimes characterized as “peacetime” obligations, it is important to recall that such rules in relation to missing persons contemplate State action as soon as feasible during the armed conflict, even if that action is likely to be carried out towards the end of hostilities or a conflict. In this way, these rules constitute a clear type of obligation that straddles the in bello and post bellum boundary. For instance, as indicated by the phrase “as soon as circumstances permit”, the search rules effectively anticipate that compliance will only be feasible at certain times due to the challenges associated with search activities. Nevertheless, States cannot delay indefinitely, and must periodically assess when these activities can be undertaken.

The AP I Commentary reiterates that although States retain “great latitude” with respect to the feasibility of search efforts during hostilities, they must assess feasibility at regular intervals and must not delay until hostilities have ceased. Hence, a withdrawing State should be aware of the continuing nature of search-related duties and, in view of these paradigms, may need to consider whether its withdrawal will facilitate or hinder the feasibility of its searches, as well as whether withdrawal also marks the end of hostilities.

While the rules with respect to searching for missing persons thus reflect a preference to undertake efforts before hostilities have ended, they remain applicable afterwards, to the extent that such efforts have not yet been completed. Other rules related to searches also continue to apply post-conflict, with their post-conflict orientation being more expressly suggested. For example, GC IV Article 133, which concerns searching for displaced internees, directly contemplates that committees may be established by agreement “after the close of hostilities, or of

163 Emphasis added. Notably, the UN General Assembly in Resolution 3220 (XXIX) called upon conflict parties to provide information about missing persons and undertake related obligations “during and after the end of hostilities”. See UNGA Res. 3220 (XXIX), 6 November 1974 (emphasis added). In addition, Article 33(2) of AP I suggests an obligation to search for persons “if they have died in other circumstances [than detention] as a result of hostilities or occupation”.

164 ICRC Customary Law Study, above note 52, Rule 117.

165 A. Petrig, above note 162, p. 269.

166 ICRC Commentary on AP I, above note 29, para. 1239; A. Petrig, above note 162, p. 269. The AP I Commentary identifies Article 33 as being among those articles “whose application in relation to a conflict may continue beyond the termination of this conflict”. ICRC Commentary on AP I, above note 29, para. 149.

167 ICRC Commentary on AP I, above note 29, paras 1235, 1237.
the occupation of territories, to search for dispersed internees”.168 While AP I Article 74, which obliges parties to facilitate the reunion of families “dispersed as a result of armed conflicts”, does not directly specify its temporal applicability, the Commentary to AP I recognizes its continued application after the termination of conflict.169 In comparison, other search-related rules, particularly in relation to the wounded and dead, apply “[w]henever circumstances permit, and particularly after an engagement”, a formulation that may also become relevant where a State’s withdrawal coincides with the end of an engagement.170

The obligations related to gravesites are also not limited in their temporal scope. Article 34 of AP I requires States to facilitate access and to conclude agreements to protect and maintain the gravesites “permanently”.171 GC I Article 17(3) likewise requires that graves be respected, marked and maintained “so that they may always be found” (emphasis added). As explained in the Pictet Commentaries, the key point about the marking of gravesites is “that it should always be possible to find the grave of any combatant”.172 Accordingly, where a State’s withdrawal prompts the cessation of hostilities, or where the withdrawal would impact the ability to search for missing persons or account for the dead, the withdrawing State may be required to increase such efforts.

168 See also A. Petrig, above note 162, p. 270. GC III Article 119 also calls for agreements to be made for the purpose of searching for dispersed PoWs. See also GC I, Art. 15 (calling for the arrangement of “an armistice or a suspension of fire … to permit the removal, exchange and transport of the wounded left on the battlefield”).

169 ICRC Commentary on AP I, above note 29, para. 149. GC IV Article 26, similarly pertaining to facilitating enquiries made by members of dispersed families, arguably also continues to apply after the conclusion of armed conflict.

170 AP II, Art. 8; see also GC I, Art. 15; GC II, Art. 18. Somewhat less certain is the extent to which obligations pertaining to searching for the wounded and sick also continue to apply after the end of armed conflict. See, for example, GC I, Art. 15; GC II, Art. 18; AP II, Art. 8. The Geneva Conventions stress that the obligation to search for the wounded arises after each engagement, and that searches in relation to this obligation must be undertaken “without delay”. See also 2016 Commentary on GC I, above note 19, paras 1487 (“The obligation to act without delay is strict, but the action to be taken is limited to what is feasible, in particular in the light of security considerations”), 1486 (“[W]henever there is an indication that there may be wounded or sick people in an area, and circumstances permit, a reasonable commander should commence search and rescue activities”). Notably, under GC I Article 15, States must “[a]t all times … take all possible measures to search for and collect the wounded and sick” (emphasis added), whereas GC IV Article 16(2) provides that States should search for the dead and wounded “[a]s far as military considerations allow”. According to the Commentary on GC II, it was a conscious decision by the drafters to omit the phrasing “at all times” found in GC I Article 15 from GC II Article 18 on account of the challenging conditions of warfare at sea. See 2017 Commentary on GC II, above note 11, para. 1653. As such, while “the obligations of Article 18(1) remain applicable and are to be continued for as long as there is a reasonable chance of such persons being found”, even after one search operation has been conducted (ibid., para. 1657), the Commentary suggests that the obligation only exists during “conflict”.

171 See also GC III, Art. 120(4) (stating that PoW graves must be “suitably maintained and marked so as to be found at any time”). It has been noted that the duty to conclude agreements regarding gravesite access and maintenance may not apply in NIACs, out of concern that the conclusion of such agreements in the form of a treaty could be interpreted as affording recognition to an NSAG. A. Petrig, above note 33, p. 359.

172 See A. Petrig, above note 33, p. 360, citing Jean Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, p. 566. An alternative is that the obligation is not ad infinitum but instead follows the approach of AP I Article 34, which provides a system in the event that the parties are unable to enter into agreements on the maintenance of gravesites. Ibid.
In addition, withdrawing States should be aware that they may be expected to continue abiding by these obligations in the post bellum period. For instance, following ceasefires reached in the Nagorno–Karabakh conflict, the ICRC has recalled the need to identify missing persons and to assist in their return from conflict areas, in accordance with IHL.\textsuperscript{173} And even decades after the conflict in Yugoslavia, Balkan states have undertaken efforts regarding missing persons, such as multilateral commitments to update missing persons records and ensure public access to key information.\textsuperscript{174} Such obligations in relation to the missing and care of the dead are thus some of the more obvious examples of conflict-incurred obligations which States must consider at withdrawal, and even after.

Conclusion

As frequently as States enter armed conflicts, they must also exit them. Withdrawals from conflicts in recent years have called attention to the need to consider how States do so. This article has shown that the laws of armed conflict are relevant to this question, imposing a series of enduring obligations aimed at avoiding unnecessary suffering and ensuring certain minimal measures of accountability. Some of these duties are tethered to explicit temporal triggers set forth in IHL treaties, while others are only more implicitly relevant during, and even after, withdrawal. In all cases, such rules supply the minimum content of States’ IHL obligations when transitioning between the in bello and post bellum phases of armed conflict. The goal of this article has therefore been to offer guidance on how these IHL rules relevant to a State’s end of participation operate, and in doing so, to invite discussion as to the IHL content corresponding to jus ex bello notions.

One area open for further analysis concerns how States are to reasonably comply with their end-of-participation obligations. To a certain extent, the precise point at which the various end-of-participation obligations discussed in this article no longer remain relevant remains open to debate, particularly given the potentially very long-lasting application of certain obligations, and the potential difficulties associated with interpreting concepts like foreseeable effects too broadly. Accordingly, for each of the rules discussed here and any others, further development of just what minimal efforts are required for compliance is appropriate. Importantly, the literature on CA 1, as explained above, has...
highlighted the myriad ways – diplomatic, economic and political – by which States can achieve compliance, providing a starting point for determining which means are appropriate in the facts of any particular withdrawal effort. At the same time, achieving compliance with certain such rules may well be difficult, and leaders must accordingly internalize that risk when entering conflict.

Further research might also focus on the relevance of these rules to NSAGs, including under what circumstances a State could be considered responsible for NSAG breaches. This issue is particularly important given that contemporary State withdrawals from armed conflict often involve the continuation of the armed conflict by other actors, including NSAGs, many of whom may have partnered with withdrawing States.

Finally, and most importantly, this article invites further reflection on the adequacy of the IHL rules corresponding to *jus ex bello* principles. The rules discussed in this piece pertaining to the end of participation are of relatively limited nature and indeed address only a fraction of considerations relevant to exiting armed conflicts, let alone those relevant to building *post bellum* peace and respect for human rights. Recent events have nonetheless shown both the necessity of putting an end to situations of armed conflict (as well as the grave consequences that can result in the course of doing so) and the need for measures of accountability. By beginning to operationalize the IHL rules pertaining to the end of participation, this article has accordingly sought to better understand their application to challenging factual situations, and by doing so, encourage future efforts aimed at their improvement.
Indigenous Australian laws of war: *Makarrata, milwerangel* and *junkarti*

Samuel White and Ray Kerkhove*

Samuel White is a Captain in the Australian Army Legal Corps, currently posted to the Directorate of Operations and International Law. He holds a BA/LLB (Honours) from the University of Queensland, an LLM (Honours I) from the University of Melbourne, and a Master of War Studies from the University of New South Wales.

Ray Kerkhove is a Historian at the Aboriginal Environments Research Centre, University of Queensland. He holds a BA, MA and PhD from the University of Queensland.

**Abstract**

Studies in Australian history have lamentably neglected the military traditions of First Australians prior to European contact. This is due largely to a combination of academic and social bigotry, and loss of Indigenous knowledge after settlement. Thankfully, the situation is beginning to change, in no small part due to the growing literature surrounding the Frontier Wars of Australia. All aspects of Indigenous customs and norms are now beginning to receive a balanced analysis. Yet, very little has ever been written on the laws, customs and norms that

* This paper draws upon and refines research conducted by the authors, recently published in “Indigenous Australians”, in Samuel White (ed.), *The Laws of Yesterday’s Wars*, Brill Nijhoff, Leiden, 2021. The authors would like to extend their thanks to Mr Angus Murray, a Wiradjuri man completing his PhD at the University of Newcastle on pre-settlement warfare, who provided valuable inputs, direction and unique fragments of knowledge that underlay this work. The views presented in this article are the authors’ own and do not represent those of any organizations with which they are affiliated.
regulated Indigenous Australian collective armed conflicts. This paper, co-written by a military legal practitioner and an ethno-historian, uses early accounts to reconstruct ten laws of war evidently recognized across much of pre-settlement Australia. The study is a preliminary one, aiming to stimulate further research and debate in this neglected field, which has only recently been explored in international relations.

**Keywords:** Indigenous Australians, laws of war, spectrum of conflict, legal history, regulated battle, customary law, payback.

This paper aims to reconstruct some of the regulations surrounding traditional warfare as it was practiced across Indigenous (Aboriginal) Australia (including Tasmania). To maintain the study’s focus, the conflict customs of the Torres Strait will not be included, having generally more in common with Melanesian warfare. Today, Indigenous Australians for the most part prefer to call themselves “people” or “First Nations” of various language groups; indeed, the names of Indigenous peoples, such as Arunta and Kurnai, usually translate to “people” in their own language.1 Thus, as far as possible, the names of local groups will be used. “Traditional” is here used to describe practices at or before the time of European contact. The focus will be on armed inter-tribal conflicts that early literature refers to as “raids” and “battles”.

Traditional Indigenous Australian warfare ceased over a century ago, and oral accounts detailing specifics are now rare. Moreover, such stories remain the cultural property of specific communities, fragmented across nodes and networks.2 For this reason, we will instead mostly examine the written record. Fortunately, explorers and early settlers offered numerous observations. Of course, their accounts manifest nineteenth-century biases and ignorance. This detriment is somewhat softened by the authors’ reliance on Indigenous informants to explain much of what they were witnessing.

This underlines the importance of correctly interpreting Indigenous warfare. Thus, the first section of this paper is necessarily a discussion of previous studies and of what “war” is, and seeks to dispel a line of academic thinking that warfare did not occur in pre-contact Australia. It then addresses the specific prohibitions applied to regulated warfare, before finally addressing through concluding remarks some lessons that can be applied to modern warfare and geopolitics.

1 Tyson Yunkaporta, *Sand Talk*, Text Publishing, Melbourne, 2019, p. 22. As with any rule, there are exceptions—the names of some peoples, such as the Barapa Barapa, Wemba Wemba, Wadi Wadi and Yorta Yorta, translate as “no no” in their respective languages. This is viewed as underscoring these groups’ rights to forbid entry (except by invitation). See Colin Pardoe, “Conflict and Territoriality in Aboriginal Australia: Evidence from Biology and Ethnography”, in Mark W. Allen and Terry L. Jones (eds), *Violence and Warfare amongst Hunter-Gatherers*, Left Coast Press, Walnut Creek, CA, 2014, pp. 112, 117.

2 T. Yunkaporta, above note 1, p. 12.
Indigenous warfare: A history of arguments

Whether collective armed conflicts occurred within forager societies, and particularly in pre-contact Australia, became “one of the most disputed topics of social anthropology for decades”. There has been deliberate avoidance of the topic. Military historian John Connor points out that Peter Turbet’s study of traditional Aboriginal society of the Sydney region makes no mention of warfare, even though almost half his section on artefacts is devoted to weapons. Likewise for the same region, Michael Martin’s On Darug Land asserted that “traditional Indigenous society was not an internally hostile one”. In fact, Martin’s illustration of a Darug man brings the reader’s attention to the woven possum-hair belt and headband that he wears, but ignores the club, spear and shield that he is carrying.

The seeds of this confusion began when early observers (peaking during the 1880s–1930s) laced their analyses with social Darwinist theory, wherein Indigenous Australians were always cast as “primitive war-mongering savages”. Some of these early studies included Roderick Flanagan’s The Aborigines of Australia (published as a book posthumously) and John Wilhelm von Blandowski’s Australien in 142 photographischen Abbildungen nach zehnjahrigen Erfahrungen (1862). Blandowski and Flanagan detailed phases of Australian collective engagements (battles) and the protocols involved. Other early contributions were Gerald Wheeler’s The Tribe and Intertribal Relations in Australia and Herbert Basedow’s The Australian Aboriginal. Their works offered penetrating but brief chapters on warfare that identified the cause and process of raids, and the nature of weaponry. In 1931, Lloyd Warner added Black Civilization, wherein he noted that “warfare is one of the most important social activities of the Murngin people and surrounding tribes”.

This perspective shifted when, in 1964, Ronald and Catherine Berndt’s The World of the First Australians – based on their Northern Territory fieldwork – depicted societies in which authority was principally totemic and ceremonial, and

---

5 Michael Martin, On Darug Land: An Aboriginal Perspective, Greater Western Education Centre, St Mary’s, 1988, p. 11.
6 Ibid.
fighting was small-scale and internal. The Berndts’ findings were part of a global trend of scepticism towards nineteenth-century observations and a more positive image of Indigenous peoples. In 1965, US anthropologists Keith and Charlotte Otterbein conducted intercultural surveys and found relatively little evidence of warfare in hunter-gatherer groups. They proposed that all hunter-gatherer conflicts be classed as internal “feuding”. Likewise in 1970, Richard Gould opined that Western Desert groups (Watjarri, Wawula, Tjupany and Badimaya peoples) only engaged in judicial and revenge expeditions:

[They] lack any kind of organized warfare, although small war parties organized along kin lines sometimes travel long distances to fight over issues like an elopement or the violation of a sacred site. These parties travel openly and are called warmala as opposed to the revenge expedition, or tjinakarpil, which travels under cover of night and employs sorcery.

This perspective gained added support when, in 1971, Tasaday “hunter-gatherers” were discovered in the Philippines jungles. The fact that the Tasaday appeared ignorant of warfare inspired many researchers to argue that all hunter-gatherers were primarily pacifists.

Soon a deluge of historians dismissed the extent or even existence of Indigenous Australian warfare. In 1975, Malcolm Prentis declared Indigenous Australian groups capable of only small, local hostilities. Heather Goodall posited that traditional Indigenous warfare was “highly ritualized”, whilst Henry Reynolds claimed inter-tribal warfare was “intermittent” and environmental historian Tim Flannery suggested that the El Niño effect forced Indigenous groups to cooperate and minimize warfare.

By the late 1970s, however, holes began to appear in the image of the “peaceful forager”. Richard Alexander began contending that since the Palaeolithic Age, hunter-gatherers everywhere relied on “multi-male bands” to defend themselves from the “predatory effect” of other groups. In the late 1980s, the “gentle Tasaday” were revealed to be a hoax. Concurrently, new studies on hunter-gatherer groups found evidence of considerable internal and

17 Malcolm Prentis, A Study in Black and White: The Aborigines in Australian History, Hicks, Smith & Sons, Sydney, 1975, p. 27.
19 Henry Reynolds, Fate of a Free People, Penguin, Camberwell, 1995, p. 34.
inter-group violence. Meanwhile, Frontier Wars studies highlighted the existence of Indigenous war tactics—such as Eric Willmot’s popular historical novel *Pemulwuy*.

Even so, the notion that Indigenous Australian groups only practiced extremely “limited” warfare persisted for the next three decades. Partly this built on cross-cultural analyses by anthropologists such as Douglas Fry and Patrik Söderberg. Well into the twenty-first century, their work perpetuated Otterbien’s findings of limited and rather family-driven fatalities in forager conflicts.

Thus, for the *Oxford Companion to Australian Military History*, Peter Dennis wrote that “the egalitarian, non-cohesive nature” of Indigenous Australian society precluded complex military strategy. Meanwhile, military historian Jeffrey Grey concluded that Indigenous Australian peoples could not organize anything akin to a battle. Even Richard Broome, whose work long formed the basis of current perceptions of Indigenous Australian society, argued that pre-settlement conflict “was more often related to domestic violence, social feuding and the practice of tribal criminal law than to war as such.”

Yet, if recourse is taken to Carl von Clausewitz’s classic definition of war—that war is “an act of force to compel our enemy to do our will”—we find that Indigenous Australian warfare fits easily within that framework. Clausewitz held that war is the continuation “of political intercourse” (*des politischen Verkehrs*) “with the intermixing of other means” (*mit Einmischung anderer Mittel*). John Keegan has pointed out that “political intercourse” with “intermixing” implies “the existence of states, of state interests and of rational calculation about how they may be achieved.”

Problematically for this definition, Indigenous Australia was never State-organized. Rather, it was comprised of networks of small, inter-independent peoples to which individuals were aligned, and by which they were divided, through complex self-identification: totemic, kin and other ties. This meant that Indigenous Australian politics worked rather differently from those of

---

30 Ibid.
large nation-States. Nevertheless, we can identify Clausewitz’s “political intercourse” within the protocols surrounding access to and use of Indigenous groups’ lands and resources. Indigenous Australian societies certainly contested violations of those rights. Further, as Connor emphasized, the very tenacity of Indigenous Australian resistance during European settlement (as well as Indigenous groups’ modern struggle for land rights) demonstrates that Indigenous Australians understood defiance and conflict, and used this to advance the interests of their societies.32

In summary, acceptance of intra-Indigenous Australian warfare has been slow and highly politicized. Connor’s application of Clausewitz’s framework to the Australian situation changed this narrative in the early 2000s. He composed the first detailed, modern military assessment of Indigenous Australian warfare. It distinguished four main types of traditional Indigenous Australian warfare: formal battles, ritual trials, raids for women and revenge attacks.33

Another advancement followed in 2009 when Peter Sutton produced The Politics of Suffering. In this, he conceded that neither the “simplistic … racist” image of the nineteenth century nor the “idealised and romanticized” interpretation of Indigenous violence sufficed.34 Although Sutton found no evidence for “large-scale organized warfare”, he did, from the works of Stanner, Warner and his own collection of early encounter stories,35 discern large-scale fights, pitched battles, skirmishes and peace-making ceremonies (makarrata, one of the three terms in the title of this paper).36 By this time, archaeologists were weighing in on the debate, notably Nick Thorpe and Mark Allen.37 The latter demonstrated that archaeological and ethnographic evidence—globally, but especially in Australia—indicated the existence of complex and large-scale military engagements within hunter-gatherer societies.38

Further evidence along these lines was collated by Christophe Darmangeat. He analyzed hundreds of early accounts of intra-Indigenous conflicts, developed an extensive database and published the first comprehensive examination of Indigenous Australian warfare in over a century, entitled Justice and Warfare in Aboriginal Australia. Darmangeat concluded that frequent and large-scale conflict was indisputable. He considered conflicts to be primarily a means of dispensing justice, even though he had already carefully distinguished between group-to-

33 Ibid.
35 Luise Hercus and Peter Sutton (eds), This Is What Happened: Historical Narratives by Aborigines, Australian Institute of Aboriginal Studies, Canberra, 1986.
36 P. Sutton, above note 34, pp. 91–94.
38 M. W. Allen and T. L. Jones (eds), above note 1, pp. 97–98.
group confrontations and actions more classically considered judicial in nature such as duels and ordeals.39

Types of conflicts

Despite the quarrels of the past, we have finally – partly through Darmangeat’s work – arrived at a basic idea of the two main types of inter-tribal confrontation that occurred in Indigenous Australia. The most common, devastating warfare seems to have been stealth attacks – raids or *kanudaitji* (secret or revenge expeditions), for instance in the Western Deserts.40 These were usually small parties of men, but sometimes scores or more, who would sneak deep into enemy territories to commit assassinations or theft (usually of women).41 In contrast to raids there existed what we can call open, regulated battles (some prefer the word “tournaments”), which were much more formalized and lengthy events, involving anywhere from 60 to over 1,500 combatants, drawn from several allied groups.

This concurs with Christophe Darmangeat’s analysis of hundreds of early accounts of intra-Indigenous collective conflicts in pre-settlement Australia,42 from which he deduced two basic types of collective armed conflict: open battles (forming half of all recorded conflicts) and ambushes or raids (about a quarter of known conflicts). Alongside these he also included two further categories: campaigns and spontaneous clashes. Using this framework, Darmangeat found that fatalities were highest during raids (55% involved ten or more deaths), whereas open battles were generally less lethal. According to his findings, 64% of open battles ended with less than three deaths each, despite usually involving hundreds of combatants. Table 1 expands on this more fully.

Causes of war

Darmangeat cross-examined 215 instances of collective armed conflict in pre-settlement Australia and was thereby able to analyze the usual causes of such conflict (see Table 2). Almost half of the incidents identified by Darmangeat had no known or stated cause; this means that any supposition about motivation in these cases must be viewed with caution.

Nevertheless, of the remainder, Darmangeat noted that despite early literature advocating that the normal *casus bello* was violation of territory, disputes over women constituted two thirds of known conflicts, and vengeance

---

41 George Taplin (ed.), *The Folklore, Manners, Customs and Languages of the South Australian Aborigines*, E. Spiller Publishing, Adelaide, 1879, pp. 68–70.
about a third. Territorial (trespass) disagreements represented a mere tenth of known causes for conflict, even if we include rights over resources. We will examine each of these motives in turn.

Most early accounts agree that the majority of Indigenous conflicts erupted as a result of disputes concerning women. Often, as observed of the Tiwi peoples of Melville Island in the Northern Territory, this was due to a woman eloping with a man who was not her husband, after which the husband and his friends would declare war on the group to which the eloping couple had fled, or otherwise attempt a “recovery raid”. Other cases evolved from the deliberate theft of women (on account of local shortages, when elders accrued a large number). For instance, a man called Waipuldanya recalled that around 1910 there was a surprise raid in which many women were taken.

Vengeance attacks were Indigenous punishment for breaking tribal laws or, in other cases, punishment for sorcery. Sorcery, usually by persons of another group, was often deemed responsible for seemingly natural deaths.

Conflicts arising from trespass imply that some disputes were territorial. This is surprising, as early observers—for example, at King George Sound, Western Australia—found that Indigenous groups “do not seem to covet the territories of their neighbours”. Peter Gardner determined that Indigenous Australian territories are usually of near-equal size (relevant to available resources), suggesting that no particular group had integrated and assumed

<table>
<thead>
<tr>
<th>Type of confrontation</th>
<th>None</th>
<th>1 or 2</th>
<th>3 to 9</th>
<th>≥10</th>
<th>?</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open battle</td>
<td>51</td>
<td>29</td>
<td>30</td>
<td>8</td>
<td>6</td>
<td>124</td>
</tr>
<tr>
<td>Raid or ambush</td>
<td>1</td>
<td>6</td>
<td>12</td>
<td>23</td>
<td>0</td>
<td>42</td>
</tr>
<tr>
<td>Campaign</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Spontaneous clash</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Unknown</td>
<td>7</td>
<td>8</td>
<td>6</td>
<td>17</td>
<td>0</td>
<td>39</td>
</tr>
<tr>
<td>Total</td>
<td>62</td>
<td>45</td>
<td>49</td>
<td>51</td>
<td>7</td>
<td>215</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of persons killed in intra-Indigenous conflicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of persons killed</td>
</tr>
<tr>
<td>Type of confrontation</td>
</tr>
<tr>
<td>Open battle</td>
</tr>
<tr>
<td>Raid or ambush</td>
</tr>
<tr>
<td>Campaign</td>
</tr>
<tr>
<td>Spontaneous clash</td>
</tr>
<tr>
<td>Unknown</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

45 Douglas Lockwood, I, the Aboriginal, Rigby, Adelaide, 1962, pp. 43–44.
46 “An Inquiry”, Inquirer (Perth), 2 March 1842, p. 5.
Table 2. Causes of conflicts

<table>
<thead>
<tr>
<th>Cause</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights over women</td>
<td>55</td>
</tr>
<tr>
<td>Vengeance</td>
<td></td>
</tr>
<tr>
<td>With respect to women</td>
<td>8</td>
</tr>
<tr>
<td>With respect to sorcery</td>
<td>6</td>
</tr>
<tr>
<td>Other</td>
<td>24</td>
</tr>
<tr>
<td>Property</td>
<td></td>
</tr>
<tr>
<td>Trespass over border</td>
<td>3</td>
</tr>
<tr>
<td>Trespass of property rights (other than women)</td>
<td>5</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td></td>
</tr>
<tr>
<td>Accusation of ritual fault</td>
<td>4</td>
</tr>
<tr>
<td>Preventive conflict</td>
<td>1</td>
</tr>
<tr>
<td>Taking of kidney fat*</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
</tr>
<tr>
<td>Unknown cause</td>
<td>106</td>
</tr>
<tr>
<td>Total</td>
<td>215</td>
</tr>
</tbody>
</table>

*Kidney fat from deceased humans was believed to have magical properties.

dominance over another. But such an interpretation is both static and condescending. It fails to consider a view of Indigenous territorial organization that allows for Indigenous colonization of the continent, or variation in population size and disposition changing with climate and shifting resource distribution over the millennia.

It is clear that some version of trespass (in the sense of deliberate and unlawful incursions into another’s territory) occurred frequently and was the source of disputes across most regions, whether raiding for game, women or some other treasured item. This was because certain natural resources occurred in greater abundance within certain tribal territories, prompting jealousies and economic inequality. For instance, relations between the Kukabrak and the Lower Kaurna peoples of South Australia were often strained because “the Kukabrak believed them to monopolise the red ochre deposits”.

witnessed the Dieri people near Lake Eyre make secret, long-distance expeditions to raid red ochre mines, suffering “dangers” and “battles” as they passed through many hostile territories to bring back large “cakes” of the material. Such expeditions comprised “companies of picked men, [who] came prepared to fight their way”. The fact that these expeditions were “often bloody” is corroborated by Herbert Basebow and Daisy Bates.

Equally, nineteenth-century claims of groups conquering and annexing lands are rarely accepted as accurate today, although both Alfred Howitt and Gerald Wheeler were convinced that Indigenous groups experienced growth and decay, and that the Dieri and Pegullobutra had stories of being evicted from their former homelands. Some arguments have been made that increased population and the ensuing pressure on resources resulted in an increase in conflict and territorial conquest. There were certainly oral traditions of pre-contact evictions and near-evictions. For example, from Stradbroke Island and parts of the Sunshine Coast in Queensland, there were very early reports of Kalkadoon (Mount Isa, Queensland) and Iningai (Longreach, Queensland) peoples “invading” neighbouring territories: “the warrior tribes seize the best country and force the weaker clans to take the worse”. Reports of such conquests even appear in the writings of ethnographers such as Walter Roth. For the Cooper/Eyre Basin, Daisy Bates claimed that circumcised tribes incorporated or exterminated uncircumcised groups.

The nature of these reports suggests that “invasions” were probably sustained, successful raids that weakened and depleted the group being harassed. In this regard, it is significant that aggressors were reported making other groups “extinct” by controlling their resources. The Nuenonne people of Tasmania reportedly used warfare to force the Lairmairrener people “to give up their hunting ground for the common good”. This suggests that annexation of part of a neighbour’s land was not a completely foreign concept, and could be enshrined in customary law.

54 G. Wheeler, above note 10, p. 64.
Prohibited actions in Indigenous warfare

This study goes a step beyond Darmangeat’s work, by reconstructing some of the rules under which these conflicts operated – specifically, the types of conduct they prohibited. There were, of course, some regional particularities.

In Arnhem Land, Warner found a distinction between the milwerangel (the second of the three terms in the title of this paper) and the ganygarr. The milwerangel was a pre-arranged pitched battle that involved a number of clans; the ganygarr, by contrast, was larger, more regional, and somewhat chaotic, being built up over long periods of feuding. The latter involved specially decorated symbolic spears, less restrictions and a corresponding higher death toll than the milwerangel. The full protocols of Indigenous warfare are sadly not recorded by most ethnographers; this has meant that we have had to reconstruct them from events and actions witnessed by onlookers. Here we list evidence of ten probable or known prohibitions.

Attacking people with status

From various records, it appears that only individuals who had equal levels of initiation could fight one another. At Moreton Bay (Queensland) around 1830, a Quandamooka youth named Paapoonyia dared to challenge a renowned Yaggara elder and warrior named Mulrobin. His act earned him instant disapproval:

[Mulrobin was] annoyed at what I have no doubt he considered the presumption of a boy, [and] attacked Papoonya with great violence …. The grim warrior looked with scorn and contempt on the beardless youth, and would fain have left him, to join his retreating friends.

Later, Mulrobin was challenged by yet another youth – this time a Dalla (Jinnaburra) man – when trying to recover his young wife. On this occasion, to end the embarrassing situation, a suitably seasoned warrior rose up and offered to take the youth’s place:

An old and chosen warrior of the tribe then challenged Molroober [Mulrobin], telling him that the young man [the Dalla youth] who had stolen his gin [woman] was not strong enough to fight him but that he would fight for him.

This suggests that Indigenous society was not devoid of ranking and its associated protocols. Anyone’s socio-ceremonial status (level of initiation) was instantly

63 L. Warner, above note 12, p. 16.
64 “Romance of Real Life in Australia”, Colonial Times (Hobart), 24 May 1850, p. 4.
65 “Moreton Bay”, The Australian, 22 December 1838, p. 3.
apparent to others. Others simply had to note the nature and number of one’s cicatrization marks, which were scarred into males during initiation.66

It seems these initiatory levels held military significance. To have cicatrization indicated that one was “allowed to rank amongst the warriors”.67 This meant being permitted to carry and use real weapons. For the Sydney area, a youth would be given a kummel (possum-skin belt), and “into it is thrust a wooden sword, a weapon which he as a warrior is expected to use”.68 In northwestern Queensland, the initiate was presented with a spear and told:

Look here you and altogether, we make it you fighting man now… here spear and altogether belonga to you. Baal [never] you lose him…69

Prior to this, youths carried humiliating pretend items—“little spears … small shield”.70 Indeed, amongst the Jinnaburra (Southern Queensland):

The young boys were not allowed before initiation to use the ordinary real weapons of the adult, but had to practice with a makeshift one, and the why and how of their manufacture was the last lesson taught them.71

After initiation, for example, in Gatton (Queensland), youths were also advised of their military duties:

[They] were further addressed by the assembled sages of the tribe, who harangued them regarding the great courage and prowess of their forefathers, in whose footsteps they were commanded to unalteringly follow, and to remain steadfast and true to the glorious traditions of the tribe, and urged further that they were now called upon to conform to all the conditions of the tribal code, and to aid and assist by example and counsel to carry on the good government of the tribe, and to be ready at all times to repel attempted aggression from the surrounding tribes (“Whapahs”) with the sacrifice of their lives if need be. To all of these obligations they pledged themselves to remain steadfastly true.72

The initiates’ adherence to these “tribal codes” and to their vows of bravery was then tested with an open tournament-battle involving initiates, after which they were permitted to wear some specified item, such as a headband: “[A]lways after kippa- [initiate-]making, the blacks had a great fight … [and each was given] a snake-throttle tied round his forehead.”73

71 Lindsay Winterbotham, Gaiarbau’s Story of the Jinibara, Fryer Library, University of Queensland, St Lucia, 1957, p. 76.
Levels higher than this main initiation varied from region to region, and seem to have been acquired within warrior lodges—for instance, the Eagle Star group, in the Cooper Basin, allowed particular persons to own “the bamboo spear”, “the keeba stick” and other military insignia.74

Equity in damages (“payback”) and substitution

Payback was a notion that underwrote Indigenous warfare. It related to legitimacy and justice, or junkarti (the third of the three terms in the title of this paper; literally “straight” in Lardil), and provided an exact, tit-for-tat reciprocity for past actions.75 As Tyson Yunkaporta, an Apalech man, explains, the rules of engagement were that cuts could only be inflicted on the arms, back or shoulders. But these cuts, at the end of sparring, had to be replicated on one another. This meant that no one could walk away holding a grudge.76 In similar fashion, on the Gulf of Carpenteria, if a wife saw her husband being hit in a duel, she could hit his opponent, and the opponent’s wife could likewise hit the other husband, but neither man could hit the women.77

Junkarti ensured equity and helped curb the violence and brutality of warfare, as few persons cared to endure more than a few blows or cuts in payback for what they had inflicted—let alone be killed for killing an opponent. In some cases, instead of death, the “killing party” negotiated a deal with the accused or his group once they had successfully ambushed him, extorting a significant exchange or substitute from the accused, such as in property. In other cases, the older brother or father of the accused was killed in substitution, either offering themselves or being negotiated.78 Similarly, raiders might attack and kill the first person of another group that they encountered:

Revenge is not necessarily individual. The wrongdoing of one tribesman might have to be suffered for by another … of the same blood. This blood revenge, which is of course practiced by even the most civilized nations, is often the cause of the death of an innocent white man who happens to be travelling through the tribal ground.79

As Indigenous society believed blame could be shared by everyone and anyone in a group, both sides would be satisfied with this outcome.

Avoiding unnecessary wounding or killing

Another often-described prohibition pertained to superfluous injury and death. It may seem contradictory to speak of a military practice wherein killing was

76 T. Yunkaporta, above note 1, p. 34.
77 “The Australian Aborigine: Superstitions and Battles”, Advocate (Burnie), 3 October 1924, p. 5.
78 G. Taplin (ed.), above note 41, pp. 68–70.
79 H. Basedow, above note 11, p. 150.
deliberately limited, but in fact modern warfare similarly seeks to minimize the amount of loss, even amongst the enemy. However, for Indigenous groups, part of the rationale was that a great deal of natural death was blamed on sorcery, as it was common to conduct or commission sorcery against foes and rivals. Consequently, even “natural” death was considered suspicious and was usually – sooner or later – attributed to the sorcery or ill will of a supposed foe. This, then, had to be atoned for by raiding an enemy group or challenging that group to a battle. If the challenged tribe came through the battle unharmed, it was viewed as exonerating their guilt over the natural death: “[The accused] must come through it absolutely unharmed before [they] will be exonerated from all blame in connection with the death of [the victim].”

At any rate, battles, raids and duels were intended more as a form of cathartic venting rather than a field of slaughter. In South Australia, an Indigenous Australian informant described what he considered a recent “glorious” (successful) battle. He defined it as successful because “nobody tumble down, only big one yabber [talk]. … My king … say ‘don’t throw spears, only yabber.’”

Even when battles involved very large numbers of warriors, they generally resulted in flesh wounds and very few, if any, deaths – although there were some very violent exceptions, depending on the intensity of the dispute. Raids were more usually fatal, and highly unpredictable (indeed, it was expected that women and children would suffer), but often only the targets were slain.

There were several checks and balances that helped minimize damage. One was that even if one’s opponent was slain “legally” – that is, during the regulated battle – there could still be furious retributions:

If one is severely wounded [in battle], blood revenge seems … to rest on [the one who caused the other to be severely wounded] until either he is killed in consequence of it, or he pacifies the friends and relatives of the fallen one by gifts.

Thus, victory was always a mixed blessing: one gained status as a fighter, but left the field as a marked man.

Perhaps for this reason, the first sign of blood was often sufficient for the blood-cause side to declare victory: as one observer noted, “in tribal fights as soon as a black on either side was wounded, his side began a retreat.” A shout would then go around the battlefield and all would temporarily quit fighting to discuss the implications of the casualty’s fall. This would often take the battle off into a new direction. There were specific shouts passed around a battlefield if

80 Sydney Mail, 24 June 1914, p. 11.
81 “A Bloodless Battle”, Border Watch (Mount Gambier), 22 July 1896, p. 4.
82 N. Green (ed.), above note 66, p. 49.
85 C. W. M. Hart and A. Pilling, above note 44, pp. 84–85.
anyone had fallen (often “blood”, indicating a wounding), enabling hostilities to halt quickly. There were also hand signals for this purpose, even if there had been no injuries:

Should two be playing or fighting, and one wished to quit, he placed his arm straight out from the shoulder, palm down to indicate that the fight was over, as he had acknowledged defeat. Should a male aborigine approach a strange camp and wish to enter, he would give the same sign whilst standing still. Should a dhumka, messenger, approach a strange camp, he gave the same sign, whilst running or walking.86

Avoiding attacks on certain parts of the body

Another unique restriction would appear to be with respect to certain parts of the body being sacrosanct. In aiming to mitigate attacks on certain parts of the body, it is recounted that

among other rules was that which prohibited the intentional hitting of an adversary on the shoulders or breast so that the identification scars thereon should be defaced. … In a kin-bumbe [fight for women], … back slashing … is permissible.87

Ensuring the opponent is aware and fully engaged

A settler who witnessed many open battles on Bundjalung Country found that it was considered a huge breach of tribal law if a warrior simply rushed up and deliberately (rather than accidently) killed his foe:

No man was permitted willfully to slay an enemy! Chivalry to the utmost point of madness, if you like. Should a Warrior rush on an opponent and slay him, he, the slayer, was put to death by his own men.88

According to Fred Watson, this was because one of the main rules was that “no man should be attacked unaware”.89 Watson found that “violation of this code was punishment by death at the hands of the onlookers”.90 A similar example from Cairns, on Yindinjdji land, shows that this meant fighting had to be mutual and during a sequence of assigned “moves”:

[There were] elements of chivalry – an old fashioned virtue, but an admirable one. At any time during the approach, any one or all of those approaching

88 “Early Lismore – Battle on Racecourse Flat”, Northern Star (Lismore), 13 October 1923, p. 9.
89 F. J. Watson, above note 87, p. 95.
90 Ibid.
enemies could have been killed, by spear, or nulla-nulla. But such a thing was not thought of; their custom – their “scrap of paper” – was honoured.91

Ensuring equity in weaponry and numbers

Battles and subsequent one-on-one duels were regulated to ensure equality. In some cases, this meant postponing battles until both sides had sufficient weapons or numbers, even if these had to be drawn from allied groups. For instance, in Cape York, Queensland, whenever one group had too few fighters, “embassies [would] go round the neighbouring tribes, soliciting alliances”.92

Similarly, both sides had to use comparable weapons. In one instance on Gumbainggir Country,

without warning, onlookers were startled by the sight of crimson streams cascading down the Yulgilbai champion’s back! Comrades rushed in and separated the antagonists, and it was found that Grafton Tommy had a short stabbing knife concealed in his thick mat of hair, and had reached over and stabbed his opponent thrice in the back.93

The observer noted that this incident was deemed “a treacherous act, and quite outside Indigenous codes of the game”.94

Fighting on behalf of one’s guests

In some regions, it was against protocol for a visitor to fight on behalf of his host group. The hosts themselves had to fight, even if it was their guests who had created the problem. Continuing with the Moreton Bay example given earlier, Paapoonyia (although himself a Stradbroke man) upbraided the Pine Rivers clan for allowing their “foreign” (“Bunya Bunya” – Jinnaburra) guest to fight Mulrobin (a South Brisbane headman) on their land, although the cause of Mulrobin’s grievance was the theft of one of his people’s women by the other clan (the “Bribies” – the Joondoonbarri) that the Pine River clan were hosting:

Paapoonyia, who had stood by the side of Molroober during the struggle, placed himself before his friend, and upbraided the Pine River tribe for permitting a tockeroo or strange black to fight for them, and told them that they were all women.95

Protecting and honouring non-combatant elders

Although elders were the highest military and civil authority in Indigenous Australian society, they were protected from violence in regulated battles and

94 Ibid.
95 “Romance of Real Life in Australia”, Colonial Times (Hobart), 24 May 1850, p. 4.
greatly honoured. Observers of the Eora and Dharug peoples of Sydney noted that “great deference is paid to old men”.  

Senior elders were beyond the age of fighting in raids or battles, but continued to take part in duels against rival peers if such were called for. They often formulated the overall military strategy of the group, directed military manoeuvres during battles and decided the activities of warrior leaders and henchmen during daily life. From base camps, they overlooked the battlefield, monitored the conflict, issued commands and encouragement, and served as “home defence” for the camp. For example, during a battle at Fairy Mount near Lismore, New South Wales,

[h]undreds of Logan warriors streamed down the river. … Two aged reservists were Smashum and Sandy, who paced importantly about the background. … The old chaps’ idea was to bluff the enemy with [their] artillery if they charged.

Likewise in northwestern Queensland, as many as sixty old men were witnessed “yelling, dancing, and encouraging the combatants by voice and gesture”.

Protecting ammunition-gatherers

In most battles, women, children and sometimes elders assisted warriors by recovering spears and other thrown implements and passing these to their fighters for them to continue their attacks. This was a respected task but sometimes occurred in areas of the thickest fighting. There were rules around the treatment of these vital individuals:

We found out that it was the rule in such a fight for the enemy to be most careful not to throw a spear so as to endanger a picker-up of spears being hit, hence their [the ammunition-gatherers’] deliberate calm way of passing through a flight of spears without fear.

Shielding women and children

During initiation, a warrior was instructed that it was his duty to “protect the women, children and camp”. If a camp was attacked or a group was ambushed whilst out travelling or hunting and gathering, men formed a human (armed) shield between themselves and the attacker, in order to allow women, children and the elderly to flee into the surrounding bush.

Warriors were especially bound to protect and fight on behalf of female relatives. A good example of this is the same Paapoonyia mentioned above,
rushing to protect his sister during a battle north of Brisbane on Yuggera Country in the 1820s:

His sister Putchinba, who was particularly active in annoying the fugitives [i.e., defeated warriors, now fleeing], at length attracted the attention of one of them, who turned on her with the most deadly intentions. The pretty maiden defended herself admirably, but must soon have fallen a victim to her temerity, when I called Papoonya’s attention to her dangerous situation. He bounded like a kangaroo to the rescue, and placing himself before his sister, *upbraided the warrior for thus fighting with a wyah gin [young girl], and challenged him to fight.*

Amongst the Tiwis of Melville Island, if an older woman was accidently injured (such as when picking up spears), her son would be obliged to set out a fresh challenge and demand retribution from the enemy through a fight.

**Protecting and assisting the wounded and deceased**

A major protocol concerned casualties, including fatalities. Women and elderly men were usually poised to deal immediately with casualties, as witnessed during a conflict on Gumbainggir Country at Coffs Harbour, New South Wales:

There were dozens lying about the ground in various attitudes. A great many had to be carried off to the different camps. The carriers made rough stretchers of saplings to carry those who could not walk and the wounded were attended to by old abos and lubras, who seemed to be experts at fixing up spear wounds and broken heads.

Otherwise “a sheet of bark [or] sometimes … bandages … of bark” could be applied. The nurses were mostly women and sometimes male elders who were “experts at fixing.”

Significantly, many tournament/battle grounds were situated adjacent to “re recuperation” or “health” camps which had a stock of springs, clays and herbs used in treatment. These were places where warriors stayed even long afterwards whilst they healed.

It was also forbidden to harm an already wounded person, or to follow up the wounding with more devastating attacks. Women and other warriors were directly involved in halting any malicious re-engagements:

[I]f a man was beaten down these women gathered about him, “protecting” him with their sticks and harassing the enemy to such a degree that he was often glad to beat a retreat.

---

101 “Romance of Real Life in Australia”, above note 95, p. 4 (emphasis added).
102 C. W. M. Hart and A. Pilling, above note 44, pp. 84–85.
103 Ibid.
104 “Aboriginal Warfare”, *The Age* (Melbourne), 11 April 1864, p. 6.
105 “Blacks’ Tribal Fight”, *Coffs Harbour Advocate*, 14 April 1927, p. 3.
Equally, 

[a]s soon as one falls or is severely wounded, his friends direct their spears at the same time against the one, who caused the wounds and the latter unable to avoid so many spears at once either flees immediately or often falls in consequence of such a general attack.\textsuperscript{107}

Opponents would not only return the bodies of their enemies, but would help treat one another’s wounds.\textsuperscript{108} Indeed, on Melville Island, Hard observed that if it was a major elder who was wounded, the two feuding sides immediately buried their differences in order to assist him. Moreover, thereafter “both war parties felt compelled to support him or revenge his wound”.\textsuperscript{109} The bodies of the deceased were treated according to the circumstance. Regulated battles saw a great many funerary protocols being followed, whereas a sudden and violent raid could see a site being completely abandoned for decades on end, being now considered hexed (poisoned) country. In that case, “they do not bury the dead, but leave them on the field”.\textsuperscript{110} Many sites of the Australian Frontier Wars epoch were of this type.

Conclusion

The gap between studies of military history and military strategy is ever widening, and it may be claimed that there are no lessons to be taken from Australia’s pre-settlement history. However, whilst there have been many debates as to whether or not Indigenous Australian peoples had the concept of “war”, such debates are somewhat redundant in an era that recognizes a spectrum of conflict. Indigenous Australian peoples clearly demonstrated a profound and amazing ability to successfully manoeuvre between concurrent states of cooperation, competition and conflict with neighbouring peoples. Particular methods of conflict and competition evolved to reflect the fact that different groups might jump across the spectrum at any one point in time—they might cooperate over water rights while competing for land resources and conflicting over marriage rights. Specifically, a pre-settlement restriction on warfare was a prohibition against seeking to kill whilst in conflict; there is quite clear evidence that pitched, regulated battles of thousands of warriors would cease the moment that an injury occurred. Further, in a custom unique to history, there is evidence that Indigenous Australian peoples at the conclusion of a battle or duel would replicate the wounds inflicted on each other—if you stabbed someone in the leg, you yourself would be stabbed by them in the same spot, to the same depth.

\textsuperscript{107} L. Leichhardt, above note 83, p. 392.
\textsuperscript{108} H. Basedow, above note 11, p. 188.
\textsuperscript{109} C. W. M. Hart and A. Pilling, above note 44, p. 85.
\textsuperscript{110} A.W. Howitt, above note 48, p. 34.
Perhaps one of the most telling traditions that restricted the excesses of war in Indigenous Australia was the custom that, at the conclusion of a regulated battle, there was no bitterness. Except for long-standing feuds, which could fester for decades, it was observed that Indigenous Australian conflicts ended on a note of complete forgiveness and goodwill. A police officer who witnessed a battle in far north Queensland was astounded at the wholehearted manner in which animosities were dropped:

I could not refrain from wondering at the entire absence of any ill-feeling or animosity among these people. They had been only a few minutes previously emulating each other in inflicting severe wounds and hurts, nay, even in slaughtering their enemies, and yet, here they were laughing, chatting, and feasting, with every manifestation of goodwill and reciprocal friendship. That the battle … had been fought in downright earnest was only too apparent. But it had not left a vestige of that acrimony which we should have looked for from a like contest between civilised people.111

This is all to say that there are many lessons to be taken from Australia’s pre-settlement history, which can add to the depth of international humanitarian law. It can provide analogies to Australia’s current geopolitical situation, in a highly connected and interrelated world (just as Australia was for Indigenous Australian peoples prior to settlement). The rise of globalism and interconnectivity has seen academic and professional commentary turn away from binary concepts such as “peace” and “war”, instead recognizing a spectrum of cooperation, competition and conflict.112 The Indigenous Australian laws of war evolved to recognize the need for a fluid transition across this spectrum, concurrently cooperating over land management, competing over resources and, per Darmangeat’s dataset, conflicting over rights to women.

The cultural prohibitions and norms surrounding wounding and payback demonstrate the clearest examples of restrictions, at the conflict end of the spectrum, that allowed for cooperation and competition to resume without ill will. Indeed, it is arguable that as nations move towards persistent interference operations, aided by the ubiquity of cyberspace, adopting a “no grudge” approach to unfriendly, but not illegal, conduct might allow nations to more flexibly evolve to the new spectrum.113

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 in coordination with 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 2021

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@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 Great Britain by Bell & Bain Ltd, Glasgow.
Emerging Voices

Editorial: Emerging Voices: Increasing the diversity of voices featured in the International Review of the Red Cross
Bruno Demeyere

Closer to Home: How national implementation affects State conduct in partnered operations
Alessandro Mario Amoroso

Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural heritage under IHL and the Islamic law of armed conflict
Victoria Arnal

Armed escorts to humanitarian convoys: An unexplored framework under international humanitarian law
Annabel Bassil

Greener insurgencies? Engaging non-State armed groups for the protection of the natural environment during non-international armed conflicts
Thibaud de La Bourdonnaye

Collaborating with organized crime in the search for disappeared persons? Formalizing a humanitarian alternative for Mexico
Issa Cristina Hernández Herrera

For whom the bell of proportionality tolls: Three proposals for strengthening proportionality compliance
Won Jang

Liar’s war: Protecting civilians from disinformation during armed conflict
Eian Katz

Humanizing siege warfare: Applying the principle of proportionality to sieges
Maxime Nijs

The role of international humanitarian law in the search for peace: Lessons from Colombia
César Rojas-Orozco

Behind the legal curtain: Social, cultural and religious practices and their impact on missing persons and the dead in Colombia
Mayra Nuñez Pastor

The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?
Fernanda García Pinto

“Or any other similar criteria”: Towards advancing the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict
Vaughn Rossouw

Investigating the Jana Adalat of the 1996–2006 armed conflict in Nepal
Yugiccha Sangroula

Whose perception of justice? Real and perceived challenges to military investigations in armed conflict
Claire Simmons

Automating occupation: International humanitarian and human rights law implications of the deployment of facial recognition technologies in the occupied Palestinian territory
Rohan Talbot

A legal obligation under international law to guarantee access to abortion services in contexts of armed conflict? An analysis of the case of Colombia
Juliana Laguna Trujillo

The redirection of attacks by defending forces
Tsvetelina Van Benthem

Who is a civilian in Afghanistan?
Ioanna Voudouri

Jus ex bello and international humanitarian law: States' obligations when withdrawing from armed conflict
Paul Strauch and Beatrice Walton

Indigenous Australian laws of war: Makarrata, milwerangel and junkarti
Samuel White and Ray Kerkhove

https://international-review.icrc.org/

Cambridge Core
For further information about this journal please go to the journal web site at: cambridge.org/irc