

Proceedings of the Bruges Colloquium

Urban Warfare

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Actes du Colloque de Bruges

La guerre en milieu urbain

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CICR

ICRC Delegation to the EU, NATO and the Kingdom of Belgium
Délégation du CICR auprès de l'UE, de l'OTAN et du Royaume de Belgique

Audrey Eprinchard

Sous la direction de
Stéphane Kolanowski

**Members of the Editorial Board, College of Europe/
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PROCEEDINGS OF THE BRUGES COLLOQUIUM ACTES DU COLLOQUE DE BRUGES

WELCOME ADDRESS

Michele Chang

Professor, European Political and Administrative Studies Department, College of Europe

It is with great pleasure that I welcome today the participants to the 16th Bruges Colloquium on International Humanitarian Law. Dr. Dr. Jörg Monar, Rector of the College of Europe, is participating in a State visit to Poland this week so he is unfortunately unable to greet you himself. The College of Europe has been partnering with the International Committee of the Red Cross (ICRC) in Bruges, and with the Natolin College campus in Warsaw, for many years now. It is a project that we anticipate continuing. Dr. Dr. Monar sends the organisers as well as the participants his best wishes. The topic of this Colloquium is 'Urban warfare'. While the College's educational and research projects typically focus on the activities of the European Union, this topic nevertheless encompasses many of the interests of the College. The resolution of conflicts through the use of law is one of the greatest achievements of the European integration and has been viewed by many as a potential model for other regions. Over the next few days the panels will examine the important challenges to the rule of law in the context of urban warfare. Moreover, in its educational tradition the College prides itself on its multinational student body and teaching staff; over 350 students in Bruges represent more than 50 nationalities. Similarly, today's event brings together participants from across Europe and the United States of America, inviting them to engage in dialogue and to learn from international experiences and educational traditions. On behalf of the College of Europe, I thank you for coming to Bruges today and wish you a productive and successful Colloquium.

DISCOURS DE BIENVENUE

Walter Füllemann

Chef de la délégation du CICR auprès de l'Union européenne, de l'OTAN et du Royaume de Belgique

Madame le Professeur, Mesdames et Messieurs,

Il me revient le plaisir et l'honneur, au nom du Comité international de la Croix-Rouge (CICR), de vous accueillir pour ce 16^{ème} Colloque de Bruges. Le thème de cette nouvelle édition est, comme vient de le mentionner Madame le Professeur Chang, la guerre en milieu urbain. Ce thème est malheureusement d'une cruelle actualité.

Comme vous le verrez dans votre documentation, le Colloque de Bruges a, tout au long de ses 15 éditions précédentes, abordé nombre de sujets d'importance dans le domaine du Droit international humanitaire (DIH). Cette année ne fera sûrement pas exception. Je suis très heureux d'accueillir Monsieur le Professeur Yves Sandoz, membre honoraire du Comité, qui vous présentera, dans son discours introductif, le programme de nos travaux, en l'insérant à la fois dans un contexte historique et une perspective actuelle.

Mais permettez-moi, avant cela, de partager avec vous quelques éléments d'analyse et quelques réflexions. Cette année 2015 est, pour le Mouvement international de la Croix-Rouge et du Croissant-Rouge, une année importante, pour au moins deux raisons. Tout d'abord, c'est une année anniversaire pour le Mouvement, qui fête en effet le 50^{ème} anniversaire de ses Sept principes fondamentaux que sont l'humanité, l'impartialité, la neutralité, l'indépendance, le service volontaire, l'unité et l'universalité. Les Principes fondamentaux du Mouvement, qui furent proclamés à Vienne par la Conférence internationale en octobre 1965, restent d'une très grande actualité. Au-delà du fait qu'ils font partie intégrante de l'identité du Mouvement, et c'est en particulier le cas pour les principes d'impartialité, de neutralité et d'indépendance, ils constituent, avec la confidentialité, un outil essentiel pour obtenir l'accès aux victimes de conflits armés, là où d'autres acteurs n'ont pas ou ont moins accès que le CICR. Il est donc essentiel de préserver ces Principes, et il est essentiel que les Etats nous laissent travailler en pleine conformité avec ces Principes. Ensuite, 2015 est également une année de Conférence internationale. Tous les quatre ans, ces Conférences internationales de la Croix-Rouge et du Croissant-Rouge, qui réunissent les Sociétés nationales, la Fédération, le CICR et les Etats parties aux Conventions de Genève, apportent leur lot de défis, mais surtout d'opportunités. Loin d'être un simple, mais imposant « *get together* », ces Conférences internationales sont des moments clés dans l'évolution des agendas humanitaires. Et c'est d'autant plus le cas cette année, en raison du Sommet mondial de l'action humanitaire (*World Humanitarian Summit*), qui

se tiendra à Istanbul en mai 2016. De nombreux sujets humanitaires seront discutés lors de cet évènement, qu'ils soient liés ou non aux situations de conflit armé. Pour le CICR, ce sont en particulier ces situations-là qui font partie intégrante de notre domaine d'expertise. Parmi la liste des thèmes qui seront abordés lors de la Conférence internationale à Genève en décembre prochain, je relèverai trois sujets essentiels, à savoir : le renforcement du respect du DIH, la détention en conflit armé non international, et la migration. Notez que les deux premiers sujets ont fait l'objet de discussions dans cette même salle, respectivement en 2003 et en 2014.

Une écrasante majorité d'experts s'accorde à dire que le DIH, dans son ensemble, demeure adéquat pour répondre aux situations contemporaines de conflit armé, et que le problème essentiel réside dans un manque de respect du droit existant. Il est vrai qu'il est toujours plus facile de s'entendre sur un texte (quoique...) que sur son application. Pourtant ici, c'est de protection de la vie et de la dignité des victimes de conflits armés qu'il s'agit. Il est donc impératif de travailler également à une meilleure application de ce droit. C'est sur mandat de la Conférence internationale de 2011 que la Suisse et le CICR ont lancé une initiative, dès l'année suivante, visant à dégager un terrain d'entente sur de possibles mécanismes dont le but serait d'améliorer le respect du DIH. La Conférence internationale à venir constituera donc un moment clé dans ce processus, et nous espérons que les Etats prendront part aux discussions, de manière constructive, en vue d'assurer une meilleure protection pour les victimes des conflits armés.

Cette Conférence internationale sera également un moment important dans l'effort déployé afin d'améliorer la couverture normative de la détention en temps de conflit armé non international. Nous devons malheureusement constater que, si les règles régissant la détention en conflit armé international offrent une réponse suffisante, ce n'est pas forcément le cas lorsque le conflit est non international. On a pu remarquer, et en particulier par certaines décisions de jurisprudence, qu'il n'était pas réaliste de vouloir trop s'inspirer des règles internationales des Droits de l'homme en la matière. D'autant plus qu'il n'est pas non plus envisageable de se satisfaire du *statu quo*. Cela fait également quatre ans que le CICR mène un projet sur la détention en conflit armé non international. Quatre années durant lesquelles nous avons organisé des consultations d'experts et des réunions d'Etats. En décembre prochain, la Conférence internationale représentera à l'évidence un moment clé dans l'évolution de ce dossier.

Enfin, la migration. Les parcours dangereux et incertains entrepris par un grand nombre de personnes à travers le monde sont le révélateur de l'échec de certaines politiques internationales, mais également le révélateur de la détresse causée par le manque de respect pour les normes élémentaires protégeant la personne humaine. On parle en Europe de « crise migratoire ». Contrairement à un grand nombre de pays situés en Afrique, au Moyen-Orient ou en Asie, l'Europe n'a pas l'habitude d'une arrivée aussi massive de migrants sur son territoire. Pourtant, l'Europe doit agir et réagir en conformité avec ses obligations et les valeurs qu'elle proclame.

Je citerai ici un extrait du discours que le Ministre finlandais, Alexander Stubb, a prononcé ici même, à Bruges, la semaine dernière à l'occasion de l'ouverture de l'année académique. Il a déclaré: « *the refugee crisis is a defining moment for Europe. If we fail to deal with the influx of refugees, human tragedy will follow. In the midst of the crisis we should all have a warm heart and keep a cool head (...). People need help, and we must help. There is no alternative* ». Si cette « crise migratoire » est un défi humain et politique pour l'Union européenne, c'est également un sujet d'extrême importance pour le Mouvement international de la Croix-Rouge et du Croissant-Rouge. Partout, vous pouvez voir des Sociétés nationales de la Croix-Rouge et du Croissant-Rouge largement impliquées dans l'aide aux migrants. Le travail du CICR dans ce domaine, s'il est moins visible, est également essentiel, en particulier lorsqu'il s'agit de rechercher les personnes portées disparues ou de rétablir les liens familiaux. Lors des discussions qui se tiendront dans le cadre de la Conférence internationale en décembre prochain, je souhaite de tout cœur que les Etats puissent montrer, comme l'a dit le Ministre Alexander Stubb, « *a warm heart and a cool head* ». « *A warm heart* » pour répondre avec humanité, et « *a cool head* » pour résister aux tentations de repli sur soi.

Mais revenons à la thématique du Colloque de Bruges, qui est, soulignons-le, étroitement liée tant au respect du DIH qu'à la vague migratoire que connaît actuellement l'Europe. Les principes sur lesquels se basent les règles les plus essentielles du DIH, à savoir la distinction, la proportionnalité et les précautions dans – et contre les effets – des attaques sont très compliqués à mettre en œuvre lorsque les hostilités se déroulent en milieu urbain. Mais cette difficulté n'exonère en rien du plein respect des règles de DIH. Au contraire, elle nous pousse à approfondir la réflexion et la discussion sur les contours des obligations et la meilleure manière de les mettre en œuvre, tout en gardant à l'esprit l'équilibre fondamental à respecter entre les nécessités militaires et les considérations d'humanité.

Pour aborder toutes ces questions délicates, nous avons parmi nous des orateurs ayant une très grande expérience et expertise dans les domaines que nous vous proposons d'aborder tout au long de cette journée et demie de discussions et de réflexion. Je suis très heureux de pouvoir accueillir nos orateurs, dont certains sont déjà des habitués de nos rendez-vous de Bruges, et d'autres qui, je l'espère, le deviendront également.

Je ne saurais terminer sans remercier le Collège d'Europe pour la confiance renouvelée chaque année dans l'organisation des désormais traditionnels Colloques de Bruges, ni sans vous remercier, vous les participants, d'avoir été si nombreux à répondre favorablement à notre invitation à participer à cette 16ème édition du Colloque.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons partager pendant cette journée et demie, qui s'annoncent très stimulants, et je vous remercie de votre attention.

KEYNOTE ADDRESS

Mr. Yves Sandoz

Membre honoraire du Comité, CICR

Madame le Professeur Chang, cher Walter, Mesdames et Messieurs, chers amis,

Je suis très heureux d'être une fois encore parmi vous à Bruges, dans le cadre de ce 16^{ème} Colloque, entouré d'éminents experts et d'un tel auditoire.

Avec le thème de la guerre urbaine, le Colloque de Bruges nous propose une fois de plus un sujet d'une brûlante actualité, comme vient de le mentionner Walter. Cela pour différentes raisons, dont la première est évidemment que la proportion des populations qui vivent dans les villes est en augmentation constante, passant en chiffres relatifs d'un quart de la population du globe en 1950, à plus de la moitié aujourd'hui, et en chiffres absolus, de moins d'un milliard à environ quatre milliards de personnes. Le contrôle des villes est donc d'une importance stratégique croissante, d'autant plus que les belligérants qui ne disposent pas de moyens militaires aussi puissants que ceux de leurs adversaires voient aussi, en déplaçant leurs combats dans les villes, l'avantage de se dissimuler au sein de la population.

Y a-t-il compatibilité entre la guerre urbaine et le Droit international humanitaire (DIH) ? Celui-ci peut-il ou doit-il s'adapter à ce phénomène grandissant ? Le Colloque va aborder ces questions générales en analysant divers aspects de la guerre en milieu urbain et de l'évolution des stratégies militaires qu'elle a engendrée.

N'oublions pas toutefois que cette question n'est pertinente que s'il y a bien conflit armé. Des violences urbaines de grande intensité peuvent avoir lieu en dehors d'une situation de conflit armé. Déterminer que l'on se trouve bien dans une telle situation reste, particulièrement pour les conflits armés non internationaux, une question délicate, qui fait souvent l'objet de controverses d'ordre politique. Cette question essentielle a néanmoins déjà fait l'objet de débats dans de nombreux fora, et comme on ne la saurait traiter à chaque occasion, elle ne sera pas débattue dans le présent Colloque, qui prend donc comme point de départ l'existence avérée d'un conflit armé.

Il n'est en revanche pas inutile de rappeler l'origine des normes de DIH applicables à ce type de situations. Le principe central qui sera au cœur de nos débats demeure bien-sûr celui de la distinction, distinction entre les personnes et biens civils d'une part, et les objectifs militaires d'autre part. Ce principe découle de l'idée exprimée, pour la première fois dans le DIH moderne,

dans le préambule de la Déclaration de Saint-Pétersbourg de 1868, et selon laquelle « le seul but légitime que les Etats doivent se proposer, durant la guerre, est l'affaiblissement des forces militaires de l'ennemi ».

La question des bombardements a, elle aussi, été traitée depuis fort longtemps. On peut en effet déjà trouver dans les Conventions de La Haye de 1899 et 1907, l'interdiction d'attaquer les villes non défendues et l'obligation de ne bombarder que des objectifs militaires, définis de manière très restrictive. C'est également dans les Conventions de La Haye qu'apparaît le principe de précaution : en effet, l'obligation d'adresser des sommations et de prendre toutes les précautions possibles pour minimiser les dommages collatéraux est aussi imposée par ces Conventions.

A cette époque, il ne s'agit toutefois que de bombardements émanant des forces terrestres ou navales, car l'aviation n'en était alors qu'à ses balbutiements. Pressentant le terrible potentiel des bombardements aériens, les Etats, réunis à La Haye, adoptèrent une Déclaration beaucoup plus radicale, interdisant « de lancer des projectiles et des explosifs du haut de ballons ou par d'autres moyens analogues nouveaux ». Comment ne pas ressentir de l'amertume à la lecture de cette Déclaration entérinée à l'aube d'un siècle où des millions de personnes allaient mourir ou souffrir de manière abominable dans les décombres de villes détruites et saccagées par les bombardements aériens.

De fait, la Déclaration n'a pas tenu bien longtemps, puisque l'on s'est déjà engagé dans des bombardements aériens lors de la Première guerre mondiale. L'élaboration de règles moins ambitieuses, plus proches de celles imposées aux forces terrestres et navales évoquées ci-dessus, a alors été entreprise à l'issue de cette guerre par une Commission de juristes mandatée par les Etats-Unis, la France, le Royaume Uni, l'Italie, le Japon et les Pays-Bas. Les « Règles de La Haye concernant la radiotélégraphie en temps de guerre et la guerre aérienne », car c'est justement ce qui nous intéresse aujourd'hui, ont vu le jour en 1923. Bien qu'elles n'aient pas été formellement adoptées par les Etats, on considère généralement qu'elles reflétaient les règles coutumières agréées à l'époque. Parmi celles-ci, nous pouvons relever les règles suivantes : l'interdiction des bombardements aériens dans le but de « terroriser la population civile ou d'endommager la propriété privée sans caractère militaire ou de blesser les non combattants » ; une définition restrictive des objectifs militaires et le fait que la destruction partielle ou totale de l'objectif visé doit constituer un « avantage militaire net » ; l'obligation de s'abstenir de viser même des objectifs militaires s'il n'est pas possible de le faire « sans entraîner un bombardement sans discrimination de la population civile » ; et enfin, l'affirmation que « toutes les mesures doivent être prises » pour épargner autant que possible les édifices et autres lieux jouissant d'une protection renforcée. Comme nous pouvons donc le constater,

ces règles sont alors déjà imprégnées des principes de distinction, de proportionnalité et de précaution, qui demeurent au cœur du débat actuel.

Que ces règles reflètent la coutume n'a pourtant pas empêché qu'elles soient balayées par la Seconde guerre mondiale, et les bombardements à l'aveugle, massifs et indiscriminés qui s'y sont produits, tant par les puissances de l'Axe que par les puissances alliées. Si certains ont cherché à justifier ces pratiques par le droit des représailles, c'est bien tout l'édifice des règles du DIH relatif à la conduite des hostilités et la protection des populations civiles qui s'est effondré lors de cette guerre.

Le DIH devenait sans objet face à l'ambition affichée par l'Organisation des Nations Unies (ONU) de préserver dorénavant la paix dans le monde. Pourtant, il est vite redevenu d'actualité lorsqu'on a constaté, avec le début de la guerre froide, que l'ONU n'allait pas pouvoir se donner les moyens de cette ambition. La question des règles concernant la conduite des hostilités aurait alors dû être reprise dans le cadre de la refonte de ce droit qui donna naissance aux quatre Conventions de Genève en 1949. Hormis quelques règles dans le Titre II de la IV^{ème} Convention, cette question n'a toutefois pas été traitée en 1949, probablement déjà bloquée par la question des armes nucléaires. Les Etats-Unis, ayant le monopole des armes nucléaires, ne voulaient pas d'une interdiction au vu de l'avantage politique et de l'effet dissuasif que leur procurait la menace de les utiliser. En même temps, d'autres Etats exclurent toute possibilité d'aborder cette question.

L'émergence ensuite de nouvelles puissances nucléaires n'a pas permis de sortir de cette impasse : en effet, la majorité d'entre elles s'opposèrent également à l'interdiction de ces armes au vu de l'avantage que leur procurait, à leur tour, la menace de les utiliser à l'égard de ceux qui ne les possédaient pas et, surtout, de leur effet dissuasif face aux velléités belliqueuses d'autres puissances nucléaires. Au cœur de la guerre froide, « l'équilibre de la terreur » était considéré comme essentiel pour éviter un affrontement, du moins direct, entre les grandes Puissances. A défaut d'une véritable paix, cet « équilibre » préservait au moins une situation de non guerre.

L'absence de règles claires concernant la conduite des hostilités se faisait pourtant cruellement sentir sur le terrain des conflits, et le Comité international de la Croix-Rouge (CICR) a cherché inlassablement à combler ce vide juridique, notamment par un projet de règles limitant les risques courus par la population civile en temps de guerre. Si ce projet a été adopté par la Conférence internationale de la Croix-Rouge de New Delhi en 1957, il n'a toutefois pas été repris dans le cadre d'une convention internationale, buttant toujours sur cette même problématique des armes nucléaires.

Ce n'est finalement que dans le cadre des négociations qui aboutirent à l'adoption en 1977 des deux Protocoles additionnels aux Conventions de Genève qu'une solution fut trouvée : la question des armes nucléaires et de toutes les armes de destruction massive fut renvoyée dans le cadre du désarmement. L'argument décisif et convaincant suivant fut mis en avant : le DIH ne s'occupe que de l'interdiction d'utiliser certaines armes, alors qu'au vu de leur importance stratégique, il convenait aussi de s'occuper de la possession, de la fabrication et du commerce des armes de destruction massive.

Le problème des armes nucléaires étant alors évacué, on a enfin pu se pencher à nouveau sur les principes et règles concernant la conduite des hostilités, dans le but de les « réaffirmer et de les développer ». Bien que d'abord formulées dans le Protocole additionnel I consacré aux conflits internationaux, ces règles furent ensuite complétées par des interdictions ou limitations spécifiques d'utiliser certaines armes dans le cadre de conflits armés non internationaux ; cette évolution est très généralement admise. Selon l'opinion dominante, ces règles constituent donc, aujourd'hui encore, une base juridique tout à fait adéquate pour assurer la meilleure protection possible des personnes affectées par les conflits armés, l'obstacle principal, comme l'a rappelé Walter, n'étant pas leur contenu, mais leur violation massive sur de nombreux théâtres d'hostilités.

On ne saurait toutefois se limiter à ce constat et ignorer les problèmes concrets qui se posent dans l'application, tout comme dans l'interprétation de règles dont le manque de clarté, il faut le dire, reflète parfois non pas la négligence de leurs rédacteurs, mais de véritables divergences de fond. Un très gros effort doit, dès lors, être entrepris pour clarifier ces règles à la lumière des difficultés rencontrées dans leur mise en œuvre. Le CICR, notamment, s'est employé à le faire sur plusieurs points.

Parmi ceux-ci figure en bonne place la question du statut des civils participant aux hostilités de manière occasionnelle. Le CICR s'est entouré d'experts pour chercher à répondre aux nombreuses questions soulevées par ce problème dans un « Guide interprétatif de la notion de participation directe aux hostilités ». Bien qu'elle n'ait pas clos le débat, la publication de ce Guide a permis une remarquable avancée dans la clarification de cette notion. De nombreux points furent également clarifiés par une étude d'envergure sur le DIH coutumier.

On ne saurait non plus passer sous silence l'évolution des stratégies militaires et des moyens techniques face aux problèmes nouveaux rencontrés dans la guerre urbaine. La Revue internationale de la Croix-Rouge a précisément consacré deux de ses numéros à la violence urbaine et aux nouvelles technologies de guerre. Si elles ne constituent pas un point particulier de discussion de notre Colloque, ces évolutions ne seront pas absentes de nos débats : en effet,

elles peuvent aussi bien être à la source de nouveaux problèmes qu'à l'origine de solutions innovantes dans l'application du DIH.

Mesdames et Messieurs, je ne vais pas m'étendre sur le contenu du présent Colloque car il serait malvenu de prétendre tirer des conclusions avant même d'avoir écouté les débats. Je me contenterai donc, brièvement, de vous rappeler ce qui nous attend.

La première session sera consacrée à l'identification des objectifs militaires, qui pose évidemment des problèmes particulièrement délicats dans la guerre en milieu urbain, et ce d'autant plus lorsque des biens civils sont utilisés à des fins militaires. Les conditions de la perte de protection de tels biens, leur éventuelle destruction pour des raisons militaires impératives et l'obligation de vérifier la nature militaire d'un objectif seront notamment des questions qui seront approfondies lors de cette première session.

La deuxième session s'arrêtera de manière plus précise sur les précautions qui doivent être prises dans l'attaque de villes, où le choix des méthodes et moyens utilisés peuvent avoir une incidence favorable ou défavorable considérable pour les civils. La question de l'avertissement qui doit en principe être donné à la population civile en cas d'attaques pouvant l'affecter et, plus précisément, de l'efficacité de cet avertissement sera également abordée.

D'une manière générale, que faire concrètement pour mieux protéger, contre les effets des hostilités dans les villes, les civils qui vivent dans celles-ci ? Cette question cruciale fera l'objet de la troisième session, qui réfléchira d'abord aux possibilités de tenir les zones habitées à l'écart des combats et, ensuite, si cela n'est pas possible, de déplacer les habitants. Cette session mettra également le doigt sur la spirale négative que peut engendrer l'utilisation délibérée de boucliers humains, ou la tentation pour l'adversaire de sacrifier la vie de civils au nom de la nécessité militaire. Comment éviter d'entrer dans cette spirale négative, quelles sont les obligations qui incombent à un belligérant en dépit de la violation flagrante que constitue l'utilisation par son adversaire de boucliers humains, feront partie des problèmes débattus lors de cette session.

Les sièges de ville ont été nombreux tout au long de l'histoire. Mais qu'en est-il dans le contexte urbain actuel, bien différent de celui où des soldats encerclaient des villes fortifiées, les bombardaient avec des catapultes et dressaient des échelles contre les remparts ? Lors de la Seconde guerre mondiale, le terrible et très long siège de Leningrad – actuelle Saint-Petersbourg – a marqué les esprits tant il a coûté cher à la population civile. Plus près de nous, chacun garde à l'esprit l'interminable siège de Sarajevo, sans oublier ce qu'il se passe en Syrie aujourd'hui. Si les Conventions de La Haye de 1899 et 1907 prévoient déjà l'interdiction du

pillage des villes prises d'assaut, le principe de l'évacuation des zones assiégées n'est apparu que dans le IV^{ème} Convention de Genève, toujours de manière particulièrement modeste et seulement pour les personnes les plus vulnérables. N'oublions pas non plus l'interdiction d'utiliser la famine contre les civils comme moyen de guerre, qui a été intégrée aux deux Protocoles additionnels aux Conventions de Genève. Pourtant, c'est une question plus large encore qui fera l'objet du panel qui se déroulera en fin de journée : au vu du développement des villes et de l'apparition de nombreuses mégapoles, le siège d'une ville peut-il encore être envisagé dans le respect des principes et règles du DIH ?

La seconde journée de notre Colloque débutera par une quatrième et dernière session consacrée à l'interdiction des attaques indiscriminées et de celles qui ne respectent pas le principe de proportionnalité. C'est évidemment une question particulièrement délicate pour laquelle on doit tout faire pour la clarifier davantage, notamment à travers des exemples pratiques, même s'il paraît difficilement concevable de prétendre effacer toute trace de subjectivité dans l'évaluation des critères pertinents. A cette fin, trois questions seront précisément traitées au cours de cette quatrième session. Puisque le respect du principe de proportionnalité dépend du poids respectif de deux éléments différents dans les plateaux d'une balance, il s'agit de cerner d'aussi près que possible chacun de ces éléments. On peut ainsi d'abord se demander comment définir et évaluer ce qu'est un avantage militaire dans la guerre urbaine, pour ensuite se pencher sur la question des dommages collatéraux qui doivent être pris en compte dans le second plateau de la balance. Des questions délicates telles que le statut des civils ayant participé directement aux hostilités, que j'ai précédemment évoqué, ou la durée dont on doit tenir compte pour évaluer l'ampleur de dommages collatéraux, seront abordées dans l'étude de ces deux points. Un troisième point a en outre été ajouté à cette quatrième session, à savoir le tristement actuel bombardement de zones urbaines. On peut imaginer que la définition des bombardements indiscriminés comme celle de la proportionnalité seront évoquées durant les discussions sur ce point.

Notre Colloque se terminera enfin par un panel qui se penchera sur la manière de réduire le coût humain lié à l'usage d'armes explosives dans les zones peuplées. On se demandera sûrement à cette occasion si l'usage de certaines armes qui ne sont pas totalement interdites ne devrait pas l'être en zone urbaine, à l'exemple des armes incendiaires dont, rappelons-le, l'usage à partir d'un aéronef est totalement interdit « à l'intérieur d'une concentration de civils » et dont l'usage à partir du sol n'est toléré que contre un objectif militaire qui est nettement distinct de la concentration de civils.

Comme vous pouvez le constater, nous avons beaucoup de pain sur la planche, notre Colloque soulevant nombre de questions délicates qu'il faudra aborder avec humilité, et dans un souci

de dialogue, notamment entre juristes et militaires de terrain. Que le Collège d'Europe et la délégation du CICR à Bruxelles, comme tous ceux qui ont préparé ce 16^{ème} Colloque de Bruges, soient remerciés de nous permettre, une fois de plus, d'engager un tel dialogue.

Ce faisant, restons néanmoins conscients que ce dialogue n'est possible qu'entre personnes de bonne volonté et de bonne foi. Pour ceux qui utilisent le « terrorisme » comme méthode de guerre, il ne s'agit pas de réfléchir à la manière de minimiser les dommages civils, mais au contraire, de les accroître. C'est pourquoi la réflexion engagée sur le moyen de renforcer la mise en œuvre du DIH, évoquée tout à l'heure par Walter, est d'une telle importance.

Enfin, je ne manquerai jamais de le rappeler : le DIH ne saurait être ni un oreiller de paresse, ni un alibi pour ceux qui doivent s'attaquer aux causes profondes des conflits et à leur éradication. Si notre travail a bien pour objectif premier de faire diminuer le nombre des victimes de la guerre et d'atténuer leurs souffrances, il marque également notre volonté de renforcer le respect du droit international en général et la coexistence pacifique entre les peuples.

Mais il est un peu tôt pour philosopher. Laissons maintenant place aux débats. Ceux-ci feront certainement progresser notre compréhension des problèmes évoqués et, nous l'espérons tous, émerger des solutions innovantes. Que ce Colloque soit une source d'inspiration pour tous ceux qui affrontent ces problèmes et œuvrent à leur apporter la meilleure solution possible sur le plan humanitaire.

Session 1

Identifying Military Objectives in Cities

Chairperson: **Elzbieta Mikos-Skuza**

University of Warsaw

HOW CAN MY HOME, SCHOOL OR CHURCH EVER BE A MILITARY OBJECTIVE? LOSS OF PROTECTION BY USE, PURPOSE OR LOCATION

Agnieszka Jachec-Neale

Chatham House

Résumé

Dans cette présentation, Agnieszka Jachec-Neale nous a proposé d'aborder la question de la perte de protection des biens de caractère civil, que ce soit par leur utilisation, leur nature ou leur emplacement. Il est aujourd'hui généralement admis que les hostilités conduites au sein des villes et autres zones résidentielles posent de nombreuses difficultés opérationnelles, notamment en ce qui concerne le processus de ciblage ou « targeting », dont le but est d'identifier, de sélectionner et d'établir les priorités d'attaque parmi des cibles militaires présumées légitimes. Elle a d'abord analysé en quoi le milieu urbain constitue un environnement complexe, pour ensuite se concentrer sur les difficultés liées au ciblage des infrastructures, tant de surface que souterraines. Dans sa conclusion, Agnieszka Jachec-Neale a rappelé qu'en cas de doute, un bien qui est normalement affecté à un usage civil, est présumé ne pas être utilisé en vue d'apporter une contribution effective à l'action militaire, conformément à l'article 52(3) du Premier protocole additionnel de 1977.

Introduction

It is a common and widely accepted proposition that towns, cities and other built-up residential areas pose a significant operational challenge when conducting hostilities. This is particularly true in the context of targeting, and specifically in relation to the identification of lawful targets. This paper considers some selected issues which modern warfare has brought to the forefront of the international debate. It consists of two parts. The first will look at the features of the urban landscape which are specifically relevant to combat operations. The second will provide a more comprehensive discussion of specific challenges in targeting overground and subterranean infrastructure.

1. Urban landscape

Urban terrain is a complex and dynamic domain of military operations. Its dynamic nature means it is a perpetually evolving system, in a constant state of motion. This also means that, in urban warfare, events happen far more quickly in a limited physical space than in other types of landscape. Higher temporal density occurs where there is a higher volume of activities occurring in one time unit.

Its complexity relates to its dominant features, such as a high density of population in a geographically limited space, and a plethora of mostly man-made structures which tend to obscure visibility and conceal movement. Some structures further mask other structures. In such terrain, communications may be impaired. All these features, of course, can be seen both as hindrances or advantages. The presence of civilians poses additional challenges, and so does night-time combat.

Urban combat operations may occur in different areas of the same city. Alternatively, they may occur in the same area, for example, in the same block of flats, where there can even be separate actions on three different floors at the same time. Military forces may be required to adapt their operations within a limited time and space, perhaps engaging in combat in one area while assisting sheltering civilians next door. The first armed conflict in Chechnya, for example, featured three-level ambushes in Grozny in which units of Chechen fighters carried out separate operations in the same structure. One unit would be engaged in the basement, a second unit on the first floor, while the third was securing the rooftop of the building, each unit being involved in a different task. Fighters in Grozny would engage in hostilities lasting a whole day while being separated by walls, ceilings and floors, without any visual contact at any point.

2. Challenges in the application of law to urban targeting

Any military operations in such a complex physical environment are difficult. This is particularly relevant to military targeting. Targeting is a military function by which targets are identified, selected and prioritised, and the best methods and means to pursue these tasks are devised in pursuance of military goals. Identification and acquisition of targets is information-dependent in all circumstances. The ability to obtain and communicate such information is, however, often reduced in urban warfare. This may have implications for any decision on whether to engage in an attack against a particular object, when such a prospective attack is deemed lawful. The following comments will focus on a discussion of the issues relating to overground and underground infrastructures.

a. Overground infrastructure

In the context of an overground urban landscape, the identification of lawful targets in or around high-rise buildings and multi-storey blocks of flats appears to pose particular challenges. If one flat in a block is identified as the intended target, then – given that there is enough information to determine that the flat satisfies the definition of a military objective (Article 52(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions) – the commander may consider it to be a lawful target in the circumstances ruling at the time. The question arises whether the entire block containing the intended target can be considered a military objective. Given the nature of such structures, in which individual flats cannot be physically separated from the whole structure, it is quite likely that the entire block would be considered a lawful target. It is possible to ascertain that the use of the specific flat within a block of flats that satisfies the first prong of the definition is likely to give rise to the determination that the entire structure is used to make an effective contribution to military action. As far as the principle of distinction is concerned, such a target may be deemed lawful, if its destruction or neutralisation offers a required military advantage and thus permitting the commander to consider initiating an attack subject to other legal considerations (such as proportionality, the use of appropriate weapons and precautions in attack).

Where there is insufficient information to pinpoint the exact location of the target within the structure, but there is enough information for the commander to be sure that the structure is, at least in part, being used to make an effective contribution to military action, then it is possible that the whole structure will be determined to be a military objective. A multi-storey building on its own, which is partially used for military purposes, remains a ‘specific’ military objective within the meaning of Article 51(4)(a) of Additional Protocol I. It is likely that problems will arise in respect of how such an object can be attacked, where the use of some weapons and the risk of excessive collateral damage will clearly be of concern.

Determining that an entire compound containing several independent structures is one military objective, based on unspecified information about their individual use, would be similarly questionable. As mentioned, Article 51(4)(a) of Additional Protocol I requires that the attack be directed at the ‘specific’ military objective. It would be open to debate whether a whole compound could be seen as a ‘specific’ military objective, if the information available indicated that only some individual buildings within such a compound were used for military purposes. Should there be sufficient information about which structures were indeed used towards military ends, then they become intended targets subject to legal considerations. In the case where such specific information is missing, doubt arises as to the actual use of each structure within the compound. Where there is such doubt, the requirement in Article 52(3) of Additional Protocol I – to treat the object as being presumed not to be used for military

purposes – might be relevant. It is worth observing that this does not necessarily mean that there is a doubt that the compound is not used for military purposes. This, however, becomes irrelevant because treating all individual buildings within a compound as a single military objective would likely be regarded as an indiscriminate attack under Article 51(5)(a) of Additional Protocol I.

When considering attacks against high-rise or complex structures in urban operations, the information and intelligence obtained about the intended target will play a crucial role in establishing the *prima facie* lawfulness of the attacks as far as the principle of distinction is concerned. The intended target has to be identifiable as *specific, separated and distinct* from other potential targets. A single flat in a block cannot exist on its own. It is a part of one bigger object, unlike clearly detached buildings located within one compound. Accordingly, a block of flats can be regarded as a single military objective, whilst the compound as a whole would fail such a determination.

b. Subterranean infrastructure

Underground structures which are exploited during urban combat operations include a variety of objects such as subways and cellars, and tunnels for sewage and other utilities. I shall reflect here on the use of tunnels for military purposes. The use of tunnels is not new; one may recall the often overlooked practice of fighting in multi-level tunnels during the First World War. In recent years, underground passages have been extensively used in conflicts in Libya, Gaza, Syria and Iraq. In 2014, Islamic fighters claimed they had mined a half-mile tunnel under the *Wadi Deif* base, used by the Syrian army. Underground passages are used to facilitate the transport of weapons and other war materiel, to hide and move fighters, as venues for launching clandestine incursions, as escape routes, and to transport captured enemy soldiers. Fighters may utilise existing structures, or construct new tunnels. The majority of such structures, akin to overground lines of communication, would be considered as dual use, i.e. serving both civilian and military purposes. Example of such infrastructure could be some of the tunnels linking Gaza to Egypt territory. Caution is advised, though, in regards to commercial tunnels created by private consortia in Gaza and used entirely for civilian purposes; such objects would be unlikely to satisfy the requirements of the definition as military objectives. In certain circumstances, a concrete tunnel, constructed and used solely and in any circumstance for military purposes, would satisfy the ‘nature’ condition of the first prong of the definition of military objective. Hamas-constructed tunnels leading to Israel territory could be regarded as examples of such objects. Their targeting would nevertheless require ensuring the reminder of targeting rules being complied with in a satisfactory manner.

There are two aspects of tunnel warfare which deserve comment. First, one may ask whether factories producing materials used to construct such structures could be considered to be military objectives. The answer will depend on the type of material. If the question concerns a specific type of concrete support (such as arches or semi-arches), specially produced by the cement plant in question, then it is possible that the plant could be considered to be effectively contributing to military action through the production of very specific structures which enable the construction of the tunnels. One may make a comparison with ball-bearing factories. If the cement plant produced only ready-mixed cement, which could be used in the construction of any tunnels and houses, then the necessary connection between military action and the factory's production would be hard to find.

Another issue concerns any buildings located over the tunnel. These include the buildings concealing exits and entrances. Whether or not such structures can be considered integral parts of the tunnel is a matter of debate. In my view, the buildings merely shield a tunnel's exits and entrances, without becoming part of the tunnel. It is possible, though, that such concealment can be viewed as effectively contributing to military action through the 'location' criterion, as well as 'use' or 'purpose'. Their destruction, resulting in damage to the tunnel, or even just exposing the entrance or exit, could be seen as yielding a definite military advantage. However, it has been argued that the permanent destruction of the houses above tunnels may be unjustified. This may be resolved by using means and methods which make the tunnels unusable without causing extensive surface damage. Examples include filling up tunnel exits with cement, or using ground-penetrating radar to trace the tunnels.

Conclusions

In conclusion, the right amount of the right kind of information will be an underlying factor in determining whether an object effectively contributes to military action. If such information is not available, causing doubt to arise, then there will be a consequent presumption of civilian character in respect of certain objects normally regarded as civilian, such as residential houses. The loss of protection of civilian status will be contextual and temporary which, in urban warfare, means a faster and much more intense tempo of changes in circumstances, significantly affecting the legal assessment of targets.

CAN A CIVILIAN OBJECT THAT HAS LOST ITS PROTECTION AGAINST DIRECT ATTACK BE DESTROYED FOR IMPERATIVE MILITARY REASONS?

Nobuo Hayashi

International Law and Policy Institute

Résumé

« Un bien de caractère civil qui a perdu sa protection contre les attaques directes peut-il être détruit pour d'impérieuses nécessités militaires ? » est la question à laquelle Nobuo Hayashi a tenté de répondre dans l'analyse qui suit, en se fondant sur l'article 23(g) de la Convention IV de La Haye de 1907 et les articles 52(2) et 54 du Premier protocole additionnel de 1977 aux Conventions de Genève. A première vue, un bien à caractère civil ayant perdu sa protection contre les attaques directes est ipso facto susceptible d'être détruit sur base d'impérieuses nécessités militaires. Mais l'auteur a démontré que des nuances existent, aussi bien au niveau de certains concepts, tels que l'attaque et la destruction ou encore l'objectif, l'avantage et la nécessité militaires, qu'au niveau des relations que les parties au conflit entretiennent vis-à-vis de leurs propres biens ou des biens appartenant à la partie adverse.

Introduction

It is my pleasure to share with you today some of my reflections on the treatment of objects under International Humanitarian Law (IHL) in the context of urban warfare. The question that I have been given for this presentation is: 'Can a civilian object that has lost its protection against attacks be destroyed for imperative military necessity?'

At first sight, 'yes' may come across as the most straightforward answer. Surely, where an object is susceptible to attacks, it must *ipso facto* be susceptible to destruction on account of imperative military necessity. As we shall see shortly, there is a grain of truth in this answer. It's only a grain, however, and quite a bit of nuances and complexities are lost along the way.

What I propose to do together here, is to explore some of those nuances and complexities that characterise the manner in which IHL treats objects in hostilities.

I will endeavour to highlight two things in particular. First, behind a small and familiar set of applicable IHL provisions lies an intricate web of notions that need to be carefully disentangled. Second, we should approach the treatment of objects under IHL by looking at how they relate to the parties to the conflict.

1. Applicable rules

There are three well-known IHL provisions that govern the matter. They are: Article 23(g) of the 1907 Hague Regulations, Article 52(2) and Article 54 of the 1977 First Additional Protocol.

2. Unscrambling intertwined notions

Let us first sort out several key concepts. I wish to shed some light on the following distinctions:

i. Attack v. destruction

The first distinction concerns the act of ‘attacking’ an object v. the act of ‘destroying’ an object.

Article 49(1) of Additional Protocol I defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or in defence.’ In contrast, there is no formal definition of ‘destruction’ under IHL.

You would agree that the two notions are clearly interrelated. In active combat, the destruction of an object typically takes the form of an attack against it, or an attack against some other objects located in its vicinity. Similarly, when an object becomes the target of an attack, this attack often results in that object being totally or partially destroyed.

This, however, does not mean that attack entails destruction, or vice versa. The truth is quite the contrary. To begin with, not every attack necessarily involves the destruction of its target. The use of graphite filaments over electrical power stations during the 1999 Kosovo campaign, and the reported use of electromagnetic pulse as a weapon against Iraq’s satellite TV network in 2003, are among the examples. To this, one may also add certain types of cyber-attacks that disrupt and disable services.

Even if the attacker intends to destroy an object, the attack does not always cause its destruction or damage. Thus, for instance, the ordnance may simply fail to detonate; the target may move sufficiently away from the area of impact to escape or withstand the blast; an undersupplied mortar battery may exhaust its rounds without hitting the target. Plainly, if an attack is launched against an object, and if the object survives the attack, this does not mean that no attack has taken place at all.

In this connection, Article 8(2)(b), sub-paragraphs (ii) and (iv), of the Rome Statute may be briefly mentioned. They respectively designate as war crimes ‘intentionally directing attacks’ against civilian objects, and ‘intentionally launching an attack in the knowledge’ of clearly

excessive incidental damage. Significantly, neither the Statute itself nor its accompanying Elements of Crimes document requires any particular consequence to follow the attack. The International Criminal Tribunal for the former Yugoslavia (ICTY) dealt with unlawful attack charges very differently. In *Galić* and *Milošević* (Dragomir, that is), the tribunal ruled that the war crime of unlawful attacks on civilian persons requires showing that the attacks caused death or serious injury.

Nor, for that matter, does destroying an object always mean attacking it. Let me give you an example. In 1944, the port city of Brest in Bretagne experienced fierce urban fighting between German occupiers and Allied forces. Allied combat engineers blew holes in the walls of adjacent buildings to enable infantry units to advance without exposing themselves to enemy fire on the street. One might say that Allied soldiers ‘destroyed’ French property, but it would be odd to call it an ‘attack.’

Perhaps we may rephrase the difference between the two notions as follows: ‘destruction’ refers strictly to the act itself, i.e., what one does to the object; ‘attack,’ on the other hand, not only refers to the act itself, but also points to the existence of an entity that it is intended to harm in some direct way.

For the most part, the entity at issue is one’s adversary, as Article 49(1) of Additional Protocol I suggests. This is not true in some cases, e.g. where the attacker deliberately targets civilians or civilian objects as such. The International Committee of the Red Cross (ICRC)’s 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities also speaks of ‘inflict[ing] death, injury, or destruction on persons or objects protected against direct attack.’

ii. Military objective v. military advantage v. military necessity

The second group of notions in need of disentanglement is a threesome, as it were. They are: military objective, military advantage, and military necessity.

It should not be too hard for us to distinguish between military objective and military necessity. In essence, military objective pertains to objects, whereas military necessity pertains to conduct. Simple as it sounds, this distinction is something that several ICTY judgments (*Strugar*, *Brđanin*) and some international criminal lawyers have missed.

Let us look at Article 52(2) of Additional Protocol I. It gives us perhaps the most widely accepted, two-prong definition of a military objective. Besides the plain text, we should take note of two things. One is that there is nothing in the definition that requires an object to belong to the attacker’s adversary. As will be seen below, it is not inconceivable for a party

to attack its 'own' object, as long as it constitutes a military objective at the time. The other thing is what it means for an object to constitute a military objective: the object's status as a military objective justifies attacks being directed against it.

Now, compare this with the notion of military necessity. Look at Article 23(g) of the Hague Regulations. According to this provision, as well as several others, an object's destruction is justified if it – the destruction, not the object – is imperatively demanded by military necessity. There are also various kinds of conduct that one can justify under IHL if required by military necessity.

I have argued elsewhere that, in positive IHL, military necessity functions as an exception that releases an act from specific rules prescribing contrary action, to the extent that the act is required for the attainment of a military purpose and otherwise in conformity with IHL. This definition contains four cumulative elements.

First, the act must be made primarily for some specific military purpose. Second, the act must be required for the purpose's attainment. Third, the purpose must be in conformity with IHL. Fourth, the act itself must otherwise be in conformity with IHL.

The second element – that of 'requirement' – can be further divided into three parts: (1) the act must be materially relevant to the purpose's attainment; (2) of those materially relevant and reasonably available courses of action, the act in question must be the least injurious; and (3) the harm caused by the act must not be disproportionate to the gain achieved by it.

If not, or no longer, in fulfilment of these elements and requirements, an act becomes militarily unnecessary. The principal rule now governs this militarily unnecessary act. And it is this principal rule that renders the act unlawful.

Telling military advantage and military necessity apart is hard. It has sometimes been suggested that the difference is one of degrees. Thus, military necessity involves the act being 'indispensable,' whereas military advantage encompasses indispensability as well as mere gain, superiority, or expediency. Personally, I am not convinced by this line of reasoning. I do not think that *conditio sine qua non*, also known as 'but-for' causation, really characterises military necessity.

Could it be that military advantage compares the belligerent's position *vis-à-vis* that of its adversary, but military necessity does not? Here, too, I am not entirely sure that military advantage can be understood without reference to comparisons between the parties.

In my view, the clearest difference between the two notions lies in what they do as legal concepts. Unlike Article 23(g) of the Hague Regulations and others that specifically admit military necessity as an exception, no rule of positive IHL admits military advantage or convenience as an exception. Rather, military advantage is part of the definition of military objectives, and a component of the proportionality requirement in attacks.

3. Relationship between objects and Parties to the conflict

With these clarifications in mind, we can now look deeper into how IHL regulates the relationship between objects and warring parties. In the interest of analytical focus, I wish to enter three disclaimers here.

First, we will not specifically discuss works and installations containing dangerous forces, the natural environment, cultural property, and such equipment and materiel as may be specially protected under IHL.

Second, let us look strictly at objects in relation to opposing parties rather than, for instance, in relation to neutral powers and peacekeeping missions.

Third, let us proceed on the assumption that an international armed conflict is taking place and that Additional Protocol I applies to it.

i. Party to the conflict and its 'own' objects

The first relationship of interest to us is that of a Party to the conflict *vis-à-vis* its 'own' objects.

It may appear intuitive to many of us that a Party can 'destroy' its own objects but not really 'attack' them. After all, 'attacks' are by definition acts of violence 'against the adversary'.

In most cases, such an intuition has a point. Nevertheless, we saw earlier that Article 52(2) of Additional Protocol I does not necessarily require eligible objects to belong to one's adversary. For instance, one's 'own' object may happen to be located in enemy-held territory. Your adversary may also have commandeered one of your objects and use it against you. In such cases, an object, by its 'location,' 'use,' or both, may very well make an effective contribution to military action, and its destruction, capture or neutralisation, in the circumstances ruling at the time, may very well offer a definite military advantage.

It would therefore make sense to speak of one Party ‘attacking’ its own objects, as long as these objects constitute military objectives at the time and the Party in question is thereby directing violence against its adversary. The legality of such attacks would in turn depend on whether they comply with the precautionary and proportionality principles.

What about one Party ‘destroying’ its own objects? It is clear that Article 23(g) of the Hague Regulations does not apply here. It specifically prohibits the destruction and seizure of *enemy* property; it says nothing about one’s own property.

It is also apparent that Article 54(2) of Additional Protocol I applies to all relevant objects, including one’s own, wherever they are. Thus, a Party is forbidden to destroy its own objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population or its adversary their sustenance value.

We should take careful note of the expression ‘for the specific purpose’ here. Arguably, this article does not prohibit the destruction of the same indispensable objects for some other purposes. The *travaux préparatoires* indicate:

‘[B]ombarding an area to prevent the advance through it of an enemy is permissible, whether or not the area produces food, but the deliberate destruction of food-producing areas in order to prevent the enemy from growing food on them is forbidden. Similarly, destroying a field of crops in order to clear a field for fire or to prevent the enemy using it for cover is permissible, but destroying it to prevent the enemy from consuming the crops is forbidden.’

Furthermore, we need to look at Article 54’s paragraphs (3) and (5). As you can see, these paragraphs indicate that this qualified prohibition is subject to two exceptions. One is where the objects are used by the adversary in one of the two ways specified in paragraph (3). Sub-paragraph (a) is said to encompass foodstuffs, agricultural areas producing foodstuffs, crops, livestock and supplies of drinking water; sub-paragraph (b) is understood to cover all of these things, plus drinking water installations and irrigation works.

The other exception is where the objects at issue are located in the Party’s own territory under its own control and where their destruction is required by imperative military necessity. Professor Dinstein has suggested that the burning of crops in Ukraine by the Red Army in retreat during the early phases of World War II (but not the German retreat from the same territory later) would be a case in point.

This exception under paragraph (5) is unavailable for objects that are not located in one's own territory under one's own control.

Positive IHL is silent on the destruction of one's own objects in other situations. One may recall the Brest-like scenarios of close-quarter combat mentioned earlier. Another illustrative example in this regard would be the demolition of wooden houses in large cities throughout war-time Japan with a view to creating fire containment corridors ahead of Allied strategic bombings.

ii. Party to the conflict and objects that are not its own

The second relationship of interest to us is that between a Party to the conflict and objects that are not its own.

Whether the Party can lawfully attack these objects depends on whether they constitute military objectives. It would also matter whether the precautionary and proportionality principles are observed.

Where attacking enemy property takes the form of destroying it, Article 23(g) of the Hague Regulations comes into play, at least formally. I have argued elsewhere, however, that a lawful attack would *ipso facto* mean that the resultant destruction was militarily necessary. Conversely, an unlawful attack would *ipso facto* mean that the resultant destruction was militarily unnecessary.

Such is likely to be the situation for the most part, especially in urban warfare. There can nevertheless be instances of property destruction, even during combat, that do not easily fit the definition of 'attacks' within the meaning of Article 49(1). Consider, for example, demolishing and rearranging enemy property in order to fortify a command post in anticipation of a counter-offensive, or razing structures to the ground with a view to denying enemy cover.

These actions are subject to Article 23(g) of the Hague Regulations and Article 54 of Additional Protocol I. Article 23(g) is generally understood to regulate the conduct of hostilities, but it has occasionally been applied to situations of belligerent occupation. In the *Rendulic* case, for instance, this article formed the basis on which the German occupying forces were justified in resorting to a scorched earth policy while retreating from northern Norway on account of perceived military necessity. This justification is no longer available, as it is now limited under Article 54(5) of Additional Protocol I to Parties scorching their own territory that they themselves control.

Be that as it may, Article 23(g) principally bans all destructions of enemy property. It then limits lawful exceptions to those imperatively demanded by military necessity. To this already narrow window, Article 54(2) effectively adds an extra layer of restrictions – anxious as it is to prohibit the starvation of civilians as a method of warfare. Thus, it is now forbidden to destroy enemy objects, even if it is militarily necessary to do so, insofar as they are indispensable to the survival of the civilian population for the specified purpose, unless these objects fall under Article 54(3) sub-paragraph (a) or (b).

Conclusion

The relationship between an object and a party to the conflict can be tenuous, especially in the context of urban fighting. This difficulty is not confined to objects, however. On the contrary, IHL approaches other aspects of fighting in built-up areas, such as the treatment of persons, in a similar fashion.

What we face is therefore a common challenge. How effectively can we determine an object's IHL status and treat it accordingly? How can we do so, amid the highly fluid situation of urban warfare where the information available to us is often incomplete, fragmented, and contradictory?

I will leave these as well as other daunting questions for further discussion over the course of today and tomorrow by my fellow speakers, to whom I defer for the time being.

THE OBLIGATION TO TAKE ALL FEASIBLE PRECAUTIONS TO VERIFY THAT A TARGET IS A MILITARY OBJECTIVE WHEN USING INDIRECT FIRE IN URBAN AREAS

Colonel Charles Barnett

Army Legal Services, British Army

Résumé

En acceptant d'analyser la question relative à l'obligation de prendre toutes les précautions pratiquement possibles afin de vérifier que les cibles sont des objectifs militaires en cas d'utilisation d'engins de tir indirect en zone urbaine, le Colonel Charles Barnett nous a proposé une présentation exhaustive et concrète du processus de ciblage, ou « targeting », tel que pratiqué par l'armée britannique. Il a débuté par une précision sur le principe de « nécessité militaire », selon lequel seuls le degré et le type de force strictement requis sont autorisés pour atteindre le but légitime du conflit – à savoir la soumission partielle ou complète de l'ennemi le plus tôt possible avec le coût minimum en vies humaines – en insistant sur le fait que ce principe implique également de limiter le gaspillage des moyens militaires engagés. Il a ensuite abordé un certain nombre de thèmes, tels que le rôle et la composition du « Targeting Board », les règles de légitime défense, le processus de ciblage lors des opérations menées par les coalitions internationales, le principe de précaution, ou encore la nécessité d'assurer la mise en place d'une enquête transparente en cas de violation du droit. Le Colonel Charles Barnett a conclu en soulignant le caractère fondamental de toutes les précautions à prendre dans le processus de ciblage, afin d'assurer le respect des principes d'humanité, de distinction, et de proportionnalité lors d'opérations militaires – d'autant plus lorsqu'elles se déroulent en milieu urbain.

Preliminary remarks

From a military perspective, verifying that a proposed target is a military objective and conforms to the full application of the laws of armed conflict is a very complex process and I will not be going through that complexity.

However, it does often surprise those who are introduced to the targeting process and the assessments that are made by “modern militaries” – I use this expression because it is clear that other militaries do not have the resources or available tools that the United Kingdom (UK) does – and how much care and attention is taken to ensure full compliance with the law. However, it must be recognised that the process involves a balance between humanity and military necessity. As military officers, we do not shy away from the fact that when there is

conflict, there is fighting; when there is fighting, there is dying. And when there is dying, the dying is not always done by people in uniform, but can involve ‘collateral damage’; collateral damage – which involves death, injuries and harm suffered by civilians and civilian objects – can be considered as lawful as long as it does not outweigh the anticipated military advantage or contravene the law.

My presentation is going to cover a number of areas, including the targeting authorisation and targeting procedures, self-defence, precautions in attack and direct participation in hostilities. I have deliberately included this broad consideration of issues because they are directly linked to the obligation to verify that a target is a valid military objective. Before I conclude, I am also going to deal with the complexities caused by coalition operations and the obligation to conduct investigations.

Introduction

The use of lethal force in populated areas, as elsewhere, is clearly governed by the law of armed conflict. The policy of the UK Ministry of Defence on this is entirely consistent with our obligations under international law. We have ratified Additional Protocol I to the Geneva Conventions and in non-international armed conflicts, where the treaty rules are less extensive, we apply the targeting rules contained in that particular Protocol, whose principles of course apply as a matter of customary international law. These rules state that only military objectives may be attacked and that such attacks must be discriminate, proportionate and necessary (Article 52(2) Additional Protocol I).

I would like to make a point on the issue of necessity: indeed, military necessity to achieve the objective is strongly aligned with the obligation to prevent unnecessary suffering. Military necessity will include consideration of which effect will achieve the objective and seek to avoid excessive use of limited military resources. So commanders will use only those effects necessary to achieve their objective and in doing so will operate in a way which avoids unnecessary suffering and which minimises collateral damage. It is therefore incumbent upon all our personnel involved in the targeting process to ensure that neither civilians nor civilian objects (Article 52 Additional Protocol I) are targeted and that every effort is made to avoid, or to minimise as far as possible, civilian casualties and damage to civilian objects. Failure to do so would simply prolong the conflict, especially when operating in urban areas.

1. The authorisation

The nature and scale of the operation will determine at what level target approval authority is held. In certain circumstances, our Ministers may wish to retain control over targeting decisions. This is more likely to occur in the earliest stages of any conflict than in other circum-

stances and in more mature operations; approval for clearance to engage may be delegated down to commanders at lower levels of the chain of command.

Historically, the highest level of clearance in the initial stage has been required when targeting: a) strategic facilities; b) non-military facilities that are being used solely for military purposes or 'dual-use' facilities; c) when attacking targets that might result in high levels of collateral damage and/or the release of chemical, biological, radiological or nuclear materials and other forces; and d) where there are differences of opinion between coalition partners over target selection because, as you will see, coalition operations are extraordinarily complex.

2. The targeting procedures

Those targets, where the immediate actions of the enemy are not imminently threatening forces of the UK or coalition partners, must be cleared by a formal Targeting Board. This is a complex process which, as I mentioned, I am not going to go through – not least because of its classification. Typically, the Board will consist of a qualified 'targeteer' (an expert in targeting), an intelligence officer, the operational staff, political advisers (for the policy and political input) and most importantly, the legal adviser.

At the very least, those delegated with authority to clear targets must have access at all times to legal and targeting advice. To that end, the legal adviser is one of the commander's principal staff officers, and has a key role in campaign planning and execution. For the UK, most deployed formations of brigade size and above will have at least one dedicated legal adviser. This is also often the case for smaller formations.

To verify a valid military objective, the Targeting Board will:

- Consider all the 'available' intelligence related to the target;
- Consider the 'likely' effect of the attack on civilians and civilian objects – 'likely' is the consideration of the anticipated effect, and not the actual effect after the attack;
- Consider the risks and consequences of incurring unintended effects, by paying consideration to what is or should be foreseeable;
- Ensure that the law of armed conflict and its principles are applied;
- Ensure that the target can be attacked within the commander's delegated authority and by meeting the superior commander's intent;
- Ensure that the technical aspects of weapons delivery meet the required standards – it is often referred to as 'weaponneering', or the selection of weapons which ensures compliance with the strategic direction and with the law of armed conflict principles to the best extent. An obvious example of that is the use of precision-guided munitions.

Deliberate targets such as infrastructure and dynamic or time-sensitive targets, such as known persons who are not yet located in the battle space, are all cleared as military objectives by a formal Targeting Board. They are then put on a targeting list.

In accordance with his legal responsibilities regarding the law of armed conflict, the commander is required to do a 'collateral damage estimate'. There is an existing methodology. However, whether this is a formal or informal process in any particular situation will be a matter of policy. The formal process is likely to include the use of modelling, maps and other information from all available sources, whereas the informal process is generally a visual appreciation of what is about to take place. The principles must be equally applicable to the complex world of high intensity, highly sophisticated operations, as well as operations of lower sophistication where individual soldiers may be making decisions. The considerations are the same: they must assess the expectation of collateral damage on surrounding objects and the potential for civilian casualties and damage to civilian objects. In this way, they will be able to determine whether an attack will be proportionate or not.

Different operations will, as a matter of policy, have different thresholds of civilian casualties, though policy will always require the minimising of civilian casualties and may require no civilian casualties. For example, in urban areas in the framework of a counter-insurgency situation, 'winning the hearts and minds' of the civilian population will be of paramount importance and policy will dictate a very low civilian casualty threshold. However, if a war is one of necessity or national survival, then larger collateral risks may well be more acceptable. If after having conducted his collateral damage estimation, the commander considers that the number of anticipated civilian casualties is beyond his authority, he will be obliged to refer the matter up to the next level for a decision. Thereafter, notwithstanding the commander's decision, the weapons operator remains under a responsibility, at all times, to continue to consider precautions in attack until the engagement is complete.

3. Self-defence

However, our recent experience of hybrid conflicts shows that our forces need to understand not only the laws of armed conflict but also the rules in relation to our domestic laws concerning self-defence. We have observed that around 90 percent of engagements in Afghanistan were in accordance with the rules of self-defence, and were not deliberate or pre-planned targets. This constitutes a high level of defensive activity based on the UK rules on self-defence, which complies with UK domestic criminal law. These rules do not require us to undertake a 'proportionality assessment' (in law of armed conflict terms) because of the time imperative and immediate threat to life. Rather, the armed forces must ensure that the use of lethal force is both necessary to negate the immediate threat to life and is reasonable and proportionate

(in domestic legal terms) to the threat faced. So when deciding whether or not to use self-defence, there will not be a collateral damage threshold to consider. Instead, when acting in collective self-defence, our individual soldiers and our commanders are taught to take all reasonable precautions not to injure anyone other than the target. Indeed, very often, our troops are required to and do take more risks than may perhaps be legally necessary in order to protect civilians.

4. Precautions in attack

Our planners and operators must take constant care to ensure that they take all feasible precautions to minimise incidental loss of civilian life, injury to civilians and damage to civilian objects. It is an essential exercise in balancing the often conflicting interests of military necessity with humanitarian protection.

Given our obligations under Additional Protocol I, our commanders must do what is ‘practically’ possible – in the circumstances relevant at the time they face them, and not with the benefit of hindsight – to confirm that the target is a military objective and to take all feasible precautions in the choice of means and methods of attack. Furthermore, they must also suspend or cancel the attack if it becomes apparent that the target is not a military objective; or the target no longer constitutes a valid military objective; or the target is subject to special protection; and / or the attack is going to violate the rule of proportionality.

This process enables commanders to identify whether something is a valid military objective or not. However, a continuing assessment of whether it remains a valid target is also required. If it does not, or in the case of any doubt, the armed forces will not attack.

In situations where the enemy operates in and amongst the civilian population, the proportionality rule must still be considered. Furthermore, under our interpretation of the rules relating to precautions in attack, the commander is required to bear in mind the effect on the civilian population of what he is planning to do and to take steps to reduce that effect as much as possible. Where there is a choice between different military objectives – whose attack will yield the same military advantage – the commander should choose the one which is expected to cause the least incidental damage.

We are also required to consider what we call the ‘effects-based approach’ and alternative means and methods of warfare in order to achieve the military objective. When the objective has been verified and is being targeted as a military objective, the UK’s targeting policy recognises the need – and the importance – of coordination, not only of fires, but also of influence activities and other actions which may produce the desired effect, such as psychological

and media operations. Modern smart weaponry has increased the options available to the military planner in urban areas. However, commanders need to assess not only what feasible precautions can be taken to minimise incidental loss, but also to make a comparison between different methods of conducting operations, so as to be able to choose the least damaging method compatible with military success. It will always remain a matter of fact and military judgement whether alternative methods of attacks are practically possible and will reduce the collateral risks.

The context of some operations may offer opportunities to use these non-kinetic influence activities to achieve the same effect as kinetic targeting. Against the imperative for proportionality and humanity, if pacific coercion can achieve the manipulation of opposing forces for the same military advantage, it should be considered and resourced. High intensity bespoke psychological messaging of both combatant and civilian audiences are one example. At its height, influence activity could achieve the surrender of opposing elements with an absolute minimum or even the absence of any kinetic activity.

Yet, the proportionality principle and the principles in terms of identification of a valid military objective do not require armed forces to accept increased risk. Rather, it requires commanders to refrain from attacks that may be expected to cause excessive collateral damage. Whilst commanders may be able to use force legally, they may nevertheless choose not to do so – especially in counter-insurgency campaigns – when longer term aims may take precedence over short term gains, especially when it comes to winning over the civilian population.

5. Direct participation in hostilities

In modern, complex, urban operating environments, it can be very difficult to determine whether or not someone is a member of an organised armed group or a civilian taking a direct part in hostilities. The situation will be determined by the facts, taking into account the current operational situation and an assessment of a number of important factors, supported by the available intelligence. It is important to underline that intelligence made available to commanders must be relevant, timely, from multiple sources and provide reliable corroborating information/evidence. This enables the commander to assess and balance the requirements to achieve military success with a clear understanding of any likely and collateral damage.

Legal advisers must always review intelligence with the following in mind: is it credible? Is it reliable? Is it subject to corroboration? Is it up-to-date? In the end, they must be satisfied that they can rely upon the intelligence on which they are basing their assessment. There is of course the intelligence / evidence debate: indeed, we are talking about intelligence and not evidence, and it is not necessarily perfect. But great efforts are made to ensure that we answer

those questions positively. Legal advisers will play a central role in advising the commander whether there is sufficient information to conclude that a civilian is directly participating in hostilities. The decision to proceed is a matter for the judgement and discretion of the commander, based on his assessment of all the information which is reasonably available at the relevant time – the ‘relevant time’ being the time at which he makes the decision, and not after the event. But ultimately, the commander remains responsible and must satisfy himself/herself that the intended target is a valid military objective. In order to be able to comply with the law of armed conflict, they need to know in advance with certainty and clarity what the legal framework is.

6. Coalition operations

Multinational operations create additional levels of complexity for UK personnel, especially where there is a joint targeting list or a joint targeting cell. Friction can be overcome if those working together agree that where there is contradiction or confusion between respective rules of engagement, the most restrictive criteria must apply. The situation will also be easier if coalition partners are able to accept that sufficient national scrutiny has taken place in relation to target nominations. In order to achieve this in the framework of a coalition operation, the UK will place its own personnel at each level of the target nomination process, to ensure compliance with UK policy and legal obligations.

That said, it is not always straightforward: if target lists are not shared until the majority of target development work has been completed, it may result in coalition partners having very little time to assess the target selection and identify areas of concern. Sometimes, it can be very difficult to confirm that the targets meet each coalition partner’s definition of military objective and their collateral damage criteria. Yet, it must be kept in mind that ultimately the UK targeting staff remains responsible for ensuring that targets assigned to UK assets fully comply with the UK’s political, legal and military direction and obligations.

Last but not least, coalition interoperability issues can arise, even at the lowest level. An example is actions in self-defence in a non-international armed conflict. In this situation UK forces may only open fire under self-defence against a person if that person is committing or about to commit an act likely to endanger human life, and there is no other way to prevent that danger. However, as you may be aware, the United States (US) – with whom we have often partnered – has a wider definition of self-defence. If the UK are asked to provide lethal fires in support of US forces, UK armed forces must ensure that they meet the UK’s definition before engaging.

7. Investigations

How do we ensure compliance with the rules of the law of armed conflict? This is done through training, implementation of doctrine and procedures and accountability. When things go wrong, it is important that transparent and effective investigations are carried out as soon as possible.

The UK armed forces, like many armed forces, are no strangers to scrutiny over how the UK conducts its own investigations into allegations that UK forces have breached the law of armed conflict. Following cases in the European Court of Human Rights (ECtHR), the UK enacted the 2006 Armed Forces Act. The Act, in its Section 113, requires a commanding officer to alert the independent Service Police if he/she is aware that offences such as murder, manslaughter, grave breaches of the Geneva Conventions and offences under Section 51 or 52 of the International Criminal Court Act 2001¹ may have been committed. Under Section 116 (4), the Service Police is not permitted to dispose of such cases without consulting with the civilian Director of the independent Service Prosecutions Authority.

Despite these statutory safeguards, the UK's investigative procedures have been criticised by the ECtHR². More recently, the *Al-Sweady* public inquiry³ has made comments on the UK's post-incident fact-finding and investigation process. The inquiry has said that the UK's procedures may still be deficient in a number of areas, principally because of the significant decision-making power granted to the commanding officer who, they say, lacks sufficient independence and impartiality. The current position affords the commanding officer discretion not to inform the Service Police, where there is no known breach of the law or rules of engagement. For example, if the commanding officer considers that only positively identified enemy forces have been killed or injured, and that there are no grounds to suggest that civilians may have been killed or injured as a result of the attack, the commanding officer does not need to refer the matter to the Service Police. The *Al-Sweady* inquiry was also concerned that the time frame for fact-finding and initial assessment has the potential to frustrate a prompt investigation by the independent Service Police. The inquiry has made nine recommendations, one of which relates to serious incident investigations. Recommendation 4 states that

'A shooting incident policy should be drafted which is achievable in theatre, which is compliant with Article 2 of the European Convention on Human Rights [ECHR] and which

1 Section 51 (1) of the International Criminal Court Act 2001: 'It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime'.

2 For more information, see *Al-Skeini and others v. The United Kingdom* (2011).

3 The *Al-Sweady* public inquiry considered allegations that Iraqi nationals were detained after a fire-fight with British soldiers in Iraq in 2004 and unlawfully killed at a British camp (i.e. Camp Abu Naji).

enables the ascertainment of the relevant facts leading up to, during and consequent upon the Shooting Incident by an independent body such as the Royal Military Police within a time limited but reasonable period after the Shooting Incident’.

UK policy requires that a serious incident report be produced in respect of every incident where shots or munitions employed by UK’s conventional forces are known to have resulted in death or injury. The report must detail the type of evidence and information that should be collated and also gives instruction to the commanding officer in relation to whether further investigation is required and gives the following guidance:

- The commanding officer is permitted to take no further action in the event that he considers that only positively identified enemy forces have been killed or injured and there are no grounds to suggest that civilians may have been killed or injured as a result of the action of UK forces (or that there has been a breach of law or the rules of engagement).
- The commanding officer must initiate a Shooting Incident Review in circumstances where it appears that civilians may have been killed or injured by UK Forces (or those operating under the UK’s command) but where information suggests that they acted lawfully in accordance with the Rules of Engagement. There are time limits on the Shooting Incident Review, which is to be completed within 48 hours and forwarded to the relevant Higher Authority within 14 days of completion. Before a proposal not to conduct any further investigation is authorised, the Force Provost Marshall must be consulted. Contrary to the views of the Higher Authority, they are able to decide that the matter is in fact to be subject to investigation.
- In all other circumstances, the commanding officer must inform the Service Police within 24 hours. In some circumstances where a Shooting Incident Review has taken place, the incident will be referred to the Service Police for investigation.

Accountability and the requirement to conduct timely, transparent, thorough and effective investigations is an important legal obligation and re-enforces the obligation to take all feasible precautions to verify that a target is a valid military objective. This also explains why the targeting procedures to achieve this are extensive and comprehensive.

Practically speaking, whether it is possible to conduct a Service Police investigation into every UK targeting incident resulting in death or injury, particularly in highly kinetic environments or potentially complex urban situations, remains to be seen. However, we must strive to fulfil the obligation and do everything that is reasonably practicable.

Conclusion

It is imperative to take all reasonable precautions to verify targets as a military objective in order to ensure that the principles of humanity, distinction and proportionality are properly satisfied when conducting military operations. This obligation is only heightened in the extremely complex nature of urban operations where greater care to ensure compliance is required. Failure to do so runs contrary to military necessity, which has the aim of achieving the military objective with the minimum force required as soon as possible. Failure to comply with the principles of IHL will simply exacerbate conflict and prolong the misery and anguish caused by conflict.

SESSION 1 – IDENTIFYING MILITARY OBJECTIVES IN CITIES

Following these three presentations, the audience raised questions on the following main issues:

1. The targeting of overground and underground infrastructures in urban areas

A participant shared two comments with regard to urban targeting. In his opinion, when an entire building may be taken down, the attack is not only affected by the uncertainty regarding where the military action is taking place in the construction, notably in circumstances where there are several places or flats in the same building used for military purposes. Concerning the example given by the panellist, several floors were used and it was impossible to target them without making the whole building collapse. In such circumstances, the damage to civilian property inside the building must be systematically taken into account because such an action may not be proportionate in some circumstances. Secondly, in the case where a house above a tunnel may be attacked, but the latter has no entry or exit inside the house itself, the house is not regarded as a target but only the tunnel beneath. If one finds out where the tunnel is going and a place where there is no house above it, that particular place will be targeted. Nonetheless, in many cases, you simply do not know and there is the option of going through the house to reach the tunnel. In any case, the military objective in such a context is the tunnel itself and not the house above it.

In respect of tunnels and houses overground, the panellist stressed that if the military objective is actually the tunnel, then perhaps, one could consider using different methods than going through the house and bombing it to destroy the tunnel. For example, using radar devices to identify entrances and exits of tunnel structures, as well as filling the entrances and, therefore, sealing off access to it, might be conceivable options.

2. The destruction of military objectives

A participant raised a question as to whether it is possible to destroy an object under Article 23(g) of the Hague Regulations without that object being a military objective under Article 52(2) of the 1977 First Additional Protocol. And in such cases, would the panellist say that it is indiscriminate?

The panellist explained that it could be destroyed under Article 23(g) only if it is imperatively required by military necessity. Subject to that provision, he considered that it is not inconceivable that the destruction might be lawful.

Another participant asked whether the panellist would agree that something cannot be a military objective if it is under your control. Then, only Article 23 and Article 53 of the Fourth Geneva Convention are the important rules in that case, because if it is only under your control and it is not on your territory then, in the participant's view, it is necessarily in an occupied territory.

The panellist totally agreed with the participant on the fact that if an object is under your control, as for example in the context of an occupied territory, that object is clearly not a military objective. Therefore, the Fourth Geneva Convention's prohibition of destroying property on occupied territories, 'except where such destruction is rendered absolutely necessary by military operations', would apply.

3. Military necessity, economy of force and International Humanitarian Law

A participant agreed with the fact that a widely accepted definition of 'military necessity' covers not only the minimum suffering, but also the minimum use of force. On this point, N. Dunbar mentioned once that there is an implicit principle of economy of force behind military necessity. But he wondered if economy of force is actually what International Humanitarian Law (IHL) requires the armed forces to pursue. Surely, the purpose of IHL is not to make sure that armies fight efficiently or to maximise the prospect of victory. Surely, it is not a violation of IHL that one fights poorly, in the sense of resources. Yet, fighting "wastefully" would be a violation of IHL if, but only if, that somehow affects the interests protected under IHL. The participant explained that in a way, he always finds perplexing that military necessity, under IHL, seems to require armed forces to fight competently. It seems to be well understood anyway by the military and, of course, it is in their interest to save munitions and not waste other resources on things that are not important to them. That is what we might colloquially understand as military necessity, but he was not sure that it is part of the principle of military necessity as it is understood under IHL.

In the view of the panellist, there are two different meanings or purposes to the same phrase. But in the end, they will have the same effect, which is rather useful for a military legal advisor. Indeed, the reality in military operations is that there is no infinite number of resources. This is why things have to be prioritised in order to achieve the campaign aims. That may not be the IHL definition of 'military necessity', but it is rather a useful one in terms of advising commanders.

Another participant understood the panellist's point on self-defence, but would the panellist agree that for IHL it constitutes a separate situation, although the rules are exactly the same?

Obviously, the 'feasibility' includes force protection and therefore, if somebody is under fire, the feasibility changes. Yet, from an international law point of view, do we really need this concept of self-defence, which can be confusing?

The panellist agreed that this can be confusing, and that it is very difficult, notably in terms of training soldiers when they are to apply the law of self-defence, and then flick into applying the law of armed conflict and the rules of engagement. But they have the inherent right of self-defence at all times and throughout all operations. That right cannot be taken away from them and it should not be. So, you do end up with a kind of conflation, although things need to be pretty clear for soldiers. Afghanistan is an excellent example of that: there were attempts to say that above a certain line the law of armed conflict did apply and, below that certain line, the rules of self-defence did apply. But it does not make any sense at all, because it has to be determined by the specific circumstances in which individuals find themselves at a specific time. So yes, it can be confusing, but it exists and the fundamental objective is to teach soldiers as clearly as possible how to apply these rules.

A participant shared a comment on the issue of cultural property: whereas the panellists have been dealing with civilian objects in general, he stressed that for specific categories of civilian properties, notably cultural property, the 1954 Hague Convention only covers cultural property of 'great importance to the cultural heritage of every people'. That Convention explicitly provides that cultural property can only be attacked in case of 'imperative military necessity'. The participant further underlined that the situations are described with more details in the 1999 Second Protocol to the 1954 Hague Convention, which was adopted more than twenty years later than the 1977 Additional Protocols to the 1949 Geneva Conventions. He was aware that it complicates the life of soldiers in the field when it comes to rules of engagement but, nonetheless, the participant recalled that specific precautions must be taken in the attack (Article 7 of the 1999 Second Protocol) to ensure the protection of that particular kind of property.

Session 2

Precautions when carrying out attacks in cities

Chairperson: **Andres Muñoz**,

SHAPE Legal Office, NATO

ALL FEASIBLE PRECAUTIONS IN THE CHOICE OF MEANS AND METHODS OF WARFARE

Vaios Koutroulis¹

Université Libre de Bruxelles

Résumé

Pour débiter cette deuxième session, Vaios Koutroulis a analysé l'obligation de prendre toutes les précautions pratiquement possibles quant au choix des moyens et méthodes de guerre. Il est dans un premier temps revenu sur la définition de cette obligation contenue dans l'article 57(2)(a)(ii) du Premier protocole additionnel de 1977, en mentionnant que cette définition s'applique également à la protection des biens culturels conformément à l'article 7 du Deuxième protocole de 1999 relatif à la Convention de La Haye de 1954, et qu'elle constitue une règle de droit coutumier applicable aussi bien en temps de conflit armé international que non-international. Il s'est ensuite intéressé à la structure de l'article 57(2)(a), soulignant que l'obligation relative aux précautions se trouve après l'obligation de vérifier que les objectifs à attaquer sont effectivement des objectifs militaires, mais avant l'obligation de s'abstenir de lancer une attaque disproportionnée. Mais à qui s'adresse cette obligation de prendre toutes les précautions pratiquement possibles ? L'article 57(2)(a) vise « ceux qui préparent ou décident une attaque » et sur ce point, il a repris les mots de William Boothby, considérant que la disposition engage qui-conque fait feu ou lance un projectile lors d'une attaque, planifie l'attaque au niveau tactique, ou ordonne et approuve le plan d'attaque. Vaios Koutroulis s'est ensuite penché sur le sens de l'expression « pratiquement possible ». Concrètement, cela dépend largement du contexte. Par ailleurs, les circonstances doivent être appréciées sur la base des informations à la disposition de la personne en charge de planifier ou d'ordonner l'attaque, au moment où elle a précisément pris cette décision. En outre, l'obligation de prendre toutes les précautions pratiquement possibles en vue d'éviter ou de réduire au minimum les dommages collatéraux couvre à la fois le choix des moyens et méthodes de guerre, et la manière dont ils seront utilisés lors de l'attaque. Sur ce

1 Lecturer, International Law Centre, Faculty of Law, Université libre de Bruxelles (ULB). All internet sources were accessed on 30 April 2016.

point, les Etats disposant de munitions à guidage de précision sont-ils tenus de les utiliser ? S'il n'existe aucune disposition légale le prévoyant, on peut néanmoins considérer que l'alternative de recourir à ces armes plus précises rendrait l'utilisation d'armes moins précises illégale, en violation de l'obligation de choisir les moyens et méthodes d'attaque en vue d'éviter ou de réduire au minimum les pertes en vies humaines et les dommages aux biens de caractère civil.

The obligation to take all feasible precautions in the choice of means and methods of warfare is set out in Article 57(2)(a)(ii) of the 1977 First Additional Protocol to the Geneva Conventions (AP I), according to which:

2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (...)
 - (ii) 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.²

The same obligation is found in Article 7 of the Second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.³ The rule is considered by the International Committee of the Red Cross (ICRC) to be of a customary nature, applicable to both international and non-international armed conflicts.⁴ It has also been included in several doctrinal manuals, such as the 1994 San Remo Manual on Armed Conflicts at Sea (rule 46(c)),⁵ the 2009 Humanitarian Policy and Conflict Research (HPCR) Manual on International

2 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 UNTS 3, p. 29.

3 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212, p. 214.

4 J.-M. Henckaerts – L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, ICRC – CUP, Cambridge, 2005, p. 56 (rule 17): 'Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.' Legal scholarship confirms the customary nature of the rule, and it seems that there is sufficient State practice to prove its application in non-international armed conflicts; see S. Sivakumaran, *The law of non-international armed conflict*, OUP, Oxford, 2012, pp. 351-353.

5 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DFB8BAE6CB0308F5C12563FB0049E4B6>>.

Law Applicable to Air and Missile Warfare (rule 32(b)),⁶ and the 2012 Tallinn Manual on the International Law Applicable to Cyber Warfare (rule 54).⁷ Finally, it should also be mentioned that the United Nations Secretary General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law has a section specifying that '[t]he United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.'⁸ Although the section does not mention explicitly the choice of means and methods of warfare, it is suggested that the general obligation to take all feasible precautions to avoid or minimise collateral damage encompasses precautions involving the choice of means and methods of warfare.

If one looks at the structure of Article 57(2)(a), the obligation to avoid or minimise collateral damage through the choice of means and methods of attack comes after the obligation to verify the target and before the obligation to refrain from launching a disproportionate attack. As it has been rightly pointed out, this implies that in International Humanitarian Law (IHL)

'there is a requirement to minimise collateral damage and not merely to cause no more than proportional collateral damage (...) [I]t is not sufficient when planning an attack to conclude that the expected collateral damage is not excessive to the anticipated military advantage. There is also a positive obligation to reduce the expected collateral damage by taking all feasible precautions.'⁹

In other words, even a proportionate attack may violate IHL, if the proportionate collateral damage inflicted on the adversary could have been avoided through the use of other available means and methods of warfare. This has been confirmed in 2010 by Germany's Federal Court of Justice in a case relating to the bombing by the German armed forces of two fuel tankers stolen by the Taliban near Kunduz. The bombing had resulted in several civilian casualties, and the Court had to determine whether the German colonel who ordered the airstrike had committed war crimes or other crimes under German criminal law. In dealing with this issue, the Court examined separately, *primo*, whether the airstrike violated the principle of proportionality,

6 HPCR Manual on International Law Applicable to Air and Missile Warfare, 15 May 2009, available at: <<http://www.ihlresearch.org/amw/manual/category/section-g-precautions-in-attacks>>.

7 M. N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, CUP, Cambridge, 2013, p. 168.

8 UN Secretary General, "Bulletin on the Observance by United Nations Forces of International Humanitarian Law", ST/SGB/1999/13, 6 August 1999, at: <<https://www.icrc.org/eng/resources/documents/misc/57jq7l.htm>>.

9 Ian Henderson, *The Contemporary Law on Targeting*, Martinus Nijhoff Publishers, Leiden / Boston, 2009, p. 168.

and, *secundo*, whether the collateral damage could have been avoided (what the Court called ‘the principle of the mildest possible means’).¹⁰

This crucial preliminary point having been made, I will deal in turn with three issues relating to the scope and interpretation of the obligation to take all feasible precautions in the choice of the means and methods of warfare, namely the addressees of the obligation (A), the definition of ‘feasible’ (B), and the impact of the obligation on the use of precision-guided munitions in urban warfare. (C).

A. To whom is the obligation addressed?

According to the text of Article 57(2)(a) of AP I, the obligation to take all feasible precautions through the choice of means and methods of warfare is addressed to ‘those who plan or decide upon an attack’. The argument is sometimes made that the obligation applies only to commanding officers of a certain military rank. In this respect, Switzerland is reported to have stated that the ‘provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion or group level and above.’¹¹ Firstly, it should be noted that this statement is not found among the declarations and reservations of States party to AP I listed on the ICRC website.¹² Secondly, in view of the text of the provision, there does not seem to be any reason to limit the scope of application of the obligation set out in Article 57(2)(a)(ii) only to high-level commanding officers. Everyone who has the ability to plan and decide upon an attack is capable of applying the relevant precaution(s). The UK Manual on the Law of Armed Conflict spells this out very clearly:

‘[t]hose who plan or decide upon attacks are the planners and commanders (...) Whether a person will have this responsibility [i.e. to respect precautions] will depend on whether he has any discretion in the way the attack is carried out and so the responsibility will range from commander-in-chief and their planning staff to single soldiers opening fire on their own initiative.’¹³

This seems indeed to be the better view. In the words of William Boothby, the term ‘those who plan or decide upon an attack’ ‘would seem to include, *inter alia*, anyone who fires a weapon

10 Germany, Federal Court of Justice, Federal Prosecutor General, *Fuel Tankers* case, decision 16 April 2010, available at: <https://www.icrc.org/customary-ihl/eng/docs/v2_ru_rule17>.

11 Henderson, *op. cit.*, note 8, p. 159.

12 See the list of States party to the 1977 First Additional Protocol and their declarations and reservations at: <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470#panelReservation>.

13 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, OUP, Oxford, 2004, p. 85, §5.32.9.

as part of the attack, anyone who directs a munition such as a rocket, missile, or bomb, anyone who plans the attack at the tactical level, those on whose orders the particular attack proceeds, and those who approve the attack plan.¹⁴

B. What does ‘feasible’ mean and how is it translated in practice?

Turning to the second point of this presentation, the definition of the word ‘feasible’, it is important to start from the equally authentic French version of AP I, which refers to ‘*toutes les précautions pratiquement possibles*’. Along the same lines, according to the Eritrea Ethiopia Claims Commission, ‘[t]he law requires all “feasible” precautions, not precautions that are practically impossible’.¹⁵ Protocols II and III of the Certain Conventional Weapons Convention define ‘feasible’ precautions as ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’.¹⁶ This interpretation has been confirmed by the declarations made by some of the States party to AP I at the time of ratification of the Protocol.¹⁷

What does this definition mean exactly? The first element of feasibility is that it is context-dependent. Indeed, there can be no pre-established list of means and methods to be applied in every situation. Means and methods that may be feasible in one context may prove not to be feasible in another. Factors which may be taken into account in determining the feasibility of the use of a specific means or method of warfare include the availability of weapons systems, the type of target, the placement of military objectives in relation to civilians, the enemy

14 W. H. Boothby, *The Law of Targeting*, OUP, Oxford, 2012, p. 120.

15 Eritrea Ethiopia Claims Commission, Ethiopia’s Claim 2, Central Front, Partial Award, 28 April 2004, paragraph 110.

16 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996), annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Article 3 §10, 2048 UNTS 133, p. 136; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (protocol III) annexed to the same convention, Article 1§5, 1342 UNTS 171, p. 172.

17 See, for example, the declarations by Belgium, 20 May 1986, available at <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=EA2560B9B790488EC1256402003FB2BC>>; Canada, 20 November 1990, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314>>; Germany, 14 February 1991, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=3F4D8706B6B7EA40C1256402003FB3C7>>; Italy, 27 February 1986, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E2F248CE54CF09B5C1256402003FB443>>; Netherlands, 26 June 1987, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E6EF925C67966E90C1256402003FB532>>; Spain, 21 April 1989, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=FC622F31C9E2236EC1256402003FB660>>.

defences, the weather, the time of day, the standard of technical training of combatants, force protection, etc.¹⁸ In this respect, the UK Military Manual gives an illuminating list of factors:

‘In considering the means and methods of attack to be used, the commander should have regard to the following factors:

- a. the importance of the target and the urgency of the situation;
- b. intelligence about the proposed target – what it is being, or will be, used for and when;
- c. the characteristics of the target itself, for example, whether it houses dangerous forces;
- d. what weapons are available, their range, accuracy, and radius of effect;
- e. conditions affecting the accuracy of targeting, such as terrain, weather, and time of day;
- f. factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zones and whether they are inhabited, or the possible release of hazardous substances as a result of the attack;
- g. the risks to his own troops of the various options open to him.’¹⁹

As for the ‘circumstances ruling at the time’ which need to be taken into account in the determination of feasibility, Article 3 paragraph 10 of Protocol II on Mines, Booby-Traps and other Devices as amended on 3 May 1996 stipulates that:

‘[t]hese circumstances include, but are not limited to:

- (a) the short – and long – term effects of mines upon the local civilian population for the duration of the minefield;
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
- (c) the availability and feasibility of using alternatives; and
- (d) the short – and long – term military requirements for a minefield.’²⁰

It has also been suggested that, while not justifying disrespect for the obligations set out in Article 57 of AP I, the violation of the obligations imposed on the Party subject to an attack (set out in Article 58 AP I) may affect what is feasible in a given situation.²¹ Finally, in accordance with the statements of several States party to AP I, the circumstances are appreciated

18 M. N. Schmitt, “Targeting in Operational Law”, in: T. D. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations*, OUP, Oxford, 2010, p. 260.

19 UK Manual, *op cit.*, note 12, p. 83-84, paragraph 5.32.5.

20 Protocol II, as amended on 3 May 1996, *op. cit.*, note 15, p. 136.

21 Henderson, *op. cit.*, note 8, p. 174.

on the basis of the information from all sources which were available to the person planning or deciding the attack at the time he/she made the decision.²²

The obligation to take all feasible precautions in order to avoid or minimise collateral damage covers both the choice of means of warfare and the way they will be used on the battlefield. This involves a series of decisions bearing on the choice of a specific weapon type in view of its characteristics,²³ the way in which the weapon will be deployed on the target, the system of guidance and control, the timing of the attack, the choice of the target, the angle of approach, the explosive fill of munitions, fusing arrangements, etc. As it has been correctly asserted, allowance should be made for what might happen, and not just for the best case scenario: if certain types of guided munitions tend on average to fall short rather than go long, then this should be factored into the planning process and the attack route chosen should aim at minimising collateral damage if the weapon should fall short.²⁴ For example, in the 1999 NATO bombing campaign in Kosovo, it is reported that the target assessment made by the Joint Staff's intelligence division included consideration of outliers, 'the potential for a bomb or missile to miss its target (...) This assessment [of outliers] was particularly important where there was a heavy built-up area with large urban structures around the target. There is a greater risk of outliers in these situations.'²⁵

Concrete examples of implementing the obligation set out in Article 57(2)(a)(ii) include the use of lasers to designate targets and then launch an attack by laser-guided bombs,²⁶ bombing at night, using penetrator munitions and delayed fuse bombs²⁷ in order to ensure that the damage from blast and fragmentation is kept within the impact area, using attack angles

22 See for example, the declarations by Austria (13 August 1982, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=C5CD201B43C3E56AC1256402003FB262>>), Belgium (op. cit.), Germany (op. cit.), Egypt (9 October 1992, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=AF3791A0FF167FFDC1256402003FB393>>), Netherlands (op. cit.), Italy (op. cit.), Ireland (19 May 1999, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=27BBCD34A4918BFBC1256402003FB43A>>); Canada (op. cit.), Spain (op. cit.), New Zealand, 8 February 1988, available at: <<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=8FEC3861203ABE21C1256402003FB53B>>).

23 For example, a direct fire weapon (rifle / wire-guided anti-tank missile) is less likely to cause incidental damage than indirect fire weapons (mortar or artillery rounds), and free fall bombs, unless dropped at a very low altitude, are less likely to hit a narrowly defined target than laser-guided bombs; see UK Manual, *op. cit.*, note 12, p. 83, paragraph 5.32.4.

24 Henderson, *op. cit.*, note 8, p. 170.

25 G. D. Solis, *The Law of Armed Conflict*, CUP, Cambridge, 2010, p. 533.

26 This method was employed in the 1991 Gulf War; UK Manual, *op. cit.*, p. 83, note 204.

27 Bombs that have a fuse set to detonate some milliseconds after impact are likely to produce less fragmentation problems than the same bomb designed to explode on impact or just prior to impact.

that take into account the location of civilian facilities, etc.²⁸ The methodologies developed by armed forces in order to evaluate collateral damage, including tools such as minimum safe distances, after-action reports and lessons-learned procedures, are also relevant in minimising collateral damage. Some forces have developed 'computer modelling to determine the weapon, fuse, attack, angle, and time of day that will ensure maximum effect on targets with minimum civilian casualties.'²⁹ In the 1999 NATO airstrikes in Kosovo, '[t]he intense concern over the issue of collateral damage (...) meant that only a certain type of ammunitions could be used or the target could only be attacked at certain times of day.'³⁰

Naturally, respect for the obligation to take all feasible precautions in order to minimise collateral damage becomes much more important in urban warfare. During the 1991 Gulf War, in setting up the master attack list for the city of Baghdad, a six-mile area around each target was scanned for schools, hospitals, and mosques in order to identify those targets where extreme care was required.³¹ Also, 'attacks on known dual (i.e., military and civilian) use facilities normally were scheduled at night, because fewer people would be inside or on the streets outside.'³² According to the UK military manual:

'[s]ometimes, especially during fighting in towns, the tactics employed can make a great difference to the control of incidental damage. Artillery fire can cause a lot of incidental damage without any appreciable military advantage. The same military advantage might be just as well achieved by manoeuvre, outflanking or by-passing the objective, rather than direct assault.'³³

Aside from these considerations, one of the most salient questions relating to the conduct of urban warfare is whether the rule contained in Article 57(2)(a)(ii) entails a prohibition to use explosive munitions in densely populated areas and an obligation to use precision-guided munitions instead. It is to this question that I will turn to in the final part of this presentation.

28 These methods were used by the coalition forces during the 2003 war in Iraq.

29 Solis, *op. cit.*, note 24, p. 532.

30 T. Montgomery, "Legal Perspective from the EUCOM Targeting Cell", in A. E. Wall (ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, *International Law Studies*, vol. 78, Naval War College, Newport, Rhode Island, 2002, p. 195.

31 US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, April 1992, p. 153, available at: <<http://www.ssi.army.mil/!Library/Desert%20Shield-Desert%20Storm%20Battle%20Analysis/Conduct%20of%20the%20Persian%20Gulf%20War%20-%20Final%20Rpt%20to%20Congress.pdf>>.

32 *Ibid.*

33 UK Manual, *op. cit.*, note 12, p. 83, §5.32.4.

C. Is there an obligation to use precision-guided munitions in situations of urban warfare?

Precision-guided munitions (PGMs) remain expensive and therefore are not available to all States.³⁴ It is clear that IHL does not oblige States to acquire such weapons.³⁵ However, if it is accepted that ‘the weapon with the most accurate delivery parameters should be employed to attack a military objective with civilian objects in its vicinity’,³⁶ are States that already have precision-guided munitions required to use them?

Some scholars reject this claim.³⁷ According to William Boothby, the rule set out in Article 57(2)(a)(ii) AP I ‘does not require that precision munitions are used for a particular attack. Indeed, the law is not written in such a way as to oblige an attacker to use specific weapons on any particular occasion.’³⁸ Along the same lines, Dinstein also asserts that ‘[n]o LOIAC [Law of International Armed Conflict] obligation is incumbent on belligerent parties to use expensive “smart bombs” where cheaper “dumb bombs” will do. There is no foundation for allegations that (a) there is a duty to use PGMs in urban settings (...).’³⁹

It is doubtful that the rule set out in Article 57(2)(a)(ii) entails a general obligation to use precision-guided munitions. In this respect, the above-mentioned authors are correct in stating that the law does not ‘oblige an attacker to use specific weapons on any particular occasion’ or ‘to use expensive “smart bombs” where cheaper “dumb bombs” will do’. Indeed, if there is no collateral damage or if the same minimising effect on collateral damage can be obtained through the use of alternative means and methods of warfare, the belligerent party is not obliged to use precision-guided munitions. However, in situations of urban warfare, this may be very difficult to prove. As long as a belligerent party has the alternative of using a discriminate weapon (such as precision-guided munitions), then the use of less discriminate

34 It seems however that the cost of precision weapons is decreasing; see ICRC, Expert meeting, “Explosive Weapons in Populated Areas: Humanitarian, legal, Technical and Military Aspects”, Chavannes-de-Bogis, Switzerland, 24-25 February 2015, Report, Geneva, ICRC, 2015, p. 6.

35 A. P. V. Rogers, *Law on the battlefield*, 3rd edn, Manchester University Press, 2012, p. 143.

36 S. Oeter, “Methods and means of combat”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn, OUP, Oxford, 2008, p. 210.

37 Rogers, *op. cit.*, note 34, p. 143.

38 Boothby, *op. cit.*, note 13, p. 124.

39 Y. Dinstein, *The conduct of hostilities under the law of international armed conflict*, 2nd edn, CUP, Cambridge, 2010, p. 142. See also, ICRC, “2015 Expert meeting on Explosive Weapons”, *op. cit.*, note 33, p. 36: ‘A government expert called into question the ICRC’s position that the use of explosive weapons with a wide impact area should be avoided in densely populated areas, expressing the view that such weapons can be used for carrying out lawful attacks on legitimate targets even in populated areas. In some cases, the use of such weapons may be the only means of achieving the military aim, though in any case the user must always respect IHL requirements of proportionality and precaution in attack.’

weapons violates the obligation to choose the means and method of combat appropriate to avoid or minimise collateral damage.⁴⁰

In this sense, while there is no general obligation to use precision-guided munitions where other means and methods of warfare yield the same result, in some situations, especially those of urban warfare, it may be impossible to respect International Humanitarian Law without using such munitions. Thus, the 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare is right in stating that '[t]here is no specific obligation on Belligerent Parties to use precision guided weapons. There may however be situations in which the prohibition of indiscriminate attacks, or the obligation to avoid – or, in any event, minimise – collateral damage, cannot be fulfilled without using precision guided weapons.'⁴¹

40 This undoubtedly imposes a higher standard for technologically developed parties to a conflict. Despite claims to the contrary (Dinstein, *op. cit.*, note 38, p. 143), this does not introduce an 'inadmissible discrimination bias' towards technologically advanced parties. This differentiation – this 'bias' – is inherent in the term 'feasible' used in the rule set out in article 57(2)(a)(ii), since the feasibility is determined in relation to what is 'practically possible' for each belligerent.

41 HPCR Manual, *op. cit.*, note 5, p. 80. See along the same lines, Boothby, *op. cit.*, note 13, pp. 124-125: "there may be particular circumstances of attack in which collateral damage can only be avoided or minimized if a precision weapon is used."

EFFECTIVE ADVANCE WARNING

Clive Baldwin

Human Rights Watch

Résumé

L'article 57(2)(c) du Premier protocole additionnel de 1977 prévoit que « dans le cas d'attaques pouvant affecter la population civile, un avertissement doit être donné en temps utile et par des moyens efficaces, à moins que les circonstances ne le permettent pas ». C'est cette obligation de donner un avertissement avant l'attaque que Clive Baldwin s'est proposé d'analyser durant cette deuxième session. Il s'est d'abord penché sur le sens de l'expression « moyens efficaces », reprenant les termes du Manuel militaire britannique. Il prévoit dans un premier temps que l'avertissement a pour objectif de permettre aux personnes civiles de quitter les lieux ou au moins de s'abriter. Par ailleurs, le Manuel précise que l'avertissement doit être donné à temps et de manière spécifique pour parvenir aux civils auxquels il est destiné, tout en leur laissant suffisamment de temps pour réagir. Il varie selon le contexte et doit être le résultat d'une évaluation continue de la situation sur le terrain. Ainsi, des avertissements trop vagues ou donnés peu de temps avant l'attaque ont déjà prouvé par le passé qu'ils avaient eu peu d'impact. Clive Baldwin a également expliqué que l'une des parties au conflit pourra être dispensée de donner un avertissement « si les circonstances ne le permettent pas », notamment lorsqu'il pourrait compromettre l'objectif de l'opération et ralentir l'attaque, ou lorsque l'élément de surprise est crucial pour le succès de l'ensemble de l'opération. Toutefois, il a nuancé cette disposition, considérant qu'aujourd'hui, les nouvelles technologies à la disposition des parties à un conflit peuvent permettre de mener à bien une opération tout en avertissant la population civile de manière efficace. De plus, Clive Baldwin a rappelé que l'article 57(5) du Premier Protocole additionnel de 1977 prévoit « [qu'] aucune disposition du présent article ne peut être interprétée comme autorisant des attaques contre la population civile » : une fois que l'avertissement a été donné, certains civils peuvent décider de rester dans la zone en question, et les belligérants devront prendre toutes les précautions pratiquement possibles afin d'éviter ou réduire au minimum les dommages collatéraux, conformément à l'article 52(a)(ii) du Premier Protocole additionnel de 1977. Pour finir, il est également revenu sur le rôle joué par les nouvelles technologies, le risque de dérives, et le besoin pour les ONG, les académiques et les membres des forces armées de continuer à travailler ensemble sur cette thématique dans le futur.

Introduction

Let me start with a quote: 'effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit' (Article 57(2)(c) of the 1977 First Additional Protocol to the 1949 Geneva Conventions).

First, I am going to examine a bit of history, and then focus on four issues I would like to discuss, partly based on the work that we do at Human Rights Watch when dealing with armed conflicts. One is: what does 'effective' mean in today's world? What does 'unless circumstances do not permit' mean today, especially with increased technology? The third issue will deal with the desired impact of giving an effective advance warning, and the fourth point will focus on a couple of thoughts on the impact of the new technologies, with a particular focus on communication technology.

What does 'effective' mean in today's world?

To begin with, one point that I find interesting is that the Hague Regulations, which were adopted a century ago, said this would be more the duty of a commander, who will do their utmost to warn the authorities of a forthcoming attack. But what does 'effective' mean? I would like to quote the United Kingdom's Military Manual from 2004, which provides a clear description of what 'effective' means. First of all, it says that the warning's objective is to enable civilians to take shelter or leave the area, and to enable the civil defence authorities to take appropriate measures. That seems reasonable as long as this is not exhaustive, because there may be other reasons or impacts for an advance warning, particularly in protecting property and homes. But then the manual goes on to say that, to be effective, the warning must be in time, sufficiently specific and comprehensible to enable the civilians to protect themselves. In my view, these are the key points in making a warning 'effective'. What does this mean, particularly in today's world with the increase of new technologies and other means and methods, but also in terms of urban environments where it may be difficult to identify the civilians? The most important point is to use whatever methods or means necessary to get the warning across as clearly and as comprehensively as possible. That would very much vary from one situation to another, and depends on how the attacking force can get the warning across, i.e. the time, whether the civilians have electricity, etc. In addition, the attacking force has to make an ongoing assessment of what would be the most effective measures. But the warnings need also to be specific enough to be understood by the civilian population who will receive them. It has been observed that vague warnings have little impact when time and location of potential attacks are not clearly set.

At Human Rights Watch, we have interviewed civilian populations who have received warnings which have been effective, and also warnings which have not been effective. An example

where we found that the warning was not sufficiently early, was in a country where the national armed forces were preparing to attack a town and some villages, which had been taken over by an opposition armed group. They gave a warning but we found out that three to five hours' notice were not enough in that situation, because entire families took hours to prepare and leave *en masse*. In that case, we found that it was not effective. One must be aware of the impact of the warning, and how civilians will react. Other cases we found where warnings were not effective, is when they were too vague. In one case, the warning was the following: 'for the sake of your safety, you are asked to evacuate the area immediately'. In the end, it causes panic because civilians would leave without knowing when the attack would come, nor where it would be. Another example of a warning which was not effective: specific phone calls told the civilians to leave their homes because of 'terrorist activity'. Again, it was not informing them about when the attack was coming or which place would be targeted. In the end, the more specific, the better in terms of giving clarity to the civilian population as to what would come, so they could decide what to do. Then should the attacker in their warning also set out escape routes or 'safe areas'? That very much depends, particularly in urban settings and urban fighting, where what would be a 'safe area' will vary very much from day to day, and perhaps hour to hour. It all depends on what the party giving the warning knows and can say. Naturally, it is vital to inform the entire armed forces involved in the proposed attack wherever warnings have been set, because there have been cases where warnings told the civilian population to go to a certain area but attacks were directed on those areas as well – probably the result of lack of communication within the attacking forces. This is why the parties have to ensure that these advance warnings are known across as much of their forces as possible.

What does 'unless circumstances do not permit' mean in today's world?

The main difference today from the law that was adopted a century ago is that there is a presumption according to which advance warnings must be given when attacks are being planned. So, what would be the exception in that case? The obvious one is where the element of surprise is needed. This is notably prescribed in the Belgian War Manual of 1993, which says that advance warning should be given unless surprise is a crucial element for the success of the attack. Both elements need to be emphasised here: that the surprise element is crucial for the attack, but the fact that the warning would destroy that surprise is also an important element.

There may be other cases where circumstances do not permit giving a warning. One thing I would like to suggest is the following: technology may be limiting the circumstances where giving a warning is not possible, notably with regard to communication technologies. In many cases in the past, armed forces, and particularly armed groups, argued that it was not possible for them to give an effective advance warning because they did not have the tools or the

technology to do so. But in today's world, even armed groups have access to quite sophisticated communication technologies which could reach the civilian population. In another key area where warning was traditionally not possible, when the element of speed was needed for the attack, today communication can be quick as well. This is why technologies must be taken into account when examining the above-mentioned elements.

What is the impact of effective advance warnings?

Perhaps legally, you might say that a warning has no impact, at least in terms of how the attack is conducted. Indeed, Article 57(5) of the First Additional Protocol states that 'No provision of this Article may be construed as authorising any attacks against the civilian population, civilians or civilian objects'. Once a warning is given, some may think that it creates a zone where attacks can simply proceed without further consideration. But of course, it does not, especially if civilians remain in that zone. It must be underlined that civilians may react in different ways: whereas many may choose to leave, some may not be able to leave or refuse to leave for various reasons. However, if they remain in that zone, they remain civilians – unless, of course, they are directly participating in the hostilities. And I cannot really conceive a possibility where simply not responding to a warning would in itself mean that a civilian is directly participating in the hostilities. This fact needs to be taken into account in the continuing proportionality assessment. Naturally, the factual situation may change once advance warning has been given. Nonetheless, Article 57(2)(a)(ii) of the First Additional Protocol provides that all feasible measures and precautions have to be taken 'in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects'.

A few thoughts for the future...

First, technology does improve the ability to communicate – for military forces, armed groups, and for civilians themselves. That in itself may change the nature, in some cases, of warnings. As I said, I think it narrows some of the exceptions from when warnings should be considered as impossible, particularly for armed groups. But the other danger would be if new technologies become the aim in themselves, i.e. considering that putting a message on social media would constitute an effective warning. The situation at a particular time must be evaluated, especially in situations of urban conflicts: what if the electricity is cut off or if the civilian population does not have access to social media because phones cannot be charged? Parties must create a communication that will be effective, but communicate in a way that will also be understood.

The second issue to be considered is the following: how would warnings apply to a use of drones, or any so-called new technologies targeting outside a battlefield? The use of drones

outside a battlefield may raise many legal concerns apart from warnings, including when the arguments about the legality of any attack and what law applies are blurred between what is a conflict and what is not a conflict. If drones and other new technologies are used to attack in the middle of a clear conflict, on the battlefield, the same issue about warnings arises as before. There are specific concerns regarding warnings if the law of armed conflict is being applied in situations of targeted killing a long way from a battlefield: on the one hand, it might be a classic case of where surprise is needed if a specific individual is targeted, but on the other hand, the attack might take place in an area where civilians would have no warning that an attack is coming. If we consider that the technology exists to carry out targeted killings, the technology could also play an important role in delivering clear warnings. But exactly what type of warnings would be needed in such cases? For example, when some individuals are being targeted and are named in advance by some countries, this cannot in itself constitute effective warning of civilians because it is not clear where the attack will take place. The use of drones and other technology for such targeted killings may turn out to be an important threat to warnings because it could be that States will argue that warnings would never be practicable in such situations.

Last but not least, is the issue of making warnings 'more effective', because of improving technology, knowledge and the ability to communicate with the civilian populations during armed conflicts and afterwards. We can begin to find out much more about what makes a warning effective. Different methods are being developed, but it is important to make sure that we all continue to research and assess whether a given warning was effective. Was it understood? Did the civilian population take measures in response? Were these measures effective in protecting them? It is our role, as Non-Governmental Organisations (NGOs), military or other academic groups to work further together on this topic.

SESSION 2 – PRECAUTIONS WHEN CARRYING OUT ATTACKS IN CITIES

Following these two presentations, the audience raised questions on the following main issues:

1. Proportionality in attack and avoidance or minimisation of incidental damage

One of the participants made a comment about the fact that we have proportionality on the one hand, and we have to minimise damage in the other hand. Proportionality is not a feasible precaution. For instance, proportionality is an absolute criterion, which when you have precise weapons, they may give you an advantage. Indeed, if you can reach your objective by destroying a room in a building, it will be proportionate, but if you destroy the building, it will naturally not be proportionate. In the end, you may have an advantage if you have precise weapons, because you will be able to reach an objective, in accordance with the principle of proportionality, that you could not reach otherwise. Even if the principle of proportionality is respected, you will have – in addition to that – to minimise damage, i.e. using the most precise weapons at your disposal. In the participant's view, this point was very important to mention, because there is a debate today as to whether if you do not have a precise weapon you can still attack, and if you are able to manufacture or acquire the weapon, or if the weapons are available but not on the spot, you should refrain from attacking. On this particular issue, the participant considered that we need an in-depth legal and ethical debate, and asked the panellist if he knows whether there has been, there is or there will be any debate of this kind.

The panellist explained that it is difficult to answer this kind of very precise question, especially when you do not have access to the concrete way armed forces plan their attacks. In the end, you must quote practices from the 1991 Gulf War, or reports that the US Department of Defence has published, and other pieces that you may find. How is the whole concept of feasibility translated in reality? This is actually something very difficult to ascertain when you are outside the operations room. The panellist came back on the ethical essence of the debate, underlining the following guiding principle in accordance with IHL: if you look at the definition of 'feasible', you have to have a balance between military and humanitarian considerations. The Commentary of the ICRC on Article 57 of the 1977 First Additional Protocol says that it would basically be a question of interpreting this obligation 'in good faith'. Actually, this does not guide us much, and the panellist noted, on the one hand, the need for a debate in the sense of knowing States' practices and, on the other hand, the need for an ethical debate on this issue. According to the panellist, the practice that has been published to date gives

the impression that States do actively look for a minimisation and an avoidance of collateral damage. Yet, the problem a lawyer may have in analysing this practice is that one needs to be very careful as to whether this practice stems from a legal perception, i.e. States have a legal obligation to do so, or from policy reasons. For instance, how do you define that each and every part of their practice falls under this *opinio juris* legal obligation aspect, and how do you distinguish that from policy reasons, which can be explained by the fact that for example, in urban warfare, armed forces need to have the civilian population on their side, so they will avoid collateral damage. For all these reasons, the panellist agreed with the fact that this truly constitutes a large area for further development and research.

2. Obligation to take all feasible precaution and the use of precision-guided munitions

From his experience, one of the participants mentioned that precision-guided munitions are mostly available to countries with advanced weapon technology.

The panellist specified that he referred to precision-guided munitions as an example, because it is among the contentious points found in the literature. Of course, the obligation to take all feasible precautions in choosing means and methods of warfare is translated differently in relation to the type of weapons used by the belligerents. For example, if you do not possess advanced technology and you only have 'dumb bombs', then the feasibility of the means and methods of warfare you choose to avoid damage to civilians will be judged in relation to that. From an intellectual point of view, the panellist noted that it raises a number of questions. But as far as we deal with the application of the principle, it is applicable to everyone in respect to their own capacities.

In addition to that, another panellist explained that a legal and a moral debate is currently taking place on that particular issue. Countries that may not have precision-guided munition, at a certain time, may request this kind of ammunition and run attacks, especially in the framework of a coalition operation. To illustrate this, the panellist took for example people living in the middle of the jungle who do not know what internet is, emphasising that when they know that internet exists, those people will start asking themselves whether they need internet, etc. This is the same idea behind advanced weapon technology. As soon as the access to this kind of weapons is possible, the legal and the moral debate exists.

Lastly, another participant shared his view, agreeing that indeed, very few countries do possess precision-guided munitions. Furthermore, during the targeting process, armed forces may prefer to keep these expensive munitions for themselves for high-value and sensitive targets. But before starting to use precision-guided munitions, the participant further stressed the

need for specific training of armed forces in the context of urban warfare, notably, for example, to improve the accuracy of their communication means.

3. Effects of an effective warning and circumstances in which it must be given

Another participant raised a question on the issue of effective warning, and more especially on Article 57(2)(c) of the 1977 First Additional Protocol referring to 'unless circumstances do not permit'. With regard to precaution, the definition of 'feasibility' encompasses both military and humanitarian considerations. The participant wondered whether these two elements of military necessity and humanitarian consideration would be more demanding on the obligation to give warning, if the warning can change a lot in terms of protecting civilians. If the warning slows down the operation, would that constitute a ground for 'circumstances do not permit', or does he consider that the terms of Article 57(2)(c) operate differently from the concept of feasibility generally speaking?

In the panellist's view, it would seem that, given the article's wording, warning should be given, except in some circumstances. The question for armed forces would be: what prevents it being feasible in such cases? Yet, it has to be kept in mind that in any case, the effects on civilians will always have to be taken into account. The panellist mentioned the need to continuously assess and reassess the feasibility of the impact on civilians of an operation, meaning that if a warning was not possible at one stage, it must be given at a later stage – especially when operations last much longer than expected.

The following was also raised: did the panellist have in his experience or knowledge various situations in which effective warning had been given and led to a situation in which the effective contribution to military action – to which the structure was contributing by its use by armed groups – vanished when the armed groups vacated the object and therefore prevented an actual or a potential attack?

The panellist did not have a specific example but agreed with the participant that it could happen, but it would be part of the overall duty to avoid or minimise collateral damage.

Session 3

Protecting civilians living in cities against the effects of hostilities

Chairperson: **Lieutenant-Colonel Chris de Cock**,
Belgian Ministry of Defence

ELOIGNER LES POPULATIONS URBAINES DES COMBATS ET ELOIGNER LES COMBATS DES POPULATIONS URBAINES

Lieutenant-Colonel Nathalie Durhin

Cellule juridique opérationnelle de l'Etat-Major des Armées (France)

Abstract

How do parties to a conflict apply the principle of precaution against the effects of attacks? How do they move cities' inhabitants away from the fighting, and how do they move the fighting away from the cities' inhabitants? These are the questions Commissaire Lieutenant-Colonel Nathalie Durhin tried to address both from a legal and a practical perspective. To begin with, she explained that the duty contained in Article 58 of Additional Protocol I is not about regulating the behaviour of combatants in wartime, but it rather encompasses all the measures that a party to a conflict must take to protect the civilian population and civilian objects under its control. She analysed the wording of Article 58(b) of Additional Protocol I, providing that each Party to a conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. She also underlined that today cities are part of a power game, taking as examples Sarajevo, Grozny or, more recently, Tripoli. In a second part, she examined the question of sieges, the duty to give effective advance warning in certain circumstances, and the evacuation of the civilian population from the vicinity of military objectives. Nathalie Durhin also presented three kinds of areas – i.e. hospital zones and localities, hospital and safety zones and localities, and neutralised zones – that are entitled to protection from attack under International Humanitarian Law, and their potential risks related to concentrations of civilians. In her concluding remarks, she raised three main issues. Although the duty to take all feasible precautions against the effects of attacks is a norm of customary international law, it is not an absolute one. For instance, these precautions must be taken 'to the maximum extent feasible', and might be difficult to put in place in practice when the parties to the conflict do not have control over a territory or a population – notably with regard to the concept of 'no boots on the ground'. Secondly, armed conflicts will continue to be waged in cities. Based on this fact, she

emphasised the need to rethink the contemporary doctrine and military strategies to limit and prevent fighting in urban and populated areas.

Je souhaiterais avant tout remercier le Collège d'Europe et le Comité international de la Croix-Rouge (CICR) de me donner l'opportunité d'intervenir au cours de ce prestigieux Colloque, et de m'adresser à un public aussi large et expérimenté. C'est une très belle occasion, mais également un défi, en tant que praticienne du droit. Car je suis loin d'être une universitaire, et c'est la raison pour laquelle je vais traiter le sujet qui m'a été proposé de façon très pragmatique, en tentant de répondre aux questions suivantes : comment les parties à un conflit, et tout particulièrement les forces armées, appliquent-elles sur le terrain le principe général de précaution contre les effets des attaques ? Comment peuvent-elles éloigner les populations urbaines des combats et éloigner les combats des populations urbaines ?

Introduction

Pour commencer, je vais rapidement aborder le champ d'application de la règle générale de protection contre les effets des attaques, que l'on trouve dans l'article 58 du Protocole additionnel I (PA I) aux Conventions de Genève¹, et qui s'applique donc aux conflits armés internationaux (CAI). Cet article 58 est le pendant de nombreuses dispositions du PA I en faveur de la population de pays ennemis. Avec cet article, il n'est plus question de réglementer le comportement à observer dans l'attaque, mais de prévoir les dispositions que toute puissance doit prendre sur son propre territoire ou sur un territoire qu'elle contrôle, en faveur de personnes qui s'y trouvent. Il s'agit donc de mesures à prendre à titre préventif, pour protéger efficacement la population civile.

En ce qui concerne les conflits armés non internationaux (CANI), l'obligation figurait initialement dans le Protocole additionnel II (PA II), mais a été abandonnée au dernier moment dans un souci de simplification du texte. Il n'y a donc pas, dans le cadre d'un CANI, d'exigence explicite de précaution contre les effets des attaques. Cependant, l'article 13 (1) du PA II exige une protection générale contre les dangers résultant d'opérations militaires, ce qui ne peut se concevoir sans la mise en œuvre de mesures de précaution. En outre, on retrouve ces mesures de précaution dans d'autres textes internationaux applicables en CANI, et notamment le Pro-

1 Article 58 PA I : « Dans toute la mesure de ce qui est pratiquement possible, les parties au conflit: a) s'efforceront, sans préjudice de l'article 49 de la IVe Convention, d'éloigner du voisinage des objectifs militaires la population civile, les personnes civiles et les biens de caractère civil soumis à leur autorité; b) éviteront de placer des objectifs militaires à l'intérieur ou à proximité des zones fortement peuplées; c) prendront les autres précautions nécessaires pour protéger contre les dangers résultant des opérations militaires la population civile, les personnes civiles et les biens de caractère civil soumis à leur autorité ».

tole additionnel II à la Convention de La Haye sur la protection des biens culturels, ce qui pourrait être un indice du caractère coutumier de la règle². Cet aspect sera traité et commenté dans l'intervention suivante par le Professeur Marco Sassòli. Mais il est toutefois intéressant de noter qu'on retrouve également cette notion de mesures préventives dans la jurisprudence des organes de protection des droits de l'homme. En effet, dans son arrêt *Issaïeva c. Russie* du 24 février 2005, la Cour européenne des droits de l'homme a conclu à la violation de l'article 2 de la Convention européenne des droits de l'homme car l'opération en cause, menée en zone urbaine, n'avait pas été préparée et exécutée « avec les précautions nécessaires à la protection des vies civiles »³.

Quoiqu'il en soit, l'exigence de précaution contre les effets des attaques est une règle à prendre en compte dès le temps de paix, mais qui prend tout son sens dans la planification, puis dans la conduite des opérations. Ce n'est toutefois pas une règle absolue, puisque l'article 58 indique dès le départ qu'elle doit s'appliquer « dans toute la mesure de ce qui est pratiquement possible », et qu'il est également fait référence à un territoire ou des populations que l'on contrôle (« soumis à leur autorité »). Les questions qui se posent donc sont les suivantes : qu'entend-on par « dans la mesure du possible » ? L'obligation s'applique-t-elle à tous, et si la partie qui a le contrôle (le défenseur au sens de l'article 58) ne le fait pas, s'applique-t-elle par défaut à l'attaquant ? Quelles sont les difficultés pratiques de mise en œuvre de cette exigence ?

Pour aborder ces différentes questions, je déclinerai le principe général en deux sous-règles, comme le fait l'étude du CICR sur le droit coutumier (éloigner les objectifs militaires des civils d'une part ⁴, et éloigner les civils des objectifs militaires d'autre part ⁵), en insistant cependant dans un troisième temps sur les défis importants auxquels ce principe est soumis, du fait notamment de l'évolution actuelle des conflits armés.

1) Eloigner les objectifs militaires des civils

De façon un peu artificielle, je distinguerai les implications pour le défenseur, c'est-à-dire généralement la partie sur le territoire de laquelle se déroule le conflit, et les implications pour l'attaquant, dans la mesure toutefois où ce dernier agit sur un territoire qu'il contrôle. Cette

2 Dans son jugement rendu en l'affaire *Kupreskic*, le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a considéré que l'exigence de précaution contre les effets des attaques faisait partie du droit international coutumier. V. TPIY, *Le Procureur c. Zoran Kupreskic et consorts*, IT-95-16-A, Chambre de première instance II, Jugement, 14 janvier 2000, paragraphe 86.

3 CEDH, *Issaïeva c. Russie*, 24 février 2005, n° 57947/00, paragraphe 199.

4 Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Droit international humanitaire coutumier*, Volume I, Règles, Bruxelles, Bruylant, 2006, Règle 23, pp. 96-99.

5 *Ibid.*, Règle 24, pp. 100-103.

distinction, parfois difficile à opérer en pratique, permet de mettre plus facilement en lumière les difficultés d'application du principe.

1.1) Obligations pour le défenseur

Le principe énoncé à l'alinéa b) de l'article 58 et formulé à la règle 23 de l'étude du CICR sur le droit coutumier implique de prendre des mesures préventives ou conservatoires dès le temps de paix. Il est donc nécessaire de ne pas construire certains bâtiments à usage militaire (casernes, dépôts de munitions, etc.) en un lieu déterminé (en l'occurrence les villes), de déplacer des objectifs de certaines zones ou encore d'écarter les points dangereux des populations.

Cette obligation est toutefois limitée à ce qui est pratiquement possible. De façon générale, cette notion de « pratiquement possible » est interprétée par de nombreux Etats comme étant limitée aux précautions qui sont matériellement ou pratiquement possibles, compte tenu de toutes les circonstances du moment, y compris les considérations militaires (absence de remise en cause de la stratégie globale de défense par exemple) et humanitaires (les mesures ne doivent pas rendre la vie des populations trop difficile). Il est à noter que des changements démographiques ou l'extension des zones urbaines peuvent faire obstacle, sur le long terme, à l'installation d'emprises militaires hors des villes. Le principe peut également ne pas s'appliquer pour des biens civils pouvant être utilisés à des fins militaires (gares, aéroports, etc.).

Enfin, il est intéressant de souligner que certains pays occidentaux se sentent ou se sont peut-être sentis, à un moment donné, à l'abri des conflits armés, et ont pour des raisons diverses (politiques, économiques, financières, etc.) installé des structures ayant clairement le statut d'objectif militaire dans les centres-villes. C'est le cas notamment du nouveau Grand Etat-Major français, installé dans le sud de Paris depuis cette année.

Par ailleurs, il faut souligner que cette obligation de précaution est plus difficile à mettre en œuvre en situation de CANI, par les groupes armés organisés (GAO) notamment. En effet, ceux-ci peuvent être de création spontanée et/ou récente et ne pas disposer de structures militaires préexistantes : ils sont donc limités dans le choix du positionnement de leurs ressources militaires. Ces groupes peuvent également disposer de faibles moyens, qui ne leur permettent pas de mettre en œuvre des mesures préventives.

Enfin, la mise en œuvre du principe d'éloignement est plus facile pour les objectifs fixes que pour les objectifs mobiles (troupes, véhicules, etc.), qui devra alors s'effectuer en mouvement. Je reviendrai sur les précautions à prendre dans ce contexte, qui ne doivent pas nous conduire à mettre en danger la sécurité des forces.

1.2) Obligations pour l'attaquant

Il convient dès l'abord de rappeler qu'il n'est pas interdit pour un attaquant de cibler des objectifs militaires, si le défenseur manque de prendre les précautions nécessaires ou s'il utilise délibérément des civils pour protéger des opérations militaires. Dans ce cas, l'attaquant doit toutefois prendre des précautions dans l'attaque, et respecter le principe de proportionnalité, même si le défenseur ne respecte pas le droit international humanitaire (DIH). L'attaquant est aussi concerné par la prise de mesures préventives.

Il faut néanmoins garder à l'esprit que la ville, en tant que telle, est un enjeu de pouvoir, et que dans le cadre d'un conflit armé, sa prise, voire sa destruction, peut devenir un symbole ou une fin en soi (cf. le bombardement des villes pendant la guerre en ex-Yougoslavie, la destruction systématique des monuments historiques par les assaillants de Sarajevo, le ravage de Grozny pour punir la population, la prise de Tripoli lors du conflit libyen en 2011 qui a marqué un tournant et précipité la chute du régime, etc.). Cette focalisation sur la prise et/ou la destruction des villes peut donc souvent conduire à faire oublier la mise en œuvre des principes du DIH, notamment par l'assaillant et même si le défenseur n'a pas pris les mesures de protection prévues.

Je vais maintenant aborder la question des mesures de précaution que peuvent prendre les Parties concernant les objectifs mobiles. Il s'agit en effet de clairement identifier ses forces militaires sans mettre en danger sa propre sécurité. Ainsi peut-il être décidé de limiter la traversée des villes par les convois (en favorisant les contournements) ou d'établir les camps et emprises hors des villes, avec un marquage clair des zones, des restrictions d'accès, une instruction des militaires pour qu'ils puissent informer la population civile, etc. Bien évidemment, le risque majeur de cette identification est de désigner clairement à l'adversaire les objectifs militaires. C'est donc une analyse au cas par cas qui doit être menée, entre l'intérêt militaire de localiser ses troupes à un endroit déterminé et clairement identifié, et la menace qui peut peser sur ces forces si cette localisation est trop visible.

Une autre solution que l'attaquant peut mettre en œuvre pour respecter le principe de précaution contre les effets de l'attaque est de chercher à repousser les adversaires vers les zones isolées. C'est, dans une certaine mesure, ce que la France a essayé de faire lors de l'opération Serval menée au Mali à compter de janvier 2013, à la demande de l'Etat malien. Confrontée à un adversaire qui cherchait à prendre le contrôle des villes jusqu'à la capitale Bamako, les forces françaises ont cherché à le repousser en menant un combat urbain limité. Elles ont fait cela en circonscrivant le champ et le nombre des opérations (notamment au moyen de forces spéciales), en permettant aux forces locales de reprendre le contrôle des villes pour se focaliser sur la poursuite des groupes, en surveillant et en tenant les points

d'approvisionnement pour empêcher que l'ennemi ne se réapprovisionne dans les villes, et en continuant à montrer leur présence dans les zones urbaines, tout en poursuivant le combat dans les zones désertiques. Cette stratégie a toutefois des limites, notamment quand les conflits se prolongent dans le temps, puisqu'elle peut conduire à ne combattre qu'à l'extérieur des zones urbaines, et donc à conférer aux villes un caractère de « sanctuaire » au profit l'ennemi.

Plus globalement, la difficulté, voire parfois l'impossibilité pour le défenseur ou l'attaquant d'éloigner les objectifs militaires des civils peut aboutir à préférer éloigner les civils des objectifs militaires.

2) Eloigner les civils des objectifs militaires

Dans cette partie, je reprendrai à nouveau la distinction défenseur/attaquant, mais ne traiterai pas de la question des boucliers humains, qui sera abordée spécifiquement par le Professeur Sassòli.

2.1) Obligations pour le défenseur

La mise en œuvre de l'alinéa a) de l'article 58 et de la règle 24 de l'étude du CICR sur le droit coutumier implique également des mesures préparatoires, comme la construction d'infrastructures dédiées pour permettre l'accueil de la population civile (abris, bâtiments, camps, dépôts de vivres, etc.), mais également le recours à la société civile (entraînement régulier des services de protection civile) et la diffusion régulière d'informations et d'avertissements. Encore une fois, ces mesures sont plus faciles à mettre en œuvre par des Etats que par des groupes armés, particulièrement lorsque ces derniers sont faiblement structurés⁶.

Concernant l'évacuation des populations à proprement parler, de nombreuses questions peuvent être soulevées. D'une part, l'obligation concerne-t-elle tous les civils, ou uniquement certaines catégories de personnes jouissant d'une protection spéciale (femmes, enfants, malades, infirmes etc.) ? Outre le fait qu'il est très difficile pour une partie à un conflit de discriminer ainsi sa population, il faut aussi noter que le souhait bien légitime de protéger les personnes les plus faibles peut aussi se heurter avec le principe de respect de l'unité familiale, que l'on trouve dans de nombreuses dispositions de DIH et de Droits de l'homme.

D'autre part, s'il est entendu qu'il faut évacuer les civils de la proximité immédiate des combats, comment délimiter précisément cette zone, et comment faire lorsque la zone de combats

6 Le caractère coutumier du principe est ici présumé.

se situe sur un territoire très exigu ? Se pose également le problème de la zone d'évacuation, normalement vers un lieu que les civils connaissent et qui ne présente aucun danger. Est-il nécessaire que les civils aient connaissance à l'avance de ce lieu, et qu'ils puissent choisir de s'y rendre en connaissance de cause ? Comment s'assurer de la sécurité de la zone, sans y consacrer trop de ressources militaires lorsque celles-ci sont comptées ? Encore une fois, est-ce faisable sur un petit territoire ravagé par les combats ?

Enfin, concernant le moment de l'évacuation, il faut, là encore, être prudent : une évacuation concomitante à des combats, notamment urbains, peut être dangereuse. Cependant, attendre la fin des combats peut être désastreux... Dans tous les cas, seul ce qui est « pratiquement possible » doit être mis en œuvre, et les précautions à prendre en évacuant la population ne sauraient dépasser le stade au-delà duquel la vie de la population deviendrait difficile, voire impossible.

Il convient en outre de rappeler qu'il existe des dispositions en CAI et en CANI visant à interdire les déplacements forcés de population⁷. Dans les deux situations, les déplacements forcés sont interdits sauf si la sécurité des civils ou des impératifs militaires l'exigent⁸. Quand ils sont permis, ces déplacements sont en outre limités, pour les CAI, à l'intérieur du territoire occupé (sauf en cas d'impossibilité matérielle), et pour les CANI, à l'intérieur du territoire national. Bien évidemment, les impératifs militaires permettant de déroger à la règle ne doivent pas s'entendre dans une optique de persécution des populations. Mais surtout, le point le plus délicat consiste en l'évaluation du niveau de sécurité des civils permettant de déterminer la nécessité d'une évacuation. Qui doit mener cette évaluation, et à l'aune de quels critères ?

2.2) Obligations pour l'attaquant

Je ne reviendrai pas sur la question de la licéité du siège d'une ville, qui sera débattue par les intervenants de la prochaine session. Mais je voudrais juste souligner que, dans ce cas de figure, l'assaillant doit prendre en compte les dispositions existant dans les Conventions de Genève (CG)⁹, visant à rechercher des accords pour évacuer ou échanger les blessés et les malades, c'est-à-dire à les éloigner de la zone de combat et du siège, et faciliter le passage du

7 En CAI, interdiction des déportations et transferts forcés (article 49 CG IV) et en CANI, interdiction des déplacements forcés (article 17 PA II).

8 Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Droit international humanitaire coutumier*, op. cit., note 4, Règle 129, pp. 602-608.

9 Voir notamment les articles 15 CG I, 18 CG II et 17 CG IV.

personnel sanitaire ou religieux. Ces obligations ont une résonance très actuelle, notamment dans le contexte du conflit syrien¹⁰.

De façon indirecte, l'attaquant peut aussi contribuer à éloigner les civils des zones de combat, en mettant par exemple en place des zones d'exclusion (aériennes ou maritimes). Cela revient à délimiter des zones dans lesquelles les adversaires ne peuvent pas entrer et où les civils sont relativement protégés, bien que la violation de ces zones puissent entraîner des combats ayant des répercussions sur les civils. Quoiqu'il en soit, dans ce cas, la mise en place d'une zone d'exclusion pose la question de l'accès de l'aide humanitaire, que l'attaquant doit également gérer en sus du respect des interdictions de survol et/ou de passage. Il ne faut pas sous-estimer la difficulté de gestion de telles zones, et le fait que cela requiert d'importants moyens, pour pouvoir discriminer et informer. Cette difficulté est renforcée si les organisations humanitaires ou les Etats qui acheminent de l'aide le font sans notification préalable aux autorités responsables de la gestion de la zone, comme cela a pu parfois être le cas lors des opérations de l'OTAN en Libye en 2011.

Plus directement, l'attaquant peut inciter les civils à s'éloigner de la zone des combats en diffusant des avertissements préalables, conformément à l'article 57 PA I, avec les difficultés qui ont déjà été mentionnées par les intervenants de la deuxième session de ce Colloque. Mais pour être efficaces, ces avertissements doivent répondre à de nombreux critères¹¹ : utilisation de moyens différents (TV, radio, téléphone, tracts, etc.), moyens devant atteindre précisément ceux qui risquent d'être touchés, avertissements aussi clairs que possible sur le lieu et le moment de l'attaque, temps suffisant donné pour réagir, indications précises sur les moyens d'éviter d'être atteint (lieu où aller, mesures d'évacuation, etc.) et crédibilité des messages. Compte tenu de ces contraintes, et dans certains cas particuliers, notamment quand le territoire est exigu et que l'intensité des combats est forte sur tout le territoire, l'efficacité de ces

10 Voir la résolution du Conseil de sécurité des Nations Unies 2139 du 22 février 2014, dans laquelle le Conseil « demande à toutes les parties de lever immédiatement le siège des zones peuplées, notamment dans la vieille ville de Homs (Homs), à Noubl et Zahra (Alep), à Madamiyet Elsham (périphérie rurale de Damas), à Yarmouk (Damas), dans la Ghouta orientale (périphérie rurale de Damas), Darayya (périphérie rurale de Damas), exige que toutes les parties autorisent l'acheminement de l'aide humanitaire, y compris l'aide médicale, cessent de priver les civils de denrées alimentaires et de médicaments indispensables à leur survie, et permettent l'évacuation rapide, en toute sécurité et sans entrave, de tous les civils qui souhaitent partir, et souligne que les parties doivent se mettre d'accord sur des pauses humanitaires, des jours de tranquillité, des cessez-le-feu localisés et des trêves afin que les organismes humanitaires puissent avoir un accès sûr et sans entrave à toutes les zones touchées en Syrie, rappelant qu'utiliser la famine contre les civils comme méthode de combat est interdite par le droit international humanitaire ».

11 Voir Rapport de la Mission d'établissement des faits de l'Organisation des Nations unies sur le conflit de Gaza, 25 septembre 2009, Doc. A/HRC/12/48.

avertissements est, à mon sens, très faible¹². En outre, il ne faut pas oublier que ces avertissements ne peuvent être réalisés que s'ils ne mettent pas en danger ses propres forces et/ou s'ils ne nuisent pas à l'effet de surprise.

Un des aspects de l'éloignement des civils des objectifs militaires peut être retrouvé dans les mesures visant à déplacer vers l'arrière les personnes hors de combat, qui en CAI ne sont pas des civils, mais qui en CANI peuvent se voir qualifier ainsi¹³. Par exemple, dans leurs opérations au Sahel, les forces armées françaises déplacent très rapidement vers leurs bases arrière les personnes capturées au combat, et les gardent dans des locaux éloignés des zones dangereuses¹⁴. C'est bien sûr une contrainte très forte sur le plan logistique. En outre, il est nécessaire de trouver un équilibre entre la discrétion sur le lieu de rétention (pour éviter les attaques visant à libérer les individus), et la nécessaire transparence (information des autorités locales et du CICR qui effectue des visites).

Enfin, on peut évoquer le cas des évacuations de population qui peuvent être menées directement par les attaquants, notamment s'ils ont un certain contrôle sur la zone de conflit. En ce qui concerne l'évacuation des nationaux d'un Etat¹⁵, outre les difficultés qui peuvent surgir dans le domaine du *jus ad bellum*¹⁶, se posent également des problèmes de discrimination.

12 Il est intéressant de souligner que durant l'opération « Plomb durci », 2 500 000 tracts ont été largués et que près de 16 500 appels téléphoniques ont été passés par les forces armées israéliennes. Les tracts visaient à donner des avertissements généraux (éloignement de la population de Gaza des zones de combat), puis régionaux (avec le temps disponible pour évacuer et la désignation de routes spécifiques menant à des zones sûres). Des avertissements plus ciblés étaient ensuite effectués par téléphone. Malgré ces efforts, la mission d'établissement des faits a jugé les actions insuffisantes et a pointé « [le] manque de précision, et donc de crédibilité, de nombreux messages préenregistrés et tracts. La crédibilité des instructions enjoignant de se déplacer vers le centre-ville pour y trouver la sécurité a également été amoindrie par le fait que même les centres des villes avaient fait l'objet d'attaques intensives durant la phase aérienne des opérations militaires ». Voir Rapport de la Mission d'établissement des faits de l'Organisation des Nations unies sur le conflit de Gaza, 25 septembre 2009, *op. cit.*, paragraphe 37.

13 Les civils qui participent directement aux hostilités perdent leur protection contre les attaques et les effets des attaques pendant la durée de leur participation, mais conservent leur statut de civil.

14 Cette pratique est conforme à la règle 121 de l'étude du CICR sur le droit coutumier concernant l'obligation de garder les personnes privées de liberté dans des locaux éloignés de la zone de combat. Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Droit international humanitaire coutumier*, *op. cit.*, note 4, Règle 121, pp. 573-575.

15 Opérations de « RESEVAC » dans la doctrine militaire française.

16 Peut-on considérer que l'usage de la force dans le cadre de l'évacuation de ressortissants à des fins humanitaires est une exception reconnue par le droit coutumier à l'interdiction du recours à la force entre Etats, ou qu'il est juste permis, sous certaines conditions, car l'intervention elle-même ne s'assimile pas à un recours à la force entre Etats ?

Est-ce légitime, voire licite, de n'évacuer que ses propres ressortissants¹⁷ et de ne pas prendre en charge les civils étrangers qui font l'objet d'exactions par exemple ? Il semble cependant qu'il n'existe aucune obligation en droit positif d'évacuer des civils en dehors d'un pays touché par un conflit. Dans une moindre mesure, si une évacuation de civils devait être menée par un attaquant dans une zone de conflit, elle devrait respecter les mêmes critères qu'évoqués pour le défenseur, et se heurterait aux mêmes difficultés pratiques de mise en œuvre.

2.3) La mise en place de zones protégées

Il me semble important de mentionner également la mise en place de zones protégées afin d'éloigner les populations urbaines des combats. Cette idée n'est pas nouvelle, et historiquement, des zones neutralisées ont déjà été mises en place comme à Madrid en 1936, à Shanghai en 1937¹⁸, et à Jérusalem en 1948¹⁹, cette dernière initiative étant à l'origine des dispositions se trouvant dans les Conventions de Genève de 1949.

On trouve actuellement en DIH trois types de zones protégées : les « zones hôpitaux » pour les blessés et malades des forces armées (article 23 CG I), les « zones et localités sanitaires et de sécurité » pour les civils bénéficiant d'une protection accrue (article 14 CG IV) et les « zones neutralisées » pour les personnes hors de combat (article 15 CG IV). Les parties ont en outre la possibilité de déclarer une localité « non défendue » (article 59 PA I) et de démilitariser des zones par le biais d'un accord (article 60 PA I). Si ces zones ne sont pas prévues par les textes applicables aux CANI, il n'en reste pas moins qu'une zone qui ne contient que des blessés et des malades, du personnel sanitaire et religieux, du personnel des secours humanitaires ou des personnes civiles ne peut être l'objet d'attaques car des règles protègent ces catégories de personnes en CANI²⁰.

Ces dispositions listent de façon très détaillée les droits et les obligations des parties, et effectuent une répartition précise des responsabilités en matière de protection des populations regroupées. Toutefois, la condition *sine qua non* de l'efficacité de ces zones repose sur le fait qu'elles soient érigées en toute connaissance de cause et avec l'accord explicite de tous les acteurs.

17 Français ou membres de l'Union européenne dans le cas de la France.

18 En 1937, le père jésuite Jacquinet de Besange a convaincu militaires chinois et japonais d'établir une zone de sécurité à Shanghai (« *Jacquinet safe zone* »). D'autres zones ont été établies sur ce modèle dans d'autres villes chinoises, permettant *a priori* de sauver plusieurs centaines de milliers de civils.

19 Accord entre le *Va'ad Leumi*, l'organisation juive armée et la Ligue arabe, permettant au CICR de créer une zone sécurisée pour mettre les civils à l'abri.

20 Jean-Marie Henckaerts, Louise Doswald-Beck (eds.), *Droit international humanitaire coutumier, op. cit.*, note 4, Règle 35, p. 160.

On voit très bien quel est l'intérêt de la mise en place de zones protégées : elles permettent d'établir une distinction claire entre les objectifs militaires et les personnes et biens à caractère civil, et de faciliter la mise en place et l'acheminement de l'assistance humanitaire. Toutefois, les risques sont nombreux, car elles créent notamment une forte concentration de personnes civiles, sans défense. En outre, si l'accord des parties est manquant ou défaillant, ou si les moyens sont insuffisants pour protéger ces zones, les conséquences de leur établissement peuvent être dramatiques. Tout le monde a en tête le cas de l'enclave de Srebrenica, érigée de façon unilatérale en « *safe zone* » par la résolution 819 d'avril 1993²¹, car le Conseil de sécurité refusait de dialoguer avec la *Republika Srpska*. L'insuffisance des effectifs onusiens (600 casques bleus) pour la protéger et les multiples dysfonctionnements relevés depuis lors ont permis les massacres de juillet 1995 que l'on connaît.

Actuellement, dans le cadre du conflit syrien, certains évoquent à nouveau la nécessité d'établir des « *free zones* »²² à la frontière turque dans le nord et/ou à la frontière jordanienne dans le sud, zones qui seraient des sanctuaires pour les réfugiés. L'intention est louable et permettrait de respecter certains principes du DIH. Toutefois, de nombreuses inconnues demeurent : comment obtenir un accord entre les belligérants, et entre quelles parties (plusieurs CANI coexistent en effet sur le territoire syrien) ? Comment ne pas dériver de la nécessité de protéger les civils à la tentation de permettre à certains groupes rebelles de se maintenir, voire de se réfugier dans ces zones ? Comment concilier la mise en œuvre de tels principes humanitaires dans un conflit dont la modalité principale des différentes parties consiste à viser expressément les civils ?

On voit bien que toutes ces diverses mesures préventives, pour autant qu'elles soient souhaitables sur le plan de la protection des civils, sont extrêmement difficiles à mettre en œuvre, surtout dans les conflits actuels.

3) Les enjeux actuels

3.1) La défaillance du défenseur

La difficulté de mettre en œuvre des mesures de précaution préventives ou conservatoires découle tout d'abord, dans de nombreux conflits contemporains, de la désintégration des structures étatiques, qu'elle soit à l'origine du conflit ou l'une de ses conséquences. Ce phénomène d'Etat failli, voire d'absence d'Etat, est particulièrement flagrant dans les villes (par exemple en Somalie en 1993 ou en Libye en 2011), ce qui rend alors illusoire la mise en place des dispositions pertinentes du DIH.

21 Le concept a ensuite été étendu à d'autres villes : Tuzla, Zepa, Bihac, Gorazde et Sarajevo en mai 1993.

22 Voir l'entretien du Général KEANE devant le Sénat américain début octobre 2015.

En outre, dans une situation de CANI, l'attribution des responsabilités de mise en œuvre est plus que délicate, surtout quand le conflit armé se déroule entre plusieurs groupes armés. On se souvient ainsi de la situation à Monrovia à l'été 2003, où l'autorité et le maintien de l'ordre étaient l'apanage des factions rivales. La situation était quelque peu similaire en République Centrafricaine en 2013-2014. Tel est également le cas dans certaines zones de Syrie à l'heure actuelle. De la même façon, quand le CANI se déroule avec un acteur non étatique qui a des ramifications dans de nombreux pays, la mise en œuvre des mesures de précaution peut être rendue illusoire par le caractère précisément transnational du groupe armé et de son manque de contrôle effectif sur le territoire où se déroule la majorité des combats.

La donne est encore compliquée par le fait que, dans certains CANI, des groupes armés luttent entre eux pour prendre le contrôle d'un territoire. Cette lutte peut se traduire par une volonté de contrôler et, par conséquent, de protéger la population. Mais elle peut aussi à l'inverse se manifester par une stigmatisation des actions de l'adversaire et/ou son incapacité à protéger, ce qui peut conduire à ne rien faire pour protéger les civils...

Quand on relit les commentaires de Jean Pictet sur les mesures de précaution prévues à l'article 58, on voit bien qu'il est sous-entendu que les Etats ont tout intérêt à prendre ces mesures. Mais que se passe-t-il quand ce ne sont pas des Etats qui sont en cause, et que l'on a des groupes qui manquent de moyens, ou qui n'ont pas forcément la volonté de jouer ce rôle « d'administration » ? En outre, on observe actuellement une tendance au non-respect intentionnel des dispositions du DIH, afin de décrédibiliser les actions de l'adversaire, et ce malgré tous ses efforts pour protéger la population civile. C'est le cas notamment de l'utilisation de boucliers humains, ou de la désinformation, voire de l'instrumentalisation des populations civiles, notamment sur la localisation et la protection des objectifs militaires.

3.2) Les engagements indirects sans troupes au sol

Il faut garder à l'esprit que l'obligation de prendre des mesures préventives s'entend dans la mesure où l'on a un contrôle sur une zone et/ou une population. Or, dans de nombreux conflits contemporains, les engagements ont lieu sans troupes au sol (« *no boots on the ground* »)²³. Peut-on dire qu'il est possible d'avoir un contrôle effectif sans déployer de troupes au sol, notamment du fait de l'existence de technologies modernes comme l'usage de satellites ou de drones, la maîtrise des communications, les techniques d'information, ou l'exploitation de renseignement humain fourni par des « alliés » au sol ?

23 Cas des opérations *Unified Protector* (Libye 2011) ou *Inherent Resolve* (Irak/Syrie 2014), où le choix politique a été fait de n'effectuer que des frappes aériennes et un appui indirect aux groupes armés de l'opposition.

Deux optiques peuvent s'affronter. Soit l'on considère que le contrôle réel est illusoire, et que les forces armées ne peuvent qu'« inciter » leurs adversaires au respect du DIH, notamment par le biais d'opérations d'information et d'influence. Soit l'on va plus loin, en considérant qu'il y a une certaine obligation de mener le conflit au plus près des forces adverses, et qu'il faut donc déployer des forces au sol, notamment si les groupes armés ennemis sont défaillants et/ou si les mesures incitatives sont insuffisantes.

Le cas des opérations menées par l'OTAN en Libye en 2011 est particulièrement parlant. Les forces alliées ont notamment largué de nombreux tracts incitant les populations civiles à s'éloigner des objectifs militaires (en l'occurrence les positions et centres de commandement des forces pro-Kadhafi). Si au début de la campagne ces objectifs militaires étaient facilement identifiables, ils l'étaient toutefois beaucoup moins au fur et à mesure que les forces armées régulières se sont désagrégées, et que les centres de commandement sont devenus mobiles. En outre, il était difficile de donner dans ces tracts des renseignements précis et utiles sur ces objectifs sans mettre en danger les forces amies. Ce conflit a aussi particulièrement bien illustré l'instrumentalisation des populations civiles par le régime, qui étaient désinformées voire utilisées comme boucliers humains, présentés parfois comme « volontaires ».

Dans un tel contexte, une des solutions peut consister à « faire sortir le combat classique des villes », en limitant par exemple les frappes aériennes sur les zones urbaines et en mettant en place un processus de ciblage très précis, pour les cas où il s'avère tout de même indispensable de frapper en ville²⁴. Cela revient à envisager des frappes aériennes sur le soutien « en amont » des opérations militaires adverses, tout en respectant les principes de la conduite des hostilités, et à éradiquer le commandement des groupes armés, en se fondant sur du renseignement très précis et en utilisant souvent les forces spéciales pour avoir une action très ciblée. Dans les villes, l'utilisation de moyens non létaux peut aussi être privilégiée (opérations psychologiques, action sur les perceptions, actions cybernétiques), tout en s'assurant que les conséquences directes ou indirectes n'affectent pas non plus les populations civiles.

3.3) Le combat urbain contemporain

Toutes ces réflexions appellent un élargissement du débat et à un examen des conditions actuelles du combat urbain. Il est à noter que les tactiques de contre-insurrection en milieu urbain ne sont pas nouvelles (exemple de la bataille d'Alger, ou de la stratégie du Général Petraeus en Afghanistan). Elles ont toutes mis en lumière le fait que l'on ne peut pas gagner

²⁴ L'opération *Inherent Resolve* en Irak/Syrie a notamment tiré les conséquences de dizaines d'années d'engagement militaire en Irak et en Afghanistan. En conséquence, les frappes aériennes en milieu urbain sont très peu nombreuses, et les « *no strike lists* » ont été considérablement élargies, avec l'objectif principal de réduire à zéro le nombre de civils tués de manière incidente.

le combat par la destruction systématique de zones urbaines, mais par une combinaison d'actions : renseignement humain, neutralisation ciblée tout en préservant la vie des populations civiles, et approche globale (« *win the hearts and minds* ») visant à ne pas perdre le soutien des habitants.

Il peut être intéressant de faire un focus sur la doctrine française des opérations urbaines (« OPURB »), qui s'est fortement développée depuis 2010, et qui met l'accent sur le fait que la ville est un espace chargé de restrictions et de risques. La notion de « *three block war* » insiste sur le fait que les unités doivent, dans les villes, conduire successivement ou simultanément des actions de coercition, de sécurisation et d'assistance dans un même espace-temps.

L'implication de ce constat est triple. D'une part, l'intégration et la coopération avec les acteurs civils est nécessaire, notamment à des fins de protection. D'autre part, il est primordial de préserver les services de première nécessité et les structures indispensables à la rénovation de la gouvernance, dans une optique d'approche globale. Enfin, la stratégie doit impliquer des moyens permettant d'isoler l'adversaire de la population, notamment urbaine, en limitant ses ressources, en entravant sa liberté d'action et en agissant par des opérations d'information et d'influence.

La mise en œuvre de tels principes peut alors contribuer à la prise en compte de la protection de la population civile en milieu urbain, et à l'application des normes du DIH en matière de précaution contre les effets des attaques.

Conclusion

Pour conclure, j'insisterai sur trois points. Premièrement, l'obligation de protection contre les effets des attaques, dont le caractère coutumier semble acquis, n'a pas un caractère absolu. Elle doit être mise en œuvre dans la mesure du possible, et est difficilement applicable si l'une ou l'autre des parties n'a pas de contrôle sur le territoire ou la population. En outre, si l'on regarde le Statut de Rome, ne pas respecter l'article 58 n'est pas un crime de guerre. Toutefois, les conséquences du non-respect de ce principe peuvent tomber sous la qualification de crime de guerre, voire de crimes contre l'humanité.

Deuxièmement, il semble clair que la ville restera au centre des combats contemporains. La zone urbaine concentre les outils de guerre et les ressources de l'adversaire qu'il faut bien évidemment cibler. Mais certains voient aussi la ville comme une zone sur laquelle il faut faire peser une menace, parfois terroriste, constante. Et l'espace urbain restera malheureusement toujours la source et la cible d'exactions (pillages, destruction massive de biens à caractère civil, et autres violations commises à l'égard de la population), du fait du caractère intrinsè-

quement confiné de la ville, qui concentre les populations et les infrastructures, mais aussi du fait du manque d'expérience et d'expertise des forces armées dans ce milieu spécifique.

Enfin, la conflictualité actuelle renforce encore, si besoin en était, la difficulté de mettre en œuvre le principe de précaution contre les effets des attaques en zone urbaine. Il est donc particulièrement nécessaire de continuer à repenser les doctrines et les tactiques pour limiter le combat urbain, en repoussant l'adversaire hors des villes, en utilisant des techniques précises de ciblage et/ou des moyens non létaux, pour respecter ainsi autant que faire se peut l'esprit du DIH.

THE OBLIGATION TO TAKE FEASIBLE PASSIVE PRECAUTIONS AND THE PROHIBITION OF THE USE OF HUMAN SHIELDS: CAN MILITARY CONSIDERATIONS, INCLUDING FORCE PROTECTION, JUSTIFY NOT RESPECTING THEM?

Marco Sassòli

University of Geneva¹

Résumé

Dans cette présentation, Marco Sassòli s'est penché sur le thème des précautions à prendre dans la mesure de ce qui est « pratiquement possible », en se concentrant ensuite sur la question des boucliers humains. Dans un premier temps, il est revenu sur les termes de l'article 58 du Premier protocole additionnel de 1977, soulignant la différence entre les obligations « actives » que la partie attaquante doit prendre dans la conduite des hostilités – notamment pour assurer le respect du principe de distinction entre civils et combattants (article 57(2)(a)(i) du Premier protocole additionnel) – et les précautions « passives » qui doivent être prises par le défenseur dans le cadre de ce qui est « pratiquement possible », en « s'efforçant » d'éloigner les objectifs militaires de la population civile et en « évitant » de placer ces objectifs à proximité de zones fortement peuplées. Ainsi, cet article laisse une marge de manœuvre au défenseur quant au choix des précautions à prendre en cas d'attaque, tout en offrant une certaine protection pour empêcher les parties d'utiliser les personnes civiles dans la réalisation d'un avantage militaire : en effet, toutes les précautions nécessaires doivent être prises pour protéger la population civile « contre les dangers résultant des opérations militaires ». Par ailleurs, Marco Sassòli a démontré que la même interprétation du terme « feasible » était retenue, pour l'article 57 et l'article 58, à la fois par le Comité international de la Croix-Rouge (CICR) et de nombreux Etats, tels que le Canada, les Etats-Unis ou le Royaume-Uni. Si l'obligation générale pour les parties au conflit de protéger la population civile et les biens de caractère civil soumis à leur autorité est indiscutablement considérée par le CICR comme une norme de droit international coutumier applicable dans les conflits armés tant internationaux que non internationaux, un certain nombre de réserves furent mentionnées par Marco Sassòli sur ce point. Concernant l'interdiction (absolue) d'employer des boucliers humains, conformément à l'article 51(7) du Premier protocole additionnel de 1977, Marco Sassòli a notamment rappelé que l'emploi de boucliers humains exige la présence délibérée en un même lieu de personnes civiles et d'objectifs militaires, « associée à l'intention spécifique » d'essayer d'empêcher que ces objectifs militaires soient pris pour cible. Cette interdiction couvre l'emploi des boucliers humains tant volontaires qu'involontaires. Sur ce point, il a notamment

1 I would like to thank Mr. Christopher Booth, research assistant at the University of Geneva, for his preliminary research and for having drafted the first version of this presentation.

mentionné qu'un civil qui servira volontairement et délibérément de bouclier humain pour tenter de protéger un objectif militaire ne perdra pas nécessairement sa protection contre les attaques directes. Pour continuer, il s'est demandé dans quelle mesure les considérations militaires doivent être prises en compte pour déterminer ce qui est « pratiquement possible » en matière de précautions « passives », prenant pour exemple les mesures de « force protection ». En outre, il reste à savoir s'il serait possible pour des combattants de se déguiser en civils, dans le cas où ils chercheraient à éviter de se faire attaquer, en rendant leur identification par l'attaquant plus difficile. Quoiqu'il en soit, les règles du droit international humanitaire seront violées, dans l'hypothèse où des combattants se mêlant aux personnes civiles dans le but de gêner des opérations militaires, parviendraient à faire suspendre ou annuler l'attaque engagée par l'autre partie au conflit.

Introduction

This contribution focuses on the obligations faced by a party to an armed conflict which is subject to an attack (i.e. an act of violence in offence or defence²). In order to adhere to International Humanitarian Law (IHL), a defending force must not only refrain from using civilians as human shields to 'protect' potential military targets, but must also take 'feasible' passive precautions in order to protect the civilian population under its control. It remains unclear, however, whether and to what extent the concept of feasibility of precautionary measures stretches to allow a defending force to draw upon the need to protect its military forces.

1. The obligation on behalf of the defender to take passive precautions

The general obligation on the part of the attacker to distinguish between civilians and civilian objects on the one hand, and military objectives on the other, implies that only military objectives may be targeted and that, even if this is adhered to, an attack on a military objective is unlawful if the anticipated incidental effect on civilians is disproportionate to any military advantage expected to be derived from the attack. In addition to this obligation, Additional Protocol I, applicable to international armed conflicts, details the obligation on the part of States party to the Protocol to take precautions not only as an attacker, but also as a defending force in order to mitigate the effects of attacks.³

Consequently, parties to a conflict, in adherence to Article 58, must

'to the maximum extent feasible (a) endeavour to remove the civilian population (...) from the vicinity of military objectives; (b) avoid locating military objectives within or

2 Article 49 (1), Additional Protocol I.

3 Article 58, Additional Protocol I.

near densely populated areas; (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’.

The wording of Article 58 already clearly indicates that these obligations are to be weaker than those of an attacker. These measures have to be taken only ‘to the maximum extent feasible,’ and the defender need only ‘endeavour to remove’ the civilian population and ‘avoid’ locating military objectives nearby.

As well as being found within the text of a treaty, the rules contained within Article 58 correspond with customary law found in the International Committee of the Red Cross (ICRC) Customary Law Study in rules 22-24.⁴ Under customary law, the general duty on the part of the defender to protect the civilian population and civilian objects under its control is unquestionably considered by the ICRC to apply in both international and non-international armed conflicts. Meanwhile, the duty to avoid locating military objectives within or near densely populated areas and the duty to remove civilian persons and objects under its control from the vicinity of military objectives only arguably extend to non-international armed conflicts, even in the view of the ICRC.

The customary nature of such obligations may, however, be subject to serious doubts, in particular bearing in mind the *Travaux préparatoires* which preceded the Protocol and the practice of States (which also has an impact on the interpretation of the treaty rule). In the competent working group of the Diplomatic Conference, ‘many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas.’⁵ Indeed, France, Switzerland, Austria, South Korea and Cameroon all declared that such a provision, in particular the obligation regarding the location of military objectives, must not prevent a State from organising its national defence as it considers necessary.⁶

4 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, Rules 22-24, pp. 68-76.

5 Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Martinus Nijhoff, 1982, p 372.

6 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, vol. VI, pp. 213/214 (France, Switzerland, Austria), p. 232 (Italy), p. 234/235 (South Korea), 239 (Cameroon).

Upon accession to Protocol I Belgium, Italy, the Netherlands, and Algeria made declarations that the term 'feasible' be understood to take available means or military considerations into account. Switzerland and Austria made reservations subjecting Article 58 to the 'exigencies dictated by the defence of the national territory'. Switzerland however has since withdrawn this reservation.

In addition to such express hesitancy on the part of States, State practice is also somewhat lacking. To elaborate further on this point, the UK Military Manual, for example, states that 'it is not prohibited to use urban terrain for military purposes, in particular the location of military headquarters in urban areas, when military necessity so dictates, but the potential danger to the civilian population is an important factor to be considered in making decisions'⁷. As for the practice of other States, if they did indeed recognise an obligation to separate military objectives from civilian population concentrations, it follows that this obligation would already have to be implemented into their respective planning laws in peacetime, since fixed military objectives such as Ministries of Defence, headquarters of armed forces, army barracks and weapons industries cannot be removed from cities once an armed conflict breaks out. I am not aware of such rules in planning laws.

2. The prohibition against using human shields

A. The distinction between the duty to take passive precautions and the prohibition against using human shields

Article 51(7) of Protocol I provides a prohibition of the use of human shields. Here, it is elaborated that 'the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations', in particular providing prohibition of any 'attempts to shield military objectives from attacks or to shield, favour or impede military operations'. In addition, the Parties to the conflict 'shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'

The decisive factor distinguishing the use of human shields by a defending force from a mere violation of their aforementioned obligation to take passive precautions is whether the intermingling of military forces and the civilian population is a result of an effort of the defender to obtain 'protection' for its military forces and objectives, or simply of a lack of care for the civilian population.

⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, paragraph 5.36.2.

It is therefore the intent of the defender which distinguishes the two concepts, a violation of the duty to take passive precautions and a violation of the prohibition of human shields.⁸

It is also important to note the subtle, but crucial, distinction that the prohibition of the use of human shields is to only apply to the 'civilian population or individual civilians', and not to encompass civilian objects within its prohibition. Camouflage, indeed, effectively consists of making combatants and military objectives look like civilian objects and to use civilian objects such as barns and trees for that purpose. Camouflage is not prohibited.

B. An absolute prohibition

Contrary to the doubts the ICRC expresses regarding the customary character of the obligation of the defending force to take certain passive precautions equally in non-international armed conflicts, the rule on the prohibition of the use of human shields is considered by the ICRC as customary IHL in both international and non-international armed conflicts.⁹

Similar prohibitions already exist outside of Protocol I in the 1949 Geneva Conventions concerning protected civilians (i.e. those who are in enemy hands) and for prisoners of war.¹⁰ During recent armed conflicts the United Nations (UN) condemned the use of human shields¹¹, the use of which has today been elevated to the status of war crime in the International Criminal Court (ICC) Statute, which prohibits 'utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations'¹². Astonishingly, however, the ICC Statute only makes reference to this crime in regard to international armed conflicts.

I have argued elsewhere that even where a civilian serves voluntarily as a human shield for a military objective, he or she is not to be labelled as participating directly in hostilities, except if he or she physically hinders enemy military operations¹³ – an opinion which has been shared

8 Jean-Marie Henckaerts & Louise Doswald-Beck, *op. cit.*, note 3, vol. 1, p. 340; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2003, pp. 344-348; Bothe, Partsch and Solf, *op. cit.*, note 4, p. 316 even refer to the 'subjective intent of [the] military commander'.

9 Jean-Marie Henckaerts & Louise Doswald-Beck, *op. cit.*, note 3, vol. 1, p. 337, Rule 97.

10 Art. 28 of Convention IV and Art. 23 (1) of Convention III.

11 For example, see for the 1991 Gulf War, U.N. General Assembly, 'Situation of Human Rights in Iraq' A/RES/46/134, December 17, 1991.

12 See Art. 8 (2) (b) (xxiii) of the ICC Statute.

13 See Marco Sassöli, "Human Shields and International Humanitarian Law", in: Fischer-Lescano, Gasser, Marauhn, Ronzitti (eds.), *Peace in Liberty, Festschrift für Michael Bothe zum 70. Geburtstag*, Baden-Baden and Zürich, Nomos and Dike, 2008, pp. 567-578, with further references.

by the ICRC.¹⁴ What is less controversial still is that civilians implicated involuntarily as human shields who are thereby forced to join combatants or military objectives, or civilians who are joined by combatants,¹⁵ do not lose their protection, including the benefit of precautionary measures by the attacker.¹⁶

In any case, what it is uncontroversial is that the absolute prohibition against using human shields covers both voluntary and involuntary human shields. Nevertheless, while civilians do indeed lose protection against attack if and for such time as they directly participate in hostilities, a party does not, in my view, violate IHL if it *allows* civilians to directly participate in hostilities it is engaged in. Here again, intent is the decisive criterion: a party allowing civilians to directly participate in hostilities does not look to protect its military objectives against attacks, but to increase its fighting capacity.

We see a clear divergence between the differing degrees of obligation on the part of the defender: on the one hand there is the strict obligation not to use human shields, even where the shield is a civilian who has volunteered, and on the other a duty to take passive precautions which is diluted by the concept of ‘feasibility’, a concept which shall now be discussed.

3. Evaluating the feasibility requirement for passive precautions

A. Feasibility in the case of active precautions

Upon accession to Protocol I, several countries including Algeria, Belgium, Germany, Italy, Spain and the United Kingdom made declarations clarifying their respective understandings of the word ‘feasible’ in relation to both Articles 57 and 58. A common theme to these assertions is that feasible precautions are largely to be taken as signifying what is *practicable or practically possible*, taking into account all circumstances *at the time*, including those *relevant to the success of military operations*.

It is clear, at least in the case of active precautions to be taken by the attacker, that military considerations may play a part in determining the feasibility of any given precaution to mitigate damage to civilians. Indeed, this view is shared by national practice. Returning to the UK

14 See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law*, Geneva, ICRC, 2010, pp. 58-60 (in particular footnote 141), available at: <<http://www.icrc.org/eng/resources/documents/publication/p0990.htm>>

15 Art. 50(3) of Protocol I clarifies that ‘[t]he 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.’ Article 50(3) is an application of the proportionality principle, a general principle of law, to the definition of the civilian population, and its customary character does therefore not need to be analysed separately (See Bothe, Partsch, Solf, *op.cit.*, note 4, p. 296).

16 UK Manual, *op. cit.*, note 6, paragraph 5.22.1.

Military Manual, it details that: '[a] commander should have regard to the following factors: (...) g. the risks to his own troops of the various options open to him'.¹⁷ Here, we can see more specifically that 'the success of military operations' entails that force protection is to be considered when assessing the feasibility of precautions.

B. Does the same concept of feasibility apply in the case of passive precautions?

Several arguments support the idea that the concept of feasibility incorporates military considerations within the scope of both active and passive precautions.

It is a general principle of treaty interpretation that a well-drafted international legal convention ought to provide the same interpretation for any given word throughout its text. Within the *Travaux préparatoires* to Protocol I, several States supported the view that 'feasible' be taken to have the same meaning throughout the text of the Protocol. In particular, the anglophone States were explicit that the word 'feasible' have the same meaning in Article 57 (then draft Article 50) and Article 58 (then draft Article 51). The delegations of the United Kingdom¹⁸, Canada¹⁹ and the United States²⁰ all made statements that the word 'feasible' must refer to that which is practicable or practically possible, taking into account all circumstances at the relevant time, including those relevant to the success of military operations.

This corresponds to the opinion of the ICRC. After a discussion of the word 'feasible' in relation to Article 57 on an attacking force's obligations, the ICRC's Commentary on Additional Protocol I discusses what the word 'feasible' signifies in the following Article 58 in relation to the defending force's obligations. It simply states that 'once again the term "feasible" is used' and refers in a footnote '[o]n the meaning of these words' to their discussion in the Commentary of Article 57.²¹ The ICRC therefore appears to retain the exact same meaning of feasibility under Article 58 as under Article 57 and, as follows, the same meaning of feasibility under both active and passive precautions. Likewise, this appears to be the opinion of the United States (US). The new US Department of Defence Law of War Manual details, while considering precautions to be taken by the defender, that 'parties to a conflict should also take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks'. It adds that 'what precautions are feasible depends greatly on the context, including

17 *Ibid.*, paragraph 5 32.5.

18 Official Records, *op.cit.*, note 5, Vol. VI, p. 214, paragraph 59.

19 *Ibid.*, p. 224.

20 *Ibid.*, p. 241.

21 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht/Geneva, Martinus Nijhoff/ICRC, 1987, paragraph 2245.

operational considerations', referring to the earlier discussion on when active precautions by the attacker are feasible.²² In this earlier discussion it explains that 'feasible precautions are those that are practicable or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations'. These circumstances may include: '(...) whether taking the precaution poses a risk to one's own forces or presents other security risks'.²³ The State practice of the United States therefore seems to indicate that a defending force may take into account military considerations, mitigating the protection of civilians, when making feasible precautions against the effects of attack.

Difficulties in omitting military considerations from a discussion of feasibility of passive precautions arise prominently when one bears in mind non-conventional aspects of modern warfare, for example when considering the feasible precautions to be taken by a guerrilla force defending themselves from attack. By their very nature, the practice of guerrillas requires that the whereabouts of their forces be unknown, often entailing a high degree of intermingling with civilians, or at least locating themselves within civilian objects. Such a force will be composed largely of militia, comprising a force so irregular that many of its subscription will be voluntary civilians. A group comprising civilians cannot take the precaution to protect civilians without taking into account the protection of its military.

4. Does the feasibility evaluation need to be qualified?

Against this backdrop of support that the concept of feasibility is taken to have the same meaning throughout the text of Protocol I, there remain doubts as to what extent military considerations can be brought into an argument of which passive precautions are feasible.

In particular, to what extent can the defending force carry out measures of force protection (i.e. measures which are taken to mitigate damage to military targets), in neglecting its obligation to protect the lives of civilians?

It is possible to imagine a scenario in which a force, in defending itself from attack, decides to station its military units among civilians and civilian objects, because not to do so would render their soldiers 'sitting ducks', easily targeted by the enemy out in the open.

Within the aforementioned concept of feasible precautions, this action should be permitted, since the defending force is seeking to limit severe damage to its military units. The ICRC Commentary indeed states that 'a Party to the conflict cannot be expected to arrange its

²² US Department of Defence Law of War Manual 2015, paragraph 5.14.

²³ *Ibid.*, paragraph 5.3.3.2.

armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary'.²⁴

The military advantages of placing or keeping military targets within the proximity of civilians and civilian objects for the purposes of force protection are apparent. Such a measure will clearly mitigate damage to the defending force because the enemy may not attack due to its own obligations as an attacking force under IHL. However, by such a move the defending party is intentionally using civilians as human shields which, as discussed earlier, is always prohibited and may therefore not be a factor in the evaluation of feasibility.

It may be that the force protection is employed in a way other than by trying to 'protect' combatants and military objectives through the presence of civilians. To make an important distinction here, the advantage of positioning military units in a way that merely makes it difficult for an enemy to *identify* combatants and military objectives may indeed be a factor which may be taken into account in the feasibility evaluation.

While this factor does not bar defending combatants from taking shelter in civilian objects, the feasibility criterion does not allow the combatants of a defending force to disguise themselves as civilians while they are engaged in an attack or a military operation preparatory to an attack. The latter prohibition results indirectly from the fact that such combatants, when making their identification difficult in these circumstances by disguising themselves as civilians, would forfeit combatant status²⁵, in addition to directly violating the prohibition of perfidy (if the purpose is to kill, injure or capture an adversary).²⁶ This nonetheless leaves open, at least under Protocol I, the possibility for combatants to disguise themselves as civilians if the intent of such an action is not to engage in an attack, but merely to avoid being attacked, by making their identification more difficult for the attacker. Conversely, IHL is violated if the intent of combatants intermingling with civilians is to hinder an attack in the hope that the adversary will ultimately call it off under its obligation to spare civilians incidentally affected by an attack directed against combatants it has identified. The latter indeed would constitute a prohibited use of human shields.

24 Sandoz, Swinarski and Zimmermann, *op.cit.*, note 20, paragraph 2246, in French 'on ne peut attendre d'une Partie au conflit qu'elle dispose ses forces armées et leurs installations de telle manière qu'elles soient signalées à l'adversaire.'

25 Additional Protocol I, Art. 44 (2) and (3).

26 *Ibid.*, Art. 37 (1) (c).

Conclusion

The obligations placed upon a defending force under IHL may be considered weaker than those placed upon an attacking force. Article 58 of Protocol I is clearly hesitant to intrude on a defending force's ability to organise its military strategy, affording it a great deal of leeway in choosing which precautions to take when facing attack. This has great implications for civilians as victims of conflict, but affords some protection against the malicious use of human shields for military gain. This prohibition of the use of human shields in my view represents the absolute limit to the inclusion of force protection considerations into the evaluation of whether passive precautions are feasible.

SESSION 3 - PROTECTING CIVILIANS LIVING IN CITIES AGAINST THE EFFECTS OF HOSTILITIES

Following the third session, the audience raised questions on the following main issues:

1. The prohibition of using human shields

With regard to considering a voluntary human shield as taking a direct part in hostilities, a participant totally disagreed with this idea because then a human shield could be attacked when heading to the objective – which is nonsense. The participant then raised the following questions: does one make a difference in the proportionality assessment between voluntary human shields and involuntary human shields, i.e. children who have been forcefully moved to the objective? How far is that element taken into consideration for the proportionality test?

The panellist explained that it is a question of active precaution, and not passive precaution. In his opinion, there is no indication that there are different civilians with different values. As long as they are civilians, they have certain values and the defender violates International Humanitarian Law (IHL) if it accepts voluntary human shields, but the voluntary human shields remain civilians and the panellist did not see how one could count some civilians as being more or less important. He could not imagine how a pilot could evaluate from 10,000 feet whether the shield is voluntary or involuntary, which would also imply that one has to evaluate whether a marriage with a Taliban member in Afghanistan is a love match or an imposed marriage, because if it is an imposed marriage, the wife would be an involuntary human shield. Otherwise, if she accompanies her husband, she would be a voluntary human shield. In the end, it is a sliding scale. And therefore, the panellist simply recalled that obviously the objective remains a legitimate military target. A proportionality evaluation has to be made. As always, if the enemy does not comply with IHL, and this is specifically laid down in Article 51(8) of Additional Protocol I, you will nevertheless have to take your own precautions and take this reality into account. From the point of view of a military commander, the dream would be to attack a country where all enemy troops are in the midst of the desert. Unfortunately, sometimes the enemy country is not that kind of country and violations of IHL by the enemy are also a part of reality.

On this issue, the other panellist added that in practice, in most situations, one cannot really know if a human shield is voluntary or involuntary. In this case, the principle of ‘in case of doubt’ must be applied, avoiding any target. When facing a voluntary human shield, the main question that needs to be answered is: do we have a necessity to target? What would be the result of this? What are the military and the political impacts of the targeting?

A participant asked how the distinction on human shields made by the panellist can be reconciled with the wording of the human shield's definition, which includes attempts to impede military operation. Of course, if the enemy cannot identify a human shield, that impedes its operation, because the enemy cannot target it.

In the panellist's opinion, the word 'impede' does not include the omission of identification, reminding everyone of another obligation which, at least in an international armed conflict, it is clear: combatants have to distinguish themselves. If they do not distinguish themselves, they are not taking human shields, but they are violating IHL.

Another question was: combatants can use a civilian object as a shield and they can take shelter in a civilian building. What are the consequences of that? Does the civilian object or the building become a military objective, because it is offering a military advantage? Or is it an element to take into account as part of the proportionality test?

The panellist explained that if combatants are only hiding there, this is not a use of the civilian building which would make a military objective of the building but, obviously, they themselves will remain legitimate targets. However, if the combatants take shelter in the sense of having a defence position there, then the building will become a military objective. Therefore, in the proportionality test, the building no longer counts as a civilian object. This raises the question of how to apply this in practice. In the panellist's view, it should not be that difficult, because if one knows that the combatants are there, this is not yet sufficient to assume that there is a 'use'. In fact, there must be something more to consider the building as a military objective.

The other panellist added that the principle of necessity must be applied, and that one must wait until the combatants leave the building, where they are hiding, to be targeted. The principle of precise and concrete military advantage must also be taken into account in these circumstances.

On this point, a lacuna in IHL was raised by the first panellist: to target a combatant, one does not need a military advantage, because a combatant is a legitimate target *per se*.

Looking at State practice in relation to how vehicles, check points and roadblocks are conducted, some armed forces let the driver get out of the car or open the door, etc. only to check that everything is fine. One of the participants suggested that, in doctrine, there has not been any reaction one way or another in relation to that tactic. If you replace the car by a house

and the driver by inhabitants, would you consider that this would be an example of use of civilians as human shields?

The panellist recalled the need to distinguish between what is under one's control and what is not. If this is done in a house located in an occupied territory, it will be a different concept of taking human shields than in the context of conduct of hostilities. As for the roadblocks, it is precisely because it is a law enforcement operation that different rules apply.

2. Moving the fighting away from the inhabitants

Another participant asked whether in operational practice, one will have a preferred option: first moving the military objective out of a city rather than evacuating the civilians, or *vice versa* – naturally keeping in mind that it will depend on the circumstances. With regard to current doctrine, the participant explained that there is no preference, although moving a military objective out of a city is very difficult, especially when one has no control over that territory. The only way is to urge people on the ground to move and to abide by their obligations, there are no other ways to act practically. Another aspect will be used and, before moving the civilians, one tries to move the fights out of the city and, only then, one tries to convince the civilians to move, notably by dropping leaflets or through an information operation, before evacuating them.

Panel Discussion

Can Siege Warfare still be Legal?

Moderator: **Steven Hill**

NATO Secretary General Legal Office

Résumé

Au cours de la première table ronde de ce 16^{ème} Colloque de Bruges, Steven Hill, Françoise Hampson et Sean Watts ont examiné la question du siège et ses implications au 21^{ème} siècle. Dans un premier temps, Françoise Hampson a tenté de préciser ce qu'il faut entendre par siège. Un siège peut se définir par ses effets, en ce qu'il implique un strict contrôle des mouvements des personnes ou des biens à l'entrée et la sortie d'une zone assiégée. Elle a également rappelé les différents objectifs militaires d'un siège, du contrôle de ponts et de routes au contrôle pur et simple d'une ville, ou l'affaiblissement de l'adversaire par l'encerclement d'une partie de ses forces armées. Françoise Hampson a ensuite examiné la distinction qui existe entre le siège et le blocus, et a également distingué le siège de l'occupation. Sean Watts a présenté la pratique et la doctrine américaines en matière de siège : considérant le siège comme un élément essentiel aux opérations militaires, il a néanmoins mis en lumière l'aversion des forces armées pour cette pratique. Les deux panelistes ont également abordé la question de l'utilisation de la famine comme méthode de guerre. La dernière question, essentielle elle aussi, présentée par Steven Hill, a porté sur le droit ou non pour les personnes civiles vivant dans une zone assiégée d'être évacuées et de recevoir de l'assistance humanitaire. Pour finir, Sean Watts a apporté quelques éléments d'analyse sur la Résolution 2139 (2014) du Conseil de sécurité des Nations unies.

PROPOS INTRODUCTIFS

Steven Hill

NATO Secretary General Legal Office

Le sujet qui nous concerne à présent, la pratique spécifique du siège, constitue l'un des éléments de la guerre en milieu urbain. Récemment revenue sur le devant de la scène, cela en fait un sujet particulièrement intéressant, notamment après ce qui s'est déroulé à Sarajevo en Bosnie ou les évènements tragiques qui se déroulent actuellement en Syrie. Avant Sarajevo, on n'avait jamais vu de sièges d'une telle ampleur depuis la Seconde guerre mondiale : en effet, le siège de Sarajevo, qui a duré presque quatre ans, fait partie d'une série d'évènements qui ont même amené l'OTAN à intensifier son intervention dans le pays. Si le siège constitue une pratique militaire très ancienne, il a toutefois connu de nombreuses évolutions, tant par l'apparition de nouvelles technologies militaires ou de communication, que sur le plan légal. Par exemple, on peut mentionner une règle coutumière qui interdisait aux commandants de piller une ville qui s'était volontairement rendue, tandis que les villes qui étaient tombées après avoir résisté étaient laissées à l'entière discrétion du commandant. Par la suite, d'autres règles relatives à la protection des bâtiments ont été adoptées. Mais ce n'est qu'après la Seconde guerre mondiale que la question relative à la protection des populations civiles a été mise en avant. Comme nous avons pu le constater lors des présentations précédentes, les évolutions législatives ou normatives en droit international humanitaire qui ont suivi ont eu de nombreuses conséquences sur la conduite des hostilités et sur la pratique des sièges. Pourtant, ces conséquences sont pour le moins floues et soulèvent de nombreuses questions que nous nous proposons d'aborder durant cette session.

A TERMINOLOGICAL ISSUE: WHAT IS A SIEGE?

Françoise Hampson

University of Essex¹

One important point to highlight is: when we see images on television of absolutely outrageous things, such as the consequences of the use of barrel bombs, we do not need to sit down and deliberate whether this is a sign that the law is not clear enough or a sign that we need more law, because these are things which are a flagrant violation of the rules. This is why it is important to distinguish between flagrant violations of the rules and situations where there may be a genuine legal problem.

In relation to sieges, there have been some famous ones. I come from a place where there was a less famous one. I live in Colchester, and with reference to the last panel, I would like to point out that Colchester is an important garrison town with a garrison right in the middle of the town. During the English Civil War in 1648, Colchester ended up besieged for the following reason: Colchester was a town that strongly supported Parliament, but a group of Royalists, who wanted to raise support for the King further north, headed into Colchester hotly pursued by Parliamentarians who then tried to take Colchester by assault but failed. So, the besieged population strongly supported the besiegers, but was forced to be in the town because of the defenders of the town, i.e. the group of Royalists trapped within Colchester's walls. This is an example of why we should not assume that all civilian populations in a besieged town are actually supporters of the defenders of the town.

We should remember that one can lay siege to military installations or areas of land, such as what happened for example in *Điễn Biên Phu*. However, this presentation will focus on sieges that occur in relation to towns and cities. I suspect sieges to be like an elephant: you know it when you see it, but you have a problem defining it. Indeed, one issue that is not addressed in the law is: do you define siege by the intent of the besieger or by the effect the siege has? I suspect that it is defined by the effect, because it involves the control of movement of persons or goods in and out of a besieged area. But does this necessarily involve total encirclement? It seems to me that the *Dragomir Milošević* case on the siege of Sarajevo answers that question: you do not have to have total encirclement if you have total control over the entry and egress of persons and goods. So, if you do have effective control over movements, even without total encirclement, it would be a siege.

¹ This contribution has been written on the basis of an audio recording and has not been reviewed by the speaker.

It is also important to remember the various military purposes of sieges, starting first with international armed conflict. It may be that the besieging force needs to control the town itself, i.e. the whole place. More commonly, the besieging force may need to control something specific in the town, such as port facilities, bridges for river crossing, or even just crossroads. Another military purpose that may underlie a siege is where the attacking forces want to advance but do not want hostile forces behind them, because those hostile forces could attack them or destroy their lines of communication. In some cases, you can avoid besieging a place simply by manoeuvring and moving elsewhere. An example of this is the Blitzkrieg. In other circumstances, it may be that you have to actually contain those forces in order to proceed and achieve your objective. So, the besieging forces may be only part of the force, the rest of which is doing something else. In an international armed conflict, it is also possible for an attacking force to secure the collapse of the opposing forces, as in Stalingrad for example.

In a non-international armed conflict, we need to remember that there is something different going on. The State has had its authority challenged, assuming that it is the State that is trying to take control over a rebel-held town. It needs to be able to assert control throughout its territory. As such, there is a need to control to establish authority. That is for either a political reason or a mixed political-military reason, but in any case, it is for an important reason. Indeed, the need cannot be dismissed only because there is a political element. Why am I emphasising the military purpose behind the siege? In my opinion, it matters for two main reasons. First, it is going to be legally relevant to the definition of a military objective - for a definite military advantage, you need to know how you articulate the advantage. However it is also going to be relevant to the proportionality of the concrete and direct military advantage anticipated. It is also important for a strategic reason: if armed forces need militarily to undertake sieges, then it is up to the law of armed conflict to come up with appropriate rules, once it is capable of being operationalised. If well-meaning humanitarians argue that the applicable rules mean that you cannot conduct sieges lawfully, that does not mean that sieges will not happen. Rather, it means that sieges will happen unlawfully or outside the framework of law. This is something really dangerous because if States think that they are forced to conduct a certain kind of operation outside the legal framework, there is a risk of leakage into areas where they could conduct operations legally. We should take this as a starting point: sieges are occasionally necessary, and being necessary, it is up to the law to accommodate them. It should not be the other way round.

What differentiates sieges from other kinds of operations? First of all, I would like to distinguish between sieges and blockades, particularly bearing in mind that we are not far from places like Ostend. Generally speaking, blockade applies to the whole or a significant part of a State's territory. Blockade has legal implications, as it does not only constitute a factual

description of a particular type of operation. For example, for a blockade to be lawful, it must be effective: in other words, if you declare a blockade that is not effective, this constitutes an unlawful declaration of blockade. Then, some commentators, including Yoram Dinstein and Wolff Heintschel von Heinegg, argue that in a non-international armed conflict, if a State declares a blockade, this will act as a declaration or a recognition of belligerency and as a result, the armed conflict will be internationalised. None of those consequences are true in relation to siege: it is a factual description of what is going on without any specific legal connotation. Having said that, if you lay siege to a coastal town, Ostend for example, in order to prevent effective movement of persons and goods, part of it is going to contain a maritime element. Nevertheless, that does not change it into a blockade, it simply constitutes the maritime component of the attempted siege of a coastal town.

Another distinction, and this is more a contrast than a true distinction, must be made between siege and assault. It could be that the besieging party would like to take the town by assault but actually cannot do so, or it could be that the besieging party actually does not want to assault the town, because you need far more forces to take a town by assault than you will need to lay some kind of siege. It is generally admitted that the ratio is between three and five attacking forces to one defending force in order to take a town by assault, whereas in the case of a siege, the ratio is said to be one to one. In many cases, a siege may end with an assault. But they are different kinds of activities and the armed forces should be aware of this.

My last point in this section is the question of the applicability of different law of armed conflict regimes. Armed forces use different ways of controlling the movement of persons and goods. Both the besieged and the besieging forces are exercising control over movement. One question that can be raised is: in an international armed conflict, is the occupation regime applicable at all to either Party? If the territorial State is besieged by a non-territorial State, then it cannot be an occupation of its own territory. However, in that situation, is the besieging Party in occupation? It all depends on what is happening in the area around the town: it is unlikely that the besieging force will not be exercising control there. But by definition the besieging force is not exercising control within the town. It seems to me that where the territorial State is the besieged Party, the occupation regime does not apply to the attacking State, with regard to the town - because it may apply elsewhere. What if it is the other way round? If the territorial State is the besieging Party, it is again not an occupation of its own territory. But what about the besieged Party in control of the town? In my opinion, there should be a distinction between 'being actually placed under the authority of the hostile army' (which is the test for occupation) and the type of control being exercised by a besieged Party. This is why I would suggest that generally speaking, in an international armed conflict, the law of occupation will actually not be *de jure* applicable.

In a non-international armed conflict, it is heresy to suggest that the occupation regime could apply to either side: on the one hand, the rebels are not supposed to occupy anything because they do not have the basis for exercising authority and, on the other, the territorial State cannot be in occupation of its own territory. In this context, there is a different question that arises: where you have a siege, can you assume that, if the rebels are the besieging force, the siege is a concerted and sustained military operation as a result of which, simply by virtue of there being a siege, the situation would come within Additional Protocol II – assuming that the Protocol has been ratified. If it is the opposite and the rebels are the ones being besieged, what is the position within the town? Can we say that it amounts to a concerted and sustained military operation because the State has not been able to take the town? There is a question as to whether a siege automatically triggers the applicability of Additional Protocol II – if it has been ratified.

As a final point, the law of armed conflict does not have different rules for different types of military operations. There are simply law of armed conflict rules on all operations and in practice, they may apply in a slightly different way depending on the operation.

SIEGE IN CONTEMPORARY DOCTRINE: HOW DOES IT WORK?

Sean Watts

Creighton University

I will begin with a confession. I am part of a dying breed of international lawyers who still refers to this as the Law of War, because this whole International Humanitarian Law (IHL) stuff confuses me, except when the International Committee of the Red Cross (ICRC) is feeding me. When the ICRC feeds me, I find it much easier to call this IHL. So I will do my best, with apologies if I call this something other than IHL.

Concerning the doctrinal aspect of siege, my research paper¹ gave me an opportunity to survey the military doctrine on siege in far greater depth than I ever had before. For a long time as a military officer, I have to confess that siege really escaped my attention and the reason why will become clearer in a moment. Regarding that doctrine, I found everything shared by Françoise minutes ago to be correct. However, my overall impression is the following: siege is essential but disfavoured. Indeed, military doctrine considers siege, including urban sieges, as an essential aspect of military operations. But we do not like to resort to sieges. The greatest or strongest evidence of our dislike of siege is that we renamed the term 'siege' in American military doctrine. When we do not like to do something, we usually give it another name. For example, we never ever 'retreat', we do 'retrograde operations'. Similarly, if you examine the military doctrine of siege, we have renamed it 'encirclement operations': so, we 'encircle' forces, but we do not 'besiege' them.

Sieges remain a persistent facet of military operations, despite the archaic imagery that the term 'siege' evokes. We still resort to them and there are strong reasons to believe that we will continue to do so. I especially appreciated the presentation of Lieutenant Colonel Nathalie Durhin, who emphasised the reason why militaries are so interested in urban areas: especially in counter-insurgency operations, there is a focus on civilian populations, and the military wants to be closer to them, wants to control them, wants to interact with them and that makes urban military operations relevant and as a result, encirclement operations will also remain relevant. But at the same time, why do we dislike them? To borrow an American political term, it is the 'optics': very often, you do not have a choice, you do not have the forces you need to undertake an assault of a city, or the weapon system that you would need to overcome the defenders. First, there may be an operational necessity but the 'optics' of

1 Sean Watts, "Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations", in: *Research and Policy Paper, Counterterrorism and Humanitarian Engagement Project*, May 2014, available at: <<http://blogs.law.harvard.edu/cheoproject/>>

these operations are not favourable. Even if in reality, you have the military advantage, or the advantage of initiative, sieges can take away that advantage very quickly. Indeed, sieges are time-consuming, resource-intensive, and static. Militaries prefer mobile operations rather than static operations. Another reason may be that sieges are overt operations, by definition. If you look at most of our operations today, we have exhibited a strong preference for doing things covertly. It is difficult in a world where technology is everywhere, but we still have that strong preference for covert operations, notably through the use of special operation teams. The problem with sieges is that they are overt by nature. Because they are static, it is hard to hide the fact that you are laying siege. These are just a couple of observations on why you might find a distaste for siege when reviewing military doctrine.

To complete the question, what does that doctrine look like? If you do force us into a siege, what are the guiding military principles behind it? Actually, there is no principle more important than the principle of isolation. Indeed, the idea of a siege is to prevent the enemy from having contact with the outside world. If you are to successfully force the enemy into surrender, you must impose isolation. Our military doctrine goes even further, by delineating several types of isolation: there is of course physical isolation that we commonly associate with siege, and which is accomplished through encirclement. But the American military doctrine also recommends psychological isolation, through which you want to reduce the will to resist and remove any sense of hope of the besieged force. Lastly, and this is a facet of the 21st century, there is also electronic isolation which enables the besieging force to deny access to the outside world.

IHL AND SIEGES: WHAT ARE THE APPLYING RULES?

Sean Watts

Creighton University

I fully agree with Françoise's initial assessment: yes, IHL, generally speaking, fully applies to sieges. If you go a little bit deeper into the topic, there are four provisions that specifically mention sieges: three provisions appear in the 1949 Geneva Conventions, and one appears in the 1907 Hague Regulations. This is where we might find the *lex specialis* on sieges. With regard to targeting questions, you cannot find a better example than Article 27 of the 1907 Hague Regulations. It directs attackers and besieging forces to spare 'as far as possible' buildings dedicated to medical, scientific, educational and cultural purposes. Furthermore, Article 27 displays that important balance of obligations between attackers and defenders. Indeed, it also provides that 'it is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand'. In many circumstances, we can observe that the besieged party is best situated to protect civilian objects in the encircled area.

In my opinion, Additional Protocol I is generally applicable but there are some refinements to make with regard to siege. What does the prohibition on terrorising a civilian population mean when that civilian population is trapped within a besieged area? In a *per se* sense, the civilian population will be terrorised each time the besieging force launches an attack on that area. Thus, we can consider that it would be only the intentional terrorising of the civilians that would violate the provisions of Additional Protocol I, which are part of customary IHL as well.

Until very recently, there was an embarrassing part of the American legal doctrine: indeed, our old Field Manual on the Law of Armed Conflict was issued in 1956. Until May 2015, that is what we went to war with. Legal doctrine should probably not be that dated. But according to a provision of this only recently expired manual, civilians attempting to escape the besieged area are liable to be fired upon. Actually, this provision derives from the *High Command* case¹. In these proceedings initiated after World War II, the Allies had brought German commanders up on charges of firing artillery shells at civilians who were attempting to leave a besieged area, but the American Military Commission, who tried the case, acquitted the German commanders. Thankfully, this case law has been repealed and is no longer part of American legal doctrine.

1 The United States of America vs. Wilhelm von Leeb et al. US Military Tribunal Nuremberg, Judgment of 27 October 1948

One last and most difficult point is the issue of Article 54 of Additional Protocol I on the prohibition on starvation. The new American Law of War Manual does attribute a customary status to that rule and even extends it explicitly to non-international armed conflict. However, what exactly is prohibited by Article 54, especially in the context of siege? Today, there appear to be two camps of interpretation. On the one hand, some people consider that we can no longer achieve the isolation prescribed by military doctrine, and that the provision relating to starvation of civilians as a method of warfare actually prevents isolation that results in any civilian's starvation. In my reading, the British Law of Armed Conflict Manual has very little tolerance for even collateral civilian starvation as derived from Article 54 of Additional Protocol I. The writings of Professor Dinstein in 1991 also coincide with this view. On the other hand, there is a competing view, which is clearly articulated by General A.P.V Tony Rogers, and which considers that as long as you are not intending civilian starvation, you are not violating the letter of the rule. Initially, he had looked at the rules following Article 54 (1) of Additional Protocol I, notably concerning the destruction of items which are indispensable to the survival of the civilian population, and considered that it is only a destruction of these items that is prohibited. In his view, if armed forces merely prevent food from being delivered to civilians, they are not violating Article 54. But in my opinion, he is probably articulating a minority position. I would now like to share with you a third position referring to this new American Law of War Manual: the U.S. approach currently seems to rely heavily on proportionality. This is unsurprising: rather than expressing the prohibition of civilian starvation *per se*, it would prohibit 'excessive' civilian starvation in relation to the direct military advantage that we would gain by starving the forces collocated with the civilians at a given moment.

THE PROHIBITION OF STARVATION: ADDITIONAL ELEMENTS?

Françoise Hampson

University of Essex

In my opinion, what is prohibited by treaty law is not starvation as such, but starvation as a method of conflict, or as a tactic, where you are seeking to achieve starvation. Having said that, there is probably a distinction because other rules of IHL impose such constraints that besieging force would not, lawfully as well as politically, be able to allow the population to starve. However, there is a real risk if the besieged force takes all the humanitarian assistance. As far as the besieging force is concerned, first of all, it has obligations not to destroy essential foodstuffs and, secondly, it has got obligations in the field of assistance. At the end of the day, for legal and imperative reasons, the besieging force is not going to allow the besieged civilian population to starve, but they are very likely to let them go significantly hungry. It should be worth remembering the urgency in Sarajevo. I was informed by a news programme on the BBC at the time of the siege that the Sarajevans had the impression that the outside community was not prepared to do anything, except make sure that they were fed. They also had the impression that nobody would mind if they died, provided they were not hungry when they were killed. There is a risk that too much focus is put on this issue of starvation. We should remember that we are talking about people dying as a result of a lack of food. If you are living for four years with not enough to maintain healthy bodily functions, it does not mean you are dead, but it would still mean a generation of children and adults significantly malnourished. But starvation is starvation, it is not hunger.

Sean Watts

Creighton University

From a strategic point of view, we cannot deny that the threat of starvation would be part of our efforts to psychologically isolate a population, and properly carry out a siege. But in my view, there is no legal space to operate between sending this kind of message to the besieged party and respecting the prohibition on terrorising the civilian population.

BESIEGED CIVILIAN POPULATION: IS THERE ANY RIGHT TO EVACUATION AND HUMANITARIAN ASSISTANCE?

Françoise Hampson

University of Essex

There is an interesting connection between the issue of evacuation and the issue of assistance. Looking at evacuation, first, in an international armed conflict, there are extremely limited treaty provisions on evacuation from besieged areas: there is a provision in Article 15 of the First 1949 Geneva Convention that is limited to the wounded and the sick, which states that local arrangements 'may' be concluded for their removal from besieged areas, and also very interestingly, for the passage of religious and medical personnel and equipment to the area. This provision thus addresses movement both ways. It is generally admitted that the Second 1949 Geneva Convention mirrors very closely the First 1949 Geneva Convention. But Article 18 of the Second 1949 Geneva Convention is much more constraining: it applies to the same groups but, whenever the circumstances permit, it requires that the Parties to the conflict 'shall' conclude local arrangements for the removal of the wounded and sick 'by sea'. This Article is thus only relevant where the besieged town has ports. Article 17 of the Fourth 1949 Geneva Convention does broaden the category of people to be evacuated, but it will not surprise you to learn that even if it covers the wounded and sick, the infirm, aged persons, children, and maternity cases, it still does not cover the entire civilian population. And even then, Article 17 requires that the Parties to the conflict 'shall endeavour' to conclude local agreements – this is not a constraining obligation. And so far, there is no provision addressing the totality of the civilian population.

Now, we need to understand what is going on at the practical level. It is possible that the besieged forces may want to prevent the civilians from leaving, for various reasons. Notably, because of the proportionality equation, the besieged forces may think that it will help them to make it more difficult for the besieging forces to target legitimate military objectives in the besieged city. For example, it was alleged that the Tamil Tigers, at the end of the conflict in Sri Lanka, actually prevented civilian Sri Lankans from leaving the area that they were fighting in. The besieging forces may also be torn between two options because, on the one hand, if they evacuate the civilian population, then there is less of a proportionality problem if they carry on fighting because the collateral casualties are likely to be lower. But on the other hand, they may want to leave them where they are because that complicates the life of the besieged forces. This is why I can understand, leaving the law aside, that the parties to the conflict are not clear as to where their benefit lies in terms of evacuation.

Additional Protocol I has nothing specific on evacuation, except a provision on children, which is not relevant here. However, I do not think that this issue is unaddressed because evacuation could clearly be regarded as a possible precaution in attack – if you are in a position to evacuate civilians. However, it is not explicitly referred to in Article 57 of Additional Protocol I. As far as the besieged forces are concerned, Article 58 of Additional Protocol I does not make an express reference to evacuation but it does require the Parties to the conflict to take other necessary precautions to protect civilians against the dangers resulting from military operations. Evacuation could be considered as another measure that could fall within the scope of Article 58. It should be also remembered that if some civilians leave, in whatever way negotiated, the attacking force cannot assume there are no civilians left. They have to take the situation as it is, as there are all sorts of reasons why people might not have left.

Another interesting point here: there is an express provision on forced movement in Additional Protocol II for non-international armed conflicts. Normally, if anything is actually contained in Additional Protocol II, you would expect some equivalent provision in Additional Protocol I. The principal focus in Article 17 of Additional Protocol II is actually to prevent forced movement, which is a human rights concern. However, in our context, perhaps the most important element in Article 17 is the qualification: it provides that the displacement of the civilian population should not be ordered unless the security of civilians is involved or imperative military reasons so demand. We can imagine that it would be possible for the besieged party to order civilians to leave the town – if there is an agreement with the other side – and invoke imperative reasons of security, whether the civilians are willing to go or not. But it is also important to mention that just because the besieged force might want them to leave, they still need to make some kind of agreement with the besieging force. In the context of siege, this is something that we will keep coming across, because in practice, each party may have the same obligations, but in any particular incident, they do not actually need to cooperate. So if you are trying to evacuate civilians from a besieged town, the besiegers and the besieged have to reach some kind of accommodation, because if only one Party backs the evacuation, it will be thwarted by the other Party. This will be particularly challenging if you want these two parties to work together, as they have totally different military interests in the siege operation.

Turning to the issue of assistance, I am not dealing either with starvation, nor the prohibition on the destruction of foodstuffs. If the besieging forces are not destroying anything but only do not allow food in, they are not violating Article 54 of Additional Protocol I – unless it is done with the objective of starving the population. What are the provisions on the delivery of assistance and relief, or anything essential to the survival of the civilian population, including medical supplies? In the context of an international armed conflict, the key provision is Article 70 of Additional Protocol I. This Article is worded in a very peculiar way: it says that if there

are civilians in need, relief actions 'shall' be undertaken, 'subject to the agreement of the Parties concerned' on such relief actions. Following a study conjointly carried out by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the University of Oxford on this issue of consent, there seems to be a general consensus that the State cannot arbitrarily withhold consent to the operation as a whole. But this raises two questions: what is 'arbitrary' and what are the consequences of an arbitrary withholding of consent?

In the context of a non-international armed conflict, the key provision is Article 18 of Additional Protocol II, if applicable. Again, if the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, relief actions 'shall be undertaken subject to the consent of the High Contracting Party concerned'. The difference with this provision of Additional Protocol II is that the only Party whose consent is necessary, is 'the High Contracting Party concerned'. First of all, in practice, if you want to deliver humanitarian assistance, whatever the law says, you need either the consent or the acquiescence of any party that is in control of any part of the territory you have to cross. In a non-international armed conflict, whilst the only consent required is that of the State, in practice, you are also going to need the consent of the armed non-state actors if you are going on their territory. However, how does it work if you can reach the civilian population without going through government-held territories, for example, delivering relief in Syria from Turkey? In that situation, Additional Protocol II says that you need the consent of the High Contracting Party concerned, i.e. consent from the Syrian authorities. In my view, if you do not have the consent of the State, then it does not change the nature of the humanitarian assistance, as it remains a civilian 'operation' with civilian personnel dealing with it. This is why, if the State were to attack that civilian personnel then it would be a violation of IHL. The only thing that the State could do is to bring civil proceedings for unlawful entry into the State. Having said that, this would jeopardise all the State's operations on the other side and there would be a real difficulty with effectively guaranteeing that the people get humanitarian assistance. I wonder whether it might be possible to link evacuation and assistance. Would there be any advantage in trying to get agreement on the following propositions: if a party to an armed conflict denies evacuation, it must allow effective relief, and vice versa: if it denies effective relief, it must allow evacuation. In my opinion, that would not solve the problem, because the two parties may reach different conclusions: for example, the besieging forces might refuse to allow humanitarian assistance because it could be used by the military on the other side, but might allow evacuation, whereas, the besieged forces might allow humanitarian assistance but not evacuation. However, if both parties are in good faith, both assistance and evacuation could be mixed: if one Party rejects evacuation, but allows assistance, and vice versa then, in some circumstances, using this balance between assistance and evacuation might help in practice.

Sean Watts

Creighton University

With respect to assistance, I very much share Françoise's frustration with the language of Additional Protocol I. I have in my mind other provisions where things are said in a more direct way and cause less confusion. In Article 70 of Additional Protocol I, the reader sees what they want to see. With respect to evacuation, this is a curious provision, although not for the same reason as Article 70 of Additional Protocol I: if the Fourth 1949 Geneva Convention is applicable to the whole of the civilian population, Article 17 narrows the scope of application to very specific vulnerable populations. But in my opinion, there is a logic to this provision: evacuation could be an opportunity for the besieged force to sneak some persons out, particularly high-value targets or symbolic leaders and people of tactical interest. One final point: I particularly like the words said by Françoise Hampson about this relationship between assistance and evacuation and I might add that there is an advantage to the very broad application of Article 54 of Additional Protocol I on the prohibition of starvation. In my opinion, the incentive to permit evacuation rises significantly as well. So, there is an important interaction between the incentives that arise from either adopting or rejecting any of these provisions that deal with evacuation and assistance.

SOME COMMENTS ABOUT THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 2139 (2014)¹

Sean Watts

Creighton University

There are both legal and non-legal points to be made about this Resolution. It was adopted under specific circumstances, following a Report of the United Nations Secretary General in 2014, which estimated that at that time in Syria, 175,000 civilians were encircled by Government forces and simultaneously, 45,000 civilians had been encircled by rebel forces. But if you are familiar with Security Council Resolutions and their usual language, you can immediately notice that this is quite exceptional. Firstly, the fact that the Security Council agreed on something about an ongoing armed conflict. This Resolution could not be adopted under current circumstances because the Russian Federation seems to have changed its mind about this armed conflict. From a legal perspective, I suppose there is a possibility that Article 103 of the United Nations Charter² constitutes an 'alteration' to IHL. Previously, if you thought that there could be some equivocation about the duty to permit relief or if you thought that you could equivocate about the duty to evacuate, here you have it. The Security Council says that the two parties must do it. The Security Council chooses its language very carefully. If we deconstruct this Resolution, you might read it to include a prohibition on sieges. You will note that 'calls upon' usually means something different from 'demands'. As to what the Security Council demands, it seems to demand relief, some voluntary evacuations, but in another paragraph of the Resolution, there is a call to the parties to apply these obligations in accordance with IHL. In my opinion, this is not an alteration of IHL, but rather an incorporation of IHL. So, if we thought that the Security Council was going to fix the law for us, it certainly passed on the opportunity here. As for non-legal considerations, this brought to my mind an experience that I had earlier as a military lawyer: there was a proposal and I reviewed it as a very junior lawyer in the office. I went to my legal supervisor who was the senior lawyer in our office and explained to her that I did not think we could do what the commander wanted to do. She told me to tell him myself. So I told him that these plans were not a legal option for us and the general thanked me for my work but told me that this was an area where he was willing to accept a legal risk. This Security Council Resolution, if not an indication of the law, is certainly an indication of non-legal factors, and the pressure that it can bring to bear on States' continued efforts to engage in sieges. It is at least clear from the Resolution that,

1 United Nations Security Council, Resolution 2139 (2014), S/RES/2139 (2014).

2 Article 103 of the United Nations Charter states that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

when you can get the five Permanent Members to all agree that the human suffering of these sieges is simply no longer tolerable and to use relatively strong language to condemn it, this underlines the very important question of this panel: can siege warfare still be lawful? While it is not technically prohibited, it is now significantly limited by IHL in both international and non-international armed conflicts.

Françoise Hampson

University of Essex

I take your point about the role of legal advisors for the military commander. But in my opinion, there is a more general issue with the Security Council Resolution: it also applies to what happens in the United Nations Human Rights Council. It is all very well to say we only have this Resolution because it was applying to conflict number one and not to conflict number two, three or four, and there is no way we would have gotten it for those conflicts. In a Foreign Affairs Ministry, you have a choice: either you say that the law does apply equally to all parties, or you say that the law does not apply equally to all parties. That is discrediting international law. I am not saying that States should refrain from putting anything into a Resolution that they would not be willing to see applied to themselves, because maybe this is a way of making progress. Nevertheless, this kind of Resolution comes with a huge risk because it is too selective.

PANEL DISCUSSION: CAN SIEGE WARFARE STILL BE LEGAL?

Following this first panel discussion, the audience raised questions on the following main issues:

1. Article 70 of Additional Protocol I

Concerning the wording of Article 70 of the 1977 First Additional Protocol, about this ‘shall be undertaken’ but ‘subject to the agreement of the Parties concerned’, a participant found this passive voice interesting: in fact, it does not identify whose duty it is, whereas the subjection to agreement is very specific to the Parties involved in relief activities. In his opinion, there is perhaps a constructive ambiguity there that may help us resolve this apparent contradiction.

The panellist underlined that the reason for the use of the passive voice is because it does not have to be undertaken merely by High Contracting Parties, as it can also be undertaken by other actors. But, in the end, the consent has to come from the High Contracting Parties.

2. Articles 51(2) and 54 of Additional Protocol I

One of the participants was also in doubt as to whether Article 54 of Additional Protocol I really prevents isolation that results in civilians’ starvation, as Professor Dinstein and others have suggested. Could it be that Article 51(2) of Additional Protocol I, especially the duty not to terrorise the civilian population, makes it practically impossible to run sieges where civilians are still inside the area?

One of the panellists agreed with the participant that Article 51(2) may have some reinforcing effect on the rule of Article 54. By contrast, the second panellist totally disagreed with the use of Article 51(2), because it is not the terrorisation of the civilian population that is prohibited, but ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.

3. Sieges: military operations v. law enforcement operations

Another participant wondered whether at least some aspects of a siege could be seen as law enforcement operations, rather than military operations. Furthermore, as the panellist referred several times to rules of International Humanitarian Law that pertain to attacks, the participant asked what is the notion of attack that we should use in this situation. Even if we see it as an attack as a whole, can it englobe the entire siege?

The panellist answered that there is a very broad category of actions called ‘military operation’, and they include – but are not totally encompassed by – attacks. This is why ‘attacks’, as defined by Additional Protocol I, constitute a category of military operation. Yet, the concept of a military operation is much broader. In addition, the panellist found it very difficult to regard the siege of a town or a city as a law enforcement operation, mentioning that it would perhaps be very different in the case of a siege of a house, particularly if it is done in an occupied territory.

4. The situation in Gaza

Lastly, a participant raised a question on the issue of the blockade or siege of Gaza by Israel, because she considered it as a striking example of what is potentially a siege: in fact, it is often referred to as a blockade, but in light of the fact that the naval element does not necessarily preclude a situation from being a siege, then what should we be calling that particular situation? In terms of the legal analysis that Gaza is occupied by Israel and that Israel therefore has obligations as an occupying power – which it violates through the blockade or siege, in the participant’s opinion – in respect of occupation, are there other conclusions we should be drawing about the legality of this action, particularly given its duration?

With regard to Gaza, the panellist raised two big difficult questions: is Gaza occupied? Secondly, one should not forget that Gaza has a border with Egypt, and that border may be closed, but it is not closed by Israel. Israel has formally declared a blockade of Gaza, and the point is that Israel is blockading the whole, or at least a significant part of the territory. And in the panellist’s opinion, that constitutes a genuine blockade. The reason Israel enforces it is because Israel knows very well that it would not be lawful if it did not make it effective. In the end, that is an effective blockade that arguably means that in so far as there are attacks during the course of the blockade, it internationalises any armed conflict on the ground. If you follow Professor Dinstein and say that in a non-international conflict, once one has a blockade, in effect, it makes it subject to international law. Nonetheless, the panellist stressed that Gaza is a very factually complicated situation, and most people do not approach it from the basis of law but rather, from the result they want to obtain – which, in the end, complicates any legal analysis.

Session 4

The Prohibition on Indiscriminate and Disproportionate Attacks

Chairperson: **Paul Berman** ,
Legal Service of the Council of the European Union

MILITARY ADVANTAGE AND GROUND COMBAT IN URBAN AREAS

Captain Guy Keinan

International Law Department, MAG Corps, Israel Defence Forces

Résumé

C'est dans le cadre de quatre questions spécifiques que le Capitaine Guy Keinan nous a proposé d'analyser la signification et le rôle de l'avantage militaire dans le contexte de combats au sol en zone urbaine. Il a d'abord défini le concept d'avantage militaire, qui apparaît notamment dans trois règles essentielles du droit international humanitaire : la définition de l'objectif militaire, l'obligation de prendre toutes les précautions pratiquement possibles, et le principe de proportionnalité. Il a également précisé les termes « contribution effective à l'action militaire » de l'article 52(2) du Premier protocole additionnel de 1977, considérant que l'avantage militaire est un avantage – militaire par nature – dont on peut démontrer qu'il affecte l'autre Partie au conflit, comme par exemple, affaiblir ses forces armées ou réduire ses capacités opérationnelles. Il s'est ensuite penché sur le concept de « cumul des avantages militaires » ou « aggrégation ». Ce concept est particulièrement pertinent lorsqu'une attaque disproportionnée en tant que telle ne sera plus considérée illégale si elle est conduite parallèlement à d'autres attaques, dans le but de cumuler ainsi les avantages militaires anticipés. Le Capitaine Guy Keinan a toutefois souligné qu'il existait des conditions à cette approche, afin d'en limiter les abus. Il a également abordé la question de « l'incertitude » : l'attaque sera-t-elle avantageuse ? Si oui, quel avantage en résultera-t-il, d'un point de vue à la fois qualitatif et quantitatif ? Enfin, Guy Keinan a envisagé le concept de « réversibilité », se demandant s'il était possible d'utiliser l'avantage militaire comme un fondement pour l'usage de la force. Il a tenté d'y répondre en se fondant sur la décision du 14 avril 2011 de la Chambre de première instance du Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire Gotovina.

Introduction

I have been asked to speak today about the concept of ‘military advantage’ in urban warfare. Since so much had been said about this previously, I have chosen to focus my presentation on the aspects of military advantage relating to ‘ground combat’ – the dirtiest kind of warfare there is. This is the kind of warfare where rifles, tanks, and heavy machinery are kings; where individual soldiers carry gear in their bags, moving slowly from one point to the next in an urban area in an attempt to clear an area while simultaneously avoiding ambushes and booby traps; a world where any military goal you achieve is usually very temporary.

Ground combat is the oldest type of warfare there is, yet it is very different from the one we usually imagine when we speak about International Humanitarian Law (IHL) and, especially, the customary rules reflected by certain key provisions of Additional Protocol I. It seems that when we, lawyers, speak about distinction, proportionality and precautions, we normally envisage a relatively ‘sterile’ world where aircrafts are attacking targets which have been previously identified based on a wealth of intelligence. We have largely forgotten, due to technological advances and the nature of most conflicts in recent decades, that ground operations persist in many parts of the world and involve applications of force which clarify certain legal notions while challenging others. By discussing military advantage during ground combat, I not only hope that we can shed light on a type of combat which has been underexplored by lawyers; I also hope that such a discussion will show that certain conclusions we may have taken for granted are actually not so obvious, whilst certain ideas that we may have considered to be controversial should not be considered as such.

Before turning to the crux of my presentation, I would like to start with a basic orientation. The concept of ‘military advantage’ appears in three important norms of IHL. One is the definition of military objectives (embodied in Article 52(2) of Additional Protocol I), which has been discussed at length during other parts of the Colloquium. According to this definition, an object is a military objective only if attacking it offers a definite military advantage. The second relevant IHL rule is the duty to take precautions, according to which when choosing between two targets with a similar military advantage, that which is expected to cause the least collateral damage must be chosen. The last IHL rule which involves the concept of ‘military advantage’ is the principle of proportionality, which stipulates that, when conducting an attack, the collateral damage expected may not exceed the concrete and direct military advantage anticipated.

I will now go over the meaning and role of military advantage in these three rules with regard to four specific issues: qualification, aggregation, uncertainty and reversibility.

1. Qualification - What constitutes a military advantage?

As military advantage must be 'military' in nature, it cannot be merely political, economic, etc. But what does 'military' mean? In this context, reference is usually made to the Saint Petersburg Declaration of 1868, which reads: 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'. Accordingly, a military advantage is certainly anything that reasonably contributes to weakening the armed forces of the enemy. In addition, military advantage also includes anything that reasonably decreases the adversary's ability to fight or somehow mitigates the adversary's operational effects.

Examples of military advantage are many. Destruction of enemy military infrastructure and disruption of enemy operational activity are two common and very straightforward ones. Gaining ground is equally straightforward but it is also especially important for ground combat: when a military is engaged in ground combat, especially in urban areas, gaining ground is crucial for the success of the operation as a whole. Another example of military advantage is force protection. Protection of one's own forces is usually discussed in the context of precaution feasibility: when we consider whether a certain precaution is feasible in the circumstances, we normally take into account the risks to armed forces. At the same time, protecting forces can also be part of the military advantage attained from an attack. If you are a military commander and the enemy has captured one of your soldiers, an attack resulting in the retrieval of the soldier would certainly have a military advantage – even if the retrieval would be the attack's only effect and would not be accompanied by injuring or killing enemy combatants. Accordingly, the relevance of force protection or preservation for military advantage must be acknowledged, although the weight given to each individual soldier in the proportionality assessment must be reasonable and may not be exaggerated. Protection of one's own *civilians* is another significant example of military advantage and one which highlights the importance of including operational effects mitigation within the definition of 'military advantage'. Consider World War II and the recurrent bombings of London by Nazi planes. The military advantage attained by the British by taking Nazi planes down included, I believe, not only the destruction of military aircraft as such but also the shielding of British civilians and civilian objects from Nazi attacks. Another example of military advantage is the preservation of one's own military resources. Resources and costs are usually taken into account when considering what is feasible and what is not, but it is also relevant with respect to military advantage. If you can neutralise a command and control centre by attacking either of two targets of equal military importance, but attacking one of the targets is more costly than the other, it is clearly more advantageous to strike the target requiring the least resources.

As mentioned before, Article 52(2) of Additional Protocol I requires that an attack against an object offers a *definite* military advantage. What does 'definite' mean? We can begin exploring the meaning of the term by turning to the negotiations of Additional Protocol I and identifying alternative terms which had been rejected: 'distinct', 'direct', 'substantial', 'clear', 'immediate', 'obvious', and 'specific' were all considered unfit for describing the military advantage needed for defining a military objective. This list allows us to understand what 'definite' is *not*. What 'definite' is, is actually far less clear, but a reasonable interpretation – supported by academic scholarship – is that a 'definite' military advantage is a military advantage that can be shown to affect the adversary (and affecting the adversary includes, of course, weakening its armed forces or reducing their operational effects).

The rule of proportionality, appearing in Articles 51 and 57 of Additional Protocol I, uses a different language and requires an assessment of the *concrete and direct* military advantage anticipated. It is usually agreed that this military advantage has to be specific (rather than general) and foreseeable (rather than merely hypothetical).

There are three implications of what I have just said. First, since the military value of a target is an important part of both distinction and proportionality, operational processes must include the collection of all reasonably available information with respect to this value. Second, commanders must be able to articulate the operational impact of the attack; they cannot simply attack a target and cross their fingers hoping that the attack will yield an advantage. Third, commanders may not exaggerate the military value of an attack and must make sure their assessment of the anticipated military advantage is a reasonable one.

While these three points are true for all operational contexts, ground combat presents some challenges of its own. First, it is obviously very difficult to collect information regarding the importance of a target in ground combat if it is a new target which has only been identified. Difficulties in this regard substantially increase where limited resources or operational expediency prevent or limit the ability to collect such information. Similarly, articulating the full operational impact of an attack is often difficult during ground combat, due to three primary factors: each attack is a small piece of a much larger operational puzzle; the value of an attack frequently depends on the execution of other attacks; and the fog of war clouds the ability to properly assess how the adversary will be affected by the attack. Finally, 'troops in contact' situations make it difficult for commanders – and third parties too – to know what a 'reasonable' advantage is when troops are acting in self-defence. In such situations, as well as situations involving a great deal of uncertainty, saying that commanders 'may not exaggerate' is not entirely clear and helpful.

2. Aggregation - Can we, and how do we, rely on a cumulative military advantage?

A second important issue involving military advantage is aggregation. When carrying out a given attack, may commanders aggregate advantages and consider the military advantage anticipated from other attacks as well? Aggregation is primarily relevant for an attack which is disproportionate on its own (since its military value appears to not be high enough) but is proportionate when judged together with other attacks. Without aggregation, therefore, such attacks would be unlawful.

State practice and *opinio juris* as well as scholarly opinion firmly support the lawfulness of aggregating advantages. A number of States have even expressly clarified, on the occasion of becoming Party to Additional Protocol I, that they consider 'military advantage' to refer to advantages resulting from 'the attack as a whole' and not only 'from isolated or particular parts of it' (cf. the statements by Australia, Belgium, Canada, Germany, Italy, the Netherlands, Spain and the United Kingdom). Such statements reflect a broad understanding of the term 'attack', which emphasises the importance of aggregating the advantages of what are in fact (that is, on the ground) disparate attacks. It appears that the Rome Statute's expression 'concrete and direct *overall* military advantage' (Article 8(2)(b)(iv), with emphasis added) likewise refers to this understanding of IHL and does not – as occasionally happens in the Statute – express a view which is specific to international criminal law.

As advantage aggregation means that seemingly disproportionate attacks are actually proportionate, this might be abused and serve as a basis for claiming that attacks are proportionate although they are actually disproportionate. In order to prevent such abuse, and for reasons of analytical clarity, it is important to delineate the circumstances in which aggregation is lawful. Scholarship is not of much assistance in this context. However, I believe aggregation should be considered lawful whenever the value of an attack depends, in full or in part, on the value of another attack. Consider a case where the adversary has two command and control centres, each with its own functions. When one of the centres is attacked, its missions and responsibilities are taken over by the other centre. These facts could be seen as indicating that attacking the command and control centre has little military advantage, because its loss is immediately 'remedied' by a backup centre. Such a view would be lacking, however, because the real value of attacking each centre depends on the value of attacking the other. As long as both command control centres are eventually attacked, the military advantage anticipated from attacking each is quite high. Aggregation enables us to see the full operational picture and therefore the real military value of targets which are somehow interconnected.

Aggregation also has implications for collateral damage assessment. When aggregating advantages, we must also aggregate collateral damages. Stated differently: if we consider the military advantages anticipated from a few attacks, we must also take into account the cumulative collateral damage of these attacks. Note, however, that collateral damage aggregation is only relevant when advantages are aggregated. Under customary international law, belligerents are not required to continuously assess the combined collateral damage expected from several attacks – they must only do so once they take into account an aggregation of advantages.

Aggregation has two strong merits in IHL. First, it serves as a convincing response to the ‘But the enemy has many more...’ argument. If a military attacks a rocket cache and the enemy nevertheless has many more rockets, it may seem that the military advantage is relatively low. This is a counterintuitive result, and aggregation reveals the real value of the attack by considering attacks against similar targets as well. Another merit of aggregation lies in that the concept acknowledges that certain military goals may only be achieved gradually. This is important for ground combat and even more so for ground combat in urban areas. After all, an urban ground manoeuvre consists of steady, slow progress through dense neighbourhoods. Tanks crawl in narrow streets and infantry soldiers gradually move from house to house, their advance hindered by necessary pauses, specific mission fulfilment and, of course, engagements with the enemy. Ground combat takes place in baby steps, and these baby steps are the very reason that aggregation is so important. Without aggregation, each step – every house-clearing, every ambush, every square meter conquered – would appear to possess a relatively low military advantage, thereby ignoring the broader operational picture.

3. Uncertainty - Is it possible to rely on an uncertain military advantage?

A third issue I would like to tackle is uncertainty with respect to the military advantage resulting from an attack. I should begin by saying that in the vast majority of real-life situations, there is *no* certainty with respect to military advantage. However, three types of uncertainty should be distinguished: (1) *whether* an attack will be advantageous; (2) *what type* of advantage will result; and (3) *how much* advantage will result. Each of these uncertainties has its own implications, which I will now explore.

Uncertainty of the first type mentioned relates to the *existence* of a military advantage. The rules of distinction and proportionality treat this type of uncertainty in different ways. Article 52(2) of Additional Protocol I determines that an attack against an object is lawful only if it ‘offers’ a military advantage, while Article 51(5)(b) and Article 57(2)(b) only require an assessment of the ‘anticipated’ military advantage. It therefore seems that the rule of distinction requires a commander to be reasonably certain that an attack against an object will have

some military advantage; the commander may not blindly attack an object in the hope that an advantage of some sort will result. Consequently, it seems that, as far as attacks against objects (rather than persons) are concerned, uncertainty with respect to the existence of a military advantage undermines the inherent lawfulness of an attack.

Uncertainties with respect to the *type* or *quantity* of military advantage are quite common in armed conflicts. Consider a case, frequent in practice, where a military identifies a heavily guarded compound belonging to and used by the armed forces of the enemy, although full intelligence about each and every structure in the compound is lacking. It is known that structure A is either a headquarters or an operational planning room. Additionally, it is known that structure B is an arms depot where missiles are stored, but it is unclear how many missiles are in it. In such a case, although there are no doubts about whether attacking the compound will be advantageous, it is nevertheless unclear what type of advantage will result (with respect to structure A) and how valuable it will be (with respect to structure B). Still, as opposed to uncertainty with respect to the existence of a military advantage, uncertainties with respect to type and quantity do not undermine the lawfulness of an attack, and their only implication is for proportionality assessments. For instance, if intelligence indicates that there is only a 50 percent chance that structure B contains long-range missiles, it will not be reasonable to 'inflate' the anticipated military advantage by assuming that long-range missiles will necessarily be destroyed. Indeed, when assessing whether an attack is expected to cause excessive collateral damage, commanders must devote reasonable efforts to estimate what the anticipated military advantage is and take into account any uncertainty which exists.

4. Reversibility - Can military advantage serve as a basis for using force?

The last issue I would like to discuss, and possibly the most interesting, is the ability to use military advantage as a basis for using force rather than as a limitation of some sort.

A good place to start is the *Gotovina* Trial Judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY), which contains a very interesting statement. According to the Tribunal, and due to the position of Martić in the armed forces of the Republic of Serbian Krajina, 'the Trial Chamber is satisfied that firing at his residence could disrupt his ability to move, communicate, and command and so offered a definite military advantage, such that his residence constituted a military target'¹. When I read this part of the judgment, it seemed to me that the Tribunal was advocating here – perhaps unconsciously – effect-based targeting. Most people I consulted agreed with this reading. After all, the Tribunal neglected to

1 ICTY, *The Prosecutor v. Ante Gotovina, Ivan Cermak, Mladen Markac*, paragraph 1899, IT-06-90-T, Trial Chamber I, Judgment, 15 April 2011, available at <<http://www.icty.org/case/gotovina/4>>

check whether Martić's residence had had some effective contribution to military action, and concluded instead that the military advantage offered by the attack – disrupting Martić's activities – had been enough to render the residence a military objective. If this is indeed what the Tribunal was suggesting, it seems to go against the prevalent interpretation of the definition of military objectives – as far as objects are concerned – contained in Article 52(2) of Additional Protocol I. At the same time, I do think that there is an interesting question to be raised here: is it permissible to launch an attack solely because it will yield a military advantage?

Ground combat provides a few examples which illustrate the pertinence of this issue. Let us start with smoke screens. During ground manoeuvres, various munitions are used to generate smoke screens. These munitions are frequently fired into densely populated areas in order to mask the movement of infantry soldiers, thus attaining an important military advantage. This universal practice may seem, however, at odds with the language of Additional Protocol I. If firing a smoke munition is an 'attack' in the sense of Article 49 of Additional Protocol I – and I think many people will say that it is – what 'specific military objective' is it 'directed at' (Article 51(4)(a))? There is none, because the whole purpose of smoke screens is to mask ground forces where they are – streets, buildings through which they are passing, and so on.

Another good example is room-clearing procedures. When a military takes over a city or a town, its forces move from house to house and gradually 'clear' each such house by entering it and making sure that enemy forces are not present. All militaries around the world have procedures in place to regulate this process and, although they are not identical, many of them have things in common: shooting down doors, making holes in walls, and so on. A representative example for these procedures can be found in a 2002 United States (US) doctrine manual, which reads:

'When entering buildings, a soldier must minimise the time he is exposed (...) He must avoid using windows and doors, except as a last resort. He should consider the use of demolitions, tank rounds, and other means to make new entrances. If the situation permits, he should precede his entry with a grenade, enter immediately after the grenade explodes, and be covered by one of his buddies'².

Naturally, not every building where this process takes place is a military objective, and the military cannot be reasonably certain that it is. Many of the buildings 'cleared' this way, all

2 Headquarters - Department of the U.S. Army, *Combined arms operations in urban terrain*, Field Manual No. 3-06.11, 3-8, 2002, available at <[www.bits.de/NRANEU/others/amd-us-archive/fm3-06.11\(02\).pdf](http://www.bits.de/NRANEU/others/amd-us-archive/fm3-06.11(02).pdf)>

around the world, are assumed to be civilian objects, and they are being entered into in order to verify that they are not being used by the enemy for military purposes. As at least some parts of these procedures fall within the definition of ‘attacks’ in Article 49 of Additional Protocol I, they raise the same question as the one raised by the use of smoke munitions. Is it really reasonable to say that these procedures, as well as the use of smoke munitions, are ‘indiscriminate’ (as Article 51(4) seems to imply)? I seriously doubt that, and I believe that most (if not all) IHL specialists would as well.

Admittedly, I am not sure that this issue should be dealt with within the ambit of ‘military advantage’. In a certain sense, it is much more foundational than that, because it appears to suggest that our understanding of distinction – perhaps the most important rule of IHL – is still incomplete after all those years; it is an understanding that is simply not in line with things that all militaries do, and have been doing, in ground combat for centuries. Perhaps this is an area where conclusions we have treated as axioms should be reconsidered – and restated to conform to our legal intuitions.

RELEVANT INCIDENTAL HARM FOR THE PROPORTIONALITY PRINCIPLE

Laurent Gisel

ICRC Legal Division*

Résumé

Au cours de cette quatrième session dédiée à l'analyse de l'interdiction des attaques indiscriminées et disproportionnées, Laurent Gisel a examiné la question des pertes incidentes vis-à-vis du principe de proportionnalité dans l'attaque. Sur ce point, l'article 51(5)(b) du Premier protocole additionnel de 1977 prévoit en effet que seront considérées comme indiscriminées « les attaques dont on peut attendre qu'elles causent incidemment des pertes en vie humaines dans la population civile, des blessures aux personnes civiles, des dommages aux biens de caractère civil, ou une combinaison de ces pertes et dommages, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu ». Laurent Gisel a d'abord rappelé que cette règle constitue une norme de droit international coutumier, soulignant que la perte incidente en question est celle attendue au moment de l'attaque – et non celle intervenue au cours de l'attaque. Il a également abordé plus en détails les questions des décès et blessures résultant des dommages causés incidemment aux biens de caractère civil, en examinant également la question des dommages causés à l'environnement. Il est ensuite revenu sur des éléments plus pertinents pour la conduite des hostilités en milieu urbain, tels que la protection du personnel et du matériel médical militaire, les dommages aux biens « à double usage » – à savoir ceux qui servent à la fois à des fins civiles et militaires – ou la question du déplacement de populations civiles et de ses répercussions économiques. Pour conclure, Laurent Gisel a souligné que le développement de l'accès aux informations relatives aux pertes incidentes, notamment par la mise en place d'analyses des dommages collatéraux à la suite d'une opération militaire et d'études plus approfondies en la matière après un conflit, constituait une avancée positive. Ainsi, la méthodologie pour l'estimation des dommages collatéraux devrait être améliorée dans les années à venir, tout comme la capacité à anticiper les effets indirects d'une attaque.

After a few initial remarks, this presentation will be divided into two parts. First, it will discuss the types of relevant incidental harm for the principle of proportionality under international humanitarian law (IHL) (Part 1); second, it will address the issue of reverberating effects, which are particularly important for urban warfare (Part 2).

The prohibition of disproportionate attacks in the IHL rules governing the conduct of hostilities has already been recalled in this Colloquium. It is prohibited to launch 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.¹ The prohibition of disproportionate attacks has been identified as a customary norm in both international and non-international armed conflicts in the International Committee of the Red Cross (ICRC) study on customary IHL.²

Guy Keinan just made a very interesting presentation on the notion of ‘concrete and direct military advantage’. In turn, this presentation will discuss the other side of the equation, namely incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof. ‘Incidental harm’ is used in this presentation as a catch-all term to cover harm to both persons and objects. The expected incidental harm is also relevant for the principle of precautions, in particular with regard to the choice of means and methods of warfare, discussed yesterday by Vaios Koutroulis.

It is important to underline at the outset that the relevant harm is that which is expected at the time of the attack, not the harm that actually occurred.³

1. Types of relevant incidental harm

Let me turn first to the different types of relevant incidental harm.

The prohibition of disproportionate attack as expressed in the First 1977 Additional Protocol (AP I) lists three type of incidental harm. First loss of civilian life. Second, injury to civilians. Third, damage to civilian objects. Let us have a closer look at them in turn.

- Loss of life is certainly the most straightforward and I will not dwell further on it.
- Injury raises more questions; do all injuries count, however small? I do not think there is a lower threshold, but the less serious they are expected to be, the less likely they will be considered excessive. What about illnesses? Exposing the civilian popu-

1 *The views expressed in this presentation are those of the author alone and do not necessarily reflect the views of the ICRC.

Article 51(5)(b) of the First 1977 Additional Protocol to the four 1949 Geneva Conventions (AP I). See also Arts 57(2)(a)(iii) and 57(2)(b) AP I.

2 ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005, Rules 14, 18 and 19.

3 See ICTY, *Prosecutor v. Galić*, IT-98-29-T, Judgement, 5 December 2003, paragraph 58 *in fine* and ICRC Customary IHL Study, *op. cit.*, p. 50.

lation to certain chemicals (e.g. if factories using chemicals are incidentally hit) or other toxic substances related to the means of methods of attacks may cause illness and disease. Also waterborne diseases may result from the destruction of essential infrastructure such as water and sanitation facilities. Was the word 'injury' meant to exclude illnesses, or should illnesses be relevant because they may be as debilitating as injuries? And what about psychological injuries or illnesses? Isn't the seriousness of the incidental harm to the civilian population the most important criterion in view of the object and purpose of the rule? It has for example been argued that serious incidental mental harm should be included in the assessment of the proportionality of the attack in view of protecting civilians from the effect of hostilities, the prohibition of attacks whose primary purpose is to terrorise the population, and the developments in the understanding and recognition of the importance of mental harm such as post-traumatic stress disorder.⁴ The Tallinn Manual on cyber warfare considers that it is reasonable to extend the definition of injury to 'serious illness and severe mental suffering that are tantamount to injury',⁵ and I would tend to agree. Conversely, it is generally admitted that mere inconvenience, stress or anxiety constitute unfortunate but unavoidable consequence of conflict and that it is hard to see how they could render an attack disproportionate.⁶

- Two points with regard to damage to objects. First, incidental damage to the environment must be considered, as the environment is not a military objective and thus constitutes a civilian object, or rather many civilian objects.⁷ Second, discussions on cyber warfare lead to an in-depth debate on whether loss of functionality of an object without physical damage is a relevant damage for the rules on the conduct of hostilities. In the view of the ICRC, it is immaterial how an object is disabled, and

4 Eliav Lieblich, "Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law", in: Derek Jinks, Jackson Maogoto and Solon Solomon (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, The Hague, Asser Press, 2014, p. 185ff.

5 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Prepared by the International Group of experts at the Invitation of the NATO cooperative Cyber Defence Centre of Excellence, Cambridge, Cambridge University Press, 2013 (Tallinn Manual), p. 108, paragraph 8 on Rule 30 on the definition of cyber attack, which reads: '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'. The reasoning is thus equally valid for the notion of injury in the proportionality rule.

6 *Ibid.*, paragraph 5 on Rule 51, p. 160; "Program on Humanitarian Policy and Conflict Research at Harvard University", in: *Manual on international law applicable to air and missile warfare* (Air and Missile Warfare Manual), Commentary, Bern, HPCR, 2009, paragraph 5 on Rule 1(l).

7 Cordula Droege and Marie-Louise Tougas, "The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection", in: Rosemary Rayfuse (ed.), *War And The Environment - New Approaches to Protecting the Environment in Relation to Armed Conflict*, Leiden, Brill-Nyhoff, pp. 11ff, in particular pp. 15-17.

loss of functionality is a relevant incidental harm for the principles of proportionality and precautions.⁸

Of course many military manuals repeat the wording of the First 1977 Additional Protocol.⁹ But some express a broader understanding. A number of them, as well as the San Remo Manual on Naval Warfare and the Humanitarian Policy and Conflict Research (HPCR) Air and Missile Warfare Manual, speak of collateral damage to protected persons and objects,¹⁰ and we will see why this is important. Broader expressions in terms of the relevant effects can also be found, such as in the 2001 Canadian military manual which speaks of ‘adverse effects’ and ‘possible harmful effects’¹¹ while in the framework of the Convention on Certain Conventional Weapons (CCW) discussions on explosives remnants of war, Norway expressed the view that commanders should take into account ‘the humanitarian consequences caused by the attack’ and the ‘more long-term humanitarian problems’.¹²

Let me turn in more depth to issues that are either more controversial or particularly relevant for urban warfare: first, military medical persons and objects; second: damage to dual-use objects; third: economic damage and displacement.

Military medical personnel and objects

On the basis of the word ‘civilians’ in the provisions on incidental harm, some authors claimed that incidental harm to military medical personnel or military medical units is not

8 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11, Report, 32^d International Conference of the Red Cross and Red Crescent, Geneva, 2015, p. 41 (ICRC 2015 IHL Challenges Report), at: <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>>. See also Knut Dörmann, “Applicability of the Additional Protocol to Computer Network Attack”, in: Karin Bystrom (ed.), *Proceedings of the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law*, Stockholm, 17-19 November 2004, p. 139; Swedish National Defence College, 2005; Michael Schmitt, “Rewired warfare: rethinking the law of cyber attack”, in: *International Review of the Red Cross*, Vol. 96, No. 893, 2014, pp. 189-206.

9 See ICRC Customary IHL Study, op. cit., practice related to rule 14, available at <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule14>.

10 See the references in the military manuals of Australia, Canada, Hungary, New Zealand, Philippines, the UK and the USA. in notes 48-53 and the other references in note 59 of Laurent Gisel, “Can the incidental killing of military doctors never be excessive?”, in: *International Review of the Red Cross*, Vol. 95, No. 889, 2013, pp. 227ff.

11 Canada, *Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels*, B-GJ-005-104/FP-021, 2001, paragraph 204(5), p. 2-2.

12 ‘Response from Norway to document CCW/GGE/X/WG.1/WP.2’, CCW/GGE/XI/WG.1/WP.5, 29 July 2005, paragraph 18 - 19.

relevant.¹³ Unfortunately, the United States Department of Defence 2015 Law of War Manual takes the same view with regard to the incidental harm to religious and medical personnel under the rule of proportionality.¹⁴

The ICRC holds the opposite view.¹⁵ To be able to provide with the least possible delay the medical care and attention required by the wounded and sick, medical personnel, units, and transports often have to operate in proximity to the fighting. It is thus particularly important to uphold their protection against incidental harm.¹⁶ This holds true for both military and civilian medical personnel and objects. For military medical personnel in particular, it goes back to the root of modern IHL and the goal of the first Geneva Convention of 1864.

It is actually straightforward with regard to objects, because military medical objects do not fall under the definition of military objective. Therefore, they actually constitute civilian objects under the rules governing the conduct of hostilities.¹⁷

With regard to persons, this stems in particular from the interpretation of the obligation ‘to respect and protect’ as the overarching obligation of the special protection afforded to all medical personnel and wounded and sick. It also stems from the rules on the conduct of hostilities when interpreted in view of their object and purpose; otherwise persons would be less protected than objects, and specially protected persons would be less protected than civilians, both conclusions which seem unreasonable. It finally stems from the fact that the war crime

13 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, 2010, p. 191; Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Leiden, Martinus Nijhoff Publishers, 2009, pp. 195-196 (for medical units) and p. 206 (for medical personnel); Rogier Bartels, “Dealing with the principle of proportionality in armed conflict in retrospect: the application of the principle in international criminal trials”, in: *Israel Law Review*, Vol. 46, No. 2, July 2013, p. 304.

14 US DoD, *Law of War Manual*, 2015, paragraph 7.8.2.1. However, the definition of collateral damage in other US DoD manuals seem to express a broader view: ‘Unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time’, “Department of Defense Dictionary of Military and Associated Terms”, Joint Publication 1-02 (As Amended Through 15 February 2016, p. 35); “Joint Targeting”, Joint Publication 3-60 (3 January 2013) pp. III - 1 and GL-4; “No-Strike and the Collateral Damage Estimation Methodology”, CJCSI 3160.01, 13 February 2009, Glossary, GL-4.

15 14th Bruges Colloquium, 17 and 18 October 2013, Keynote Address by Christine Beerli, ICRC vice-president, available at: <www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm>.

16 For more details, see Laurent Gisel, *op.cit.*, p. 217.

17 See the definitions of military objective and civilian objects in Art. 52(1 and 2) AP I. For more details, see Laurent Gisel, *op.cit.*, pp. 219ff.

of human shields extends to all protected persons – if military medical personnel would not be protected against incidental harm, how could their presence constitute a shield? It has already been mentioned that in the rules on proportionality and precautions, or in the definition of collateral damage, a number of military manuals expressly refer to protected persons and objects – instead of civilians and civilian – which include specially protected military personnel such as military doctors.¹⁸

Harm to the civilian use of dual-use objects

In urban warfare, many objects which are normally used for civilian purposes become partly used for military purposes. For example a multi-storey building in which only one apartment is used for military purposes.

As Agnieszka Jachec-Neale mentioned yesterday, the prevailing understanding of the notion of military objective is that once an object is used in such a way as to fulfil the definition of military objective, the entire object becomes a lawful target. A literal reading could lead to the conclusion that, as the entire object has become a military objective, the destruction of the part that is not used for military purpose does not need to be factored in as incidental damage.¹⁹

However, the opposite view also appears in doctrine²⁰ as well as in official documents talking of dual-use objects. Under this view, when targeting dual-use objects, the destruction of the civilian part of this object, or more generally the fact that the attack puts an end to its use by civilians, as well as the reverberating effects of such damage, must be considered as incidental damage under the proportionality principles. This is for example expressly mentioned

18 For more details, see Laurent Gisel, *op. cit.*, p. 221ff.

19 Henderson, *op. cit.*, p. 207; Hays Parks, “Asymmetries and the identification of Legitimate military objectives”, in: Wolff Heintschel von Heinegg and Volker Epping (eds.), *International humanitarian law facing new challenges, Symposium in Honour of Knut Ipsen*, p. 106.

20 Tallinn Manual, *op. cit.*, paragraph 2 on Rule 39, p. 135; Air and Missile Warfare Manual, *op. cit.*; Commentary on Rule 22(d) paragraph 7, p. 109; Henry Shue and David Wippman, “Limiting Attacks on Dual-Use facilities Performing Indispensable Civilian functions”, in: *Cornell International Law Journal*, Vol. 35, No. 3, 2002, p. 565; Noam Lubell, “Current challenges with regard to the notion of military objective - legal and operational perspectives”, in: *Conduct of hostilities: the Practice, the Law and the Future, International Institute of Humanitarian Law*, September 2014, p. 84; Michael Schmitt and Eric Widmar, “On Target: Precision and Balance in the Contemporary Law of Targeting”, in: *Journal of National Security and Policy*, Vol. 7, No. 3, 2014, p. 393; Marco Sassoli and Lindsey Cameron, “The Protection of Civilian Objects : Current State of the Law and Issues de lege ferenda”, in: Ronzitti, Natalino and Venturini, Gabriella (eds.), *The Law of Air Warfare: Contemporary Issues*, The Hague, Eleven International, 2006, pp. 35-74 at paragraphs 57ff.

in the Netherlands military manual and in various official United States publications.²¹ Coming back to the above-mentioned example, it would mean that the principle of proportionality will forbid an attack against the apartment used for military purpose if it is expected that the destruction caused by the attack to the rest of the multi-storey building is excessive compared to the military advantage anticipated.

Displacement and economic losses

Urban warfare is a primary cause of displacement in today's conflicts. Also, because cities are economic centres as much as population centres, urban warfare is detrimental to the economy of the war-affected countries. However, displacement and economic losses are not expressly mentioned as relevant incidental harm in the proportionality rule.

But are displacement and economic losses really irrelevant? Even if one does not consider them relevant *per se*, will they not affect the 'value' or 'weight' of the object damaged when assessing whether the incidental harm is excessive? Should destroying an abandoned house or destroying a house where a family lives, who will then be displaced, be assessed identically when weighted against the direct and concrete military advantage anticipated? Is the destruction of functioning robots in an industrial plant not more likely to be considered excessive than the same robots getting rusty in front of the closed factory? Interestingly, the Philippines military manual underlines that military 'commanders must be sensitive to and aware of the strategic implications of tactical operations' including the 'impact to communities of

21 Royal Army of the Netherlands, Humanitair oorlogsrecht: 'When attacking mixed objects (see point 0512), it must be carefully considered whether the military advantage expected from eliminating the military element of the mixed objective outweighs the damage done to the civilian population, by damaging or destroying the civilian element of the mixed object or ending its civilian function' (VS 27-412; *The Humanitarian Law of War: A Manual*; official in Dutch, English unofficial translation available at the ICRC library), September 2005, paragraph 0546; US Digest of United States Practice in International Law 2014: 'When undertaking a proportionality evaluation, parties to an armed conflict should consider the risk of unintended or cascading effects on civilians and civilian objects in launching a particular cyber attack, as well as the harm to civilian uses of dual-use infrastructure that may be the target of an attack' (p. 737); US Joint Publication 3-60 on Joint Targeting 31 January 2013, mentions that 'If the attack is directed against dual-use objects that might be legitimate military targets but also serve a legitimate civilian need (e.g., electrical power or telecommunications), then this factor must be carefully balanced against the military benefits when making a proportionality determination' (p. A-5). See also U.S. Commander's Handbook on the Law of Naval Operations, NWP 1-14M, paragraph 8.3, and the discussion of coalition practice in the Gulf War in Christopher Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict, in: Peter Rowe (ed.), *The Gulf War 1990-91 In International and English Law*, London, Routledge, 1993, pp. 63ff, p. 73 and 79.

non-combatants and their livelihood' and 'displacement from their homes and areas of food production.'²²

This leads to the second part of the presentation, namely the question of reverberating effects.

2. Reverberating effects²³

Reverberating effects is not a notion defined or expressly mentioned in IHL. It is usually understood in contrast to direct effects, and sometimes also referred to as indirect effects, cascading effects, repercussions, knock-on effects, or long-term consequences.

The issue of reverberating effects has gained prominence in the last few decades, in particular since the 1991 Gulf War,²⁴ and more recently in the debates on cyber warfare, where the interconnectivity of military and civilian computer systems increases the risks that the effects of an attack spread beyond the intended target.²⁵ This heightened attention is due to the increased interconnectedness and interdependence of modern societies,²⁶ to technological development in targeting capabilities,²⁷ and to the development of more sophisticated collateral damage estimation tools. For example, the United States Collateral Damage Estimation

22 Philippine Army Soldier's Handbook on Human Rights and International Humanitarian Law (2010), p. 57. See also Canada military manual and Norway statement, *op. cit.* The Final Report by the ICTY Committee Established to Review the NATO Bombing Campaign against Yugoslavia also stated that 'Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure (...) with a consequential adverse effect on the civilian population.' (ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paragraph 18). According to Reynolds Jefferson: '[a] thorough indirect collateral damage assessment must evaluate all foreseeable effects of a military operation on violence, crime, political infrastructure, housing, environment, public health, water and sanitation infrastructure, power infrastructure, poverty, economy, labour and unemployment and education.:' "Collateral Damage on the 21st Century Battlefield", in: *Air Force Law Review*, Vol. 56, 2005, p. 90. For an example of incidental economic harm not considered as relevant see US DoD, Law of War Manual, 2015, paragraph 5.12.2.1.

23 For a detailed discussion of the issue, on which this section partly draws, see Isabel Robinson, "Proportionality and precautions in attack: the reverberating effects of the use of explosive weapons in populated areas", in: *International Review of the Red Cross* (forthcoming).

24 See e.g. Françoise Hampson, "Means and Methods of warfare", in: Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, London, Routledge and Sweet & Maxwell, 1993, pp. 97ff.

25 See e.g. Cordula Droege, "Get off my cloud: cyber warfare, international humanitarian law and the protection of civilian", in: *International Review of the Red Cross*, Vol. 94, No. 886, summer 2012, p. 572ff.

26 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 03/IC/09, Report, 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003, p. 13.

27 Michael Schmitt, "The Principle of Discrimination in 21st Century Warfare", in: *Yale Human Rights and Development Law Journal*, Vol. 2, No. 1, 1999, p. 168.

Methodology (CDM) explains that: '[a]s a science, the CDM uses a mix of empirical data, probability, historical observations, and complex modelling for CDE [collateral damage estimation] analysis'.²⁸

First, it can be noted that the proportionality rule does not expressly restrict the relevant incidental harm to 'direct', contrary to the relevant military advantage.²⁹ Despite some exceptions, it is today generally agreed in the literature that the incidental harm relevant for the rules on proportionality and precautions in attack is not limited to the direct effects of the attack, but include the reverberating or indirect ones. A number of military manuals or other official State documents on collateral damage or targeting make reference to this³⁰ and it is also the position taken in the Tallinn Manual.³¹ For example, the United Kingdom 2004 military manual states that commanders must bear in mind 'the foreseeable effects of attack', and gives as an example an attack on a military fuel storage depot where there is a foreseeable risk of the burning fuel flowing into a civilian residential area causing injury to the civilian population.³² The Final Declaration of the Third Review Conference of States Parties to the CCW also noted that the 'foreseeable effects' of explosive remnants of war on civilian populations was a factor to be considered in applying the principle of proportionality and precautions.³³

The question of reverberating effects is of particular importance for urban warfare, especially when explosive weapons with a wide impact area are used, as will be discussed in the last panel of this Colloquium. Beyond the mere buildings and roads, cities are an intricate web of interconnected infrastructure, in particular with regard to water and electricity. The use of explosive weapons against lawful targets in cities might incidentally damage an underground drinking water or sewage pipe, or an electricity line supplying the water treatment plant or a

28 US Chairman of the Joint Chiefs of Staff Instruction, No-Strike and the Collateral Damage Estimation Methodology, CJCSI 3160.01, 2009, p. D-1. In addition, the Instruction states: 'The CDM is not an exact science. The supporting technical data and processes of the methodology are derived from physics-based computer models which generate statistical results, weapons test data, and operational combat observations' (p. D-2).

29 See Robin Geiss, "The Conduct of Hostilities in Asymmetric Conflicts", in: *Journal of International Law of Peace and Armed Conflicts*, Vol. 3, No. 23, 2010, pp. 122ff, p. 128.

30 See e.g. Australian Defence Force Publication 3.14 Targeting (2009), paragraph 1.21; USA, The Commanders Handbook on the Law of Naval Operations NWP 1-14M, July 2007, paragraph 8.11.4;

31 Tallinn Manual, *op. cit.*, p. 160, paragraph 6 on Rule 51. See also Sassoli/Cameron, *op. cit.*, p. 65.

32 UK: The Joint Service Manual of the Law of Armed Conflict, JSP 383, 2004 (amended in 2013), paragraph 5.33.4.

33 Third Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Final Declaration*, 17 November 2006, preambular paragraph 11, CCW/CONF.III/11 (Part II), p. 4.

hospital. This risks causing health problems to the civilian population and possibly increasing the mortality rate.³⁴

It is obviously not possible to foresee all the effects of an attack. But the ICRC's position is that foreseeable reverberating effects must be taken into consideration under the rules on proportionality and precautions.³⁵ This is subject to a standard of reasonableness, as stated by the International Criminal Tribunal for the former Yugoslavia.³⁶ However, there is no specific cut-off point in time or space beyond which the incidental effects would be irrelevant for the proportionality principles when they are reasonably expected. The 1974-77 Diplomatic Conference indeed rejected attempts to limit the incidental loss to those in the immediate vicinity of the military objective.³⁷ Obviously, the more indirect the effects are, the less reasonably expected they become, and some remote possible effects will not be considered reasonably expected. However, this is contextual – and it may change with the increase in knowledge or collateral damage estimation methodology and tools. The only relevant criteria in our view remains whether they can be reasonably expected.

A key related issue is the obligation of the parties to '*do everything feasible to assess whether the principle of proportionality will be respected*'.³⁸ As was discussed yesterday, "*Feasible precautions*" are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations'.³⁹

Numerous States have expressed the view that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on

34 See ICRC, *Urban services during protracted armed conflict: a call for a better approach to assisting affected people*, Geneva, 2015, in particular p. 31ff available at: < <https://www.icrc.org/eng/assets/files/publications/icrc-002-4249.pdf>>.

35 ICRC 2015 IHL Challenges report, *op. cit.*, p. 52.

36 In *Galić*, the ICTY Trial Chamber held that '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.' *Prosecutor v. Galić* IT-98-29-T, Judgement, 5 December 2003 paragraph 58. See also Final Report, *op.cit.*, paragraph 50.

37 Michael Bothe, Karl Josef Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Leiden/Boston, Martinus Nijhoff Publishers, 2nd edn. 2013, paragraph 2.6.2 on Art. 57, p. 406.

38 ICRC Customary IHL Study, *op. cit.*, Rule 18.

39 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980, Art. 3(4); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, Art. 1(5); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention), Art. 3(10).

the basis of their assessment of the information from all the sources which are available to them at the relevant time. Many military manuals also underline that the commander must obtain the best possible intelligence, including information on concentrations of civilian persons, important civilian objects, specifically protected objects, the natural environment and the civilian environment of military objectives.⁴⁰ As rightly put by Boothby, when attacks in urban areas 'may be expected to damage utilities on which the civilian population relies, an assessment should be made of how long it is likely that the relevant services will remain out of action and what damage, injury, and death civilians are likely to suffer during that period as a result.'⁴¹ One needs therefore not only to estimate the foreseeable damage as such, but also the capacity and time required to repair the damage and recover the service. The protracted nature of the conflict, the death or displacement of the technicians or lack of spare parts because of sanctions may mean that it is difficult to fully repair damaged civilian objects for many years. When services and infrastructure are already under stress because of the conflict – think of war wounded in hospitals for example – to incidentally damage infrastructure delivering essential services can have a very serious impact on the civilian population.

In conclusion, let me underline that it is a positive development that more and more information is available about the incidental harm caused by attacks, through collateral damage assessments after a particular operation and through more in-depth studies after a conflict. Collateral damage estimate methodology will continue to improve accordingly, which in turn will raise the bar of what will be considered as feasible in terms of assessing the potential excessiveness of the expected incidental harm. This is not to say that technology will remove the fog of war and that commanders will have a perfect grasp of all possible consequences of each operation. However, the ability to anticipate the reverberating effects of an operation will continue to improve, and this will bear on what can be expected from a reasonable military commander.

40 ICRC, Customary IHL Study, *op. cit.*, p. 54.

41 William Boothby, *The Law of Targeting*, Oxford, Oxford University Press, 2012, p. 414.

SHELLING IN URBAN AREA, WHEN DOES IMPRECISION BECOME INDISCRIMINATE?

Eric Jensen

Brigham Young University

Résumé

Face au développement de l'urbanisation, et tandis que les combats se livrent aujourd'hui plus fréquemment dans des zones peuplées, exposant toujours plus la population civile, Eric Jensen a mis en lumière les difficultés rencontrées dans le processus de « targeting », notamment au regard du principe de précaution et de l'interdiction des attaques indiscriminées. Sur ce point, il a tenté de répondre à deux questions : premièrement, existe-t-il une disposition légale interdisant aux parties à un conflit de recourir à certaines armes en milieu urbain, alors que l'utilisation de ces armes serait tout à fait légale dans d'autres circonstances ? Deuxièmement, le droit international humanitaire impose-t-il un standard minimum de précision qui interdirait le recours à certaines armes, parce qu'elles frapperaient, en raison de leur nature même, de manière indiscriminée en cas d'utilisation en zone urbaine ? Pour ce faire, il s'est notamment basé sur l'article 51(4) et (5) du Premier protocole additionnel de 1977 qui définit et interdit les attaques indiscriminées, ainsi que sur deux approches, à savoir la « règle des 3.000 pieds » de Mike Schmitt, spécialiste du droit international humanitaire, et la « règle des 200 mètres », développée par le Tribunal pénal international pour l'ex-Yougoslavie dans le cas Gotovina. Le dernier point examiné par Eric Jensen dans cette présentation a porté sur la question des technologies de pointe, et le rôle clé que ces dernières pourraient jouer pour les commandants impliqués dans des opérations en milieu urbain, notamment dans l'évaluation des zones ciblées et l'estimation des dommages collatéraux.

Introduction

As stated in the recent Report of the Expert Meeting on Explosive Weapons in Populated Areas, 'cities have never been immune from warfare, but over the last century, armed conflicts have, increasingly, come to be fought in populated centres, thereby exposing civilians to greater risk of death, injury, and displacement.'¹ The pressures of increasing urbanisation² across the globe,

1 International Committee of the Red Cross Expert Meeting, Explosive Weapons in Populated Areas, 24-25 February 2015, p. 2, available at <<https://www.icrc.org/en/document/explosive-weapons-populated-areas-consequences-civilians>>.

2 United Nations, World Urbanization Prospects – 2014 Revision, available at <<http://esa.un.org/unpd/wup/Highlights/WUP2014-Highlights.pdf>>; Mathew Burrows, *The Future Declassified*, New York, St. Martin's Press, 2014.

combined with the fact that armed conflict move into urban areas has put stress on the law of targeting, particularly with respect to the rules on discrimination and ‘precautions in the attack’

The International Committee of the Red Cross (ICRC) has taken a special interest in this problem³ and has had a number of conferences and discussions on the topic, including a recent conference in February of this year,⁴ and collaboration with the International Institute of Humanitarian Law in San Remo during September of last year.⁵ At the San Remo conference, Laurent Gisel delivered a superb paper on the use of explosives in densely populated areas.⁶ After discussing the three types of indiscriminate attacks described in the 1977 First Additional Protocol to the 1949 Geneva Conventions, and in particular the prohibition on the use of weapons which may be considered indiscriminate depending on the circumstances and manner in which they are used, Gisel made the point that ‘Warfare in populated areas is certainly a situation which might render indiscriminate particular means or methods that could be lawfully used in other situations.’⁷

Using Gisel’s point above, the question we will now consider is whether the law imposes on an attacker a proscription on the appropriateness and lawfulness of particular weapons in populated areas, even if those weapons would otherwise be legal.

There are many examples that have highlighted this issue in recent conflicts⁸ – situations where perfectly lawful weapons were used in heavily populated urban areas, leading to claims of indiscriminate or disproportionate targeting.

3 The United Nations Secretary-General also recently released a report in which he called on all parties to conflicts to ‘refrain from the use of explosive weapons with wide-area effects in populated areas.’ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/2015/453 (18 June 2015), available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/453>.

4 ICRC Expert Meeting on Explosive Weapons in Populated Areas, *op. cit.*

5 International Institute of Humanitarian Law, Eduardo Greppi (ed.), *Conduct of Hostilities: the Practice, the Law and the Future*, 4-6 September 2014, available at <<http://www.iihl.org/37-th-round-table-on-current-issues-of-ihl>>.

6 Laurent Gisel, “The Use of Explosive Weapons in Densely Populated Areas and the Prohibition of Indiscriminate Attacks”, in: Edoardo Greppi, *Conduct of Hostilities: the Practice, the Law and the Future*, 37th Round Table on Current Issues of International Humanitarian Law, San Remo, 2014, p. 100 at <<https://www.icrc.org/en/download/file/12571/ewpa-explosive-weapon-populated-area-2014-icrc.pdf>>.

7 *Ibid.*, p. 103.

8 Amnesty International, Black Friday: Carnage in Rafah During 2014 Israel/Gaza Conflict, at <<https://blackfriday.amnesty.org/>>; Amnesty International, Palestinian Armed Groups Killed Civilians on Both Sides in Attacks Amounting to War Crimes in Gaza Conflict, available at <<https://www.amnesty.org/en/press-releases/2015/03/palestinian-armed-groups-killed-civilians-on-both-sides-in-attacks-amounting-to-war-crimes-during-2014-gaza-conflict/>>; Amnesty International, Eastern Ukraine: Both Sides Responsible For Indiscriminate Attacks, at <<https://www.amnesty.org/en/latest/news/2014/11/eastern-ukraine-both-sides-responsible-indiscriminate-attacks/>>.

While there is no doubt that the principle of proportionality has a significant effect on the determination of what weapon should be used in various circumstances, the question being considered here is on the principle of discrimination. Specifically, does International Humanitarian Law impose a standard of precision such that certain weapons are indiscriminate *per se* if used in urban areas?

Indiscriminate attack definition

The current conventional international law on indiscriminate attacks is found in the provisions of the Additional Protocol I (AP I).⁹ Article 51(4) of AP I lays out the definition of indiscriminate attacks, describing such attacks as:

‘(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.’¹⁰

The next paragraph in Article 51 then provides two specific examples of ‘types of attacks’ that would be considered indiscriminate. These two examples are:

‘(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) 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.’¹¹

9 It is important to note that while the US is not a Party to AP I, it has accepted many of its provisions, including those discussed here, as customary law. See Michael J. Matheson, *The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in: *American University Journal of International Law & Policy*, Vol. 2, n° 415, 1987, pp. 419-460 (discussing which articles of AP I the US believes are customary international law and to which the US objects).

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 51.4, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3.

11 *Ibid.*, Art. 51.5.

The commentary to Article 51 clarifies that it first states the 'general rule' and then explains that the general rule will be 'accompanied by rules of application.'¹²

Schmitt's 3,000 Foot Rules

In his article, Gisel makes a compelling argument, relying on international law scholar Mike Schmitt, that:

'some aspects of the way in which the prohibition of indiscriminate attack is interpreted and applied might evolve with advances in precision weaponry'. For example, looking at weapons' circular error probability [CEP] in the past and today, it has been argued that as precision increases, the interpretation of some aspects of the notion of indiscriminate attacks "will become ever more demanding"¹³

The original article by Mike Schmitt, referenced by Gisel, was published in the *International Review of the Red Cross* in September 2005. In that article Schmitt argues that because modern weaponry is so much more accurate than any throughout history, 'a weapon system with a circular error of probability of over 3,000 feet would surely be deemed indiscriminate.'¹⁴ Schmitt goes on to explain that 'As pressure increases, the interpretation of the Article 51(4) phrase "not directed at a specific military objective" will become ever more demanding.'¹⁵

Interestingly, the commentary to Article 51 comes to a similar conclusion, though not as a matter of law. Concerning article 51(4)(b), paragraph 1958 in the commentary states:

'As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.'¹⁶

12 Claude Pilloud et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Leiden, Martinus Nyhoff, 1987, paragraph 1923, p. 615.

13 Laurent Gisel, op. cit., p. 104. For an interesting analysis of the scientific methodology behind CEP, see William Nelson, *Use of Circular Error Probability in Target Detection* (May, 1998), available at <<http://www.dtic.mil/dtic/tr/fulltext/u2/a199190.pdf>>.

14 Michael N. Schmitt, "Precision Attack and International Humanitarian Law", in: *IRRC*, Vol. 87, No. 859, 2005, p. 445, 456.

15 *Ibid.*

16 *Commentary on the Additional Protocols of 8 June 1977*, op. cit., paragraph 1958.

In other words, the relative development of weaponry will push the accepted understanding of what is a discriminate weapon. Whereas the commentary makes a practical argument for the reduction of error rate, Schmitt argues that this reduction will become required as a matter of law. He argues that because the technology is readily available and the vast majority of weapons are accurate to much less than 3,000 feet, if an attacker uses due care, using a weapon that does reach at least that standard would be discriminate.

The *Gotovina* 200 Meter Rule

A recently decided case from the International Criminal Tribunal for the former Yugoslavia appears to have adopted a similar line of reasoning to Schmitt's. The basic issue in the case was whether Gotovina and his forces were indiscriminate in their attacks during the conflict in the former Yugoslavia. The allegation was that Gotovina's use of artillery in populated areas such as the city of Knin was indiscriminate.

In the case, the Trial Chamber adopted a *post-hoc* 200-meter standard when analysing Gotovina's use of artillery.¹⁷ In the Trial Chamber's view, any impact that was more than 200 meters from a known stationary military objective indicated an attack that was not deliberately targeted at a military objective, and hence, indiscriminate. In his appeal, Gotovina raised numerous issues, including the arbitrary designation of a 200-meter standard, the exclusion of the possibility of striking targets of opportunity including mobile targets, and the more general approach of the Trial Chamber in determining the violation of the law simply based on the *post-hoc* impact sites.

The Appeals Chamber found that each of these findings by the Trial Chamber was in error and that it required a *de novo* review by the Appeals Chamber with regard to the evidence. Further, the Appeals Chamber found that 'after reviewing relevant evidence, the Trial Chamber's errors with respect to the 200 Meter Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained.'¹⁸

The appellate decision in *Gotovina* clearly rejects the arbitrary standard of 200 meters advocated by the Trial Chamber, but does not explicitly reject the idea that some rate of error would factor into a decision on discrimination. It can be argued that the issue in *Gotovina* focused more on Article 51(4)(a), which deals with a commander's exercise of discretion, but it is also reasonable to argue the same reasoning by analogy when discerning the limits of Article 51(4)(b), particularly when read in combination with Article 51(5)(b).

17 ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Trial Judgment, 15 April 2011).

18 ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A, Appeal Judgment, 16 November 2012, para. 67.

Combination of 51(4)(c) and 51(5)(b)

As opposed to both Article 51(4)(a), which is about the exercise of discretion by a commander in his targeting decision, and subsection (b), which is about a commander's weaponeering decision, subsection (c) is designed to account for weapons that are legal, unless used in a particular way that puts them in violation of the law. Thus, a commander cannot use an otherwise lawful means, or select an otherwise lawful weapon, and then employ it in a manner that does not discriminate.

Again, the Commentary provides interesting insight into this provision. In discussing subparagraph (c), the Commentary notes that there was some intense discussion about this provision and then states:

'Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.'¹⁹

Gisel, in his previously mentioned article, provides a very clear discussion of limitations on specific weapons that have been prohibited by various Treaty Parties, such as anti-personnel landmines, booby traps and cluster munitions.²⁰ He argues that these and other similar weapons cannot 'be directed at a specific military objective as required by IHL'²¹ Alternatively, subsection (c) focuses on weapons that are not otherwise illegal, but may become so through their specific use. For the purpose of this presentation, the specific use is in urban environments.

Therefore, if we agree that Article 51(4)(c) prohibits otherwise lawful weapons when used indiscriminately, it is now necessary to determine what an indiscriminate use of an otherwise lawful weapon would be. Again from the commentary:

'(...) the power of the weapons used can have the same consequences [i.e., be indiscriminate]. For example, if a 10-ton bomb is used to destroy a single building, it is

19 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, op. cit.*

20 Laurent Gisel, *The Use of Explosive Weapons in Densely Populated Areas, op.cit.*

21 *Ibid.*

inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building.²²

This reasoning might also apply to using weapons in urban areas. Insofar as the ICRC commentary reflects the intent of the State Parties, it seems clear that they felt that lawful weapons could be indiscriminate in some circumstances. Accordingly, at least one of those contemplated circumstances might include use of a weapon that, while effectively destroying its intended target, did so in a way that necessarily damaged non-targeted buildings around it. There is textual support for this idea in the subsequent paragraph of Article 51.

The example of a non-discriminating attack in Article 51(5)(b) helps us apply this to urban areas. Article 51(5)(b), often quoted as supporting the idea of proportionality and directly referenced to Article 57 in its origin, describes an indiscriminate attack as one that '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.'²³

The Commentary adds:

'In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; *moreover*, even after those conditions are fulfilled, the incidental civilian losses [p.626] and damages must not be excessive.'²⁴

In other words, in reading Articles 51(4)(c) and 51(5)(b) together, a targeted attack that hits its objective, but still causes excessive incidental injury or death will be considered indiscriminate, despite the otherwise lawful nature of the attack. In urban areas, this, of necessity, acts as a greater constraint than in non-urban areas. A weapon with a circular error probability of 800 feet is more likely to be indiscriminate, due to excessive incidental death or injury, when used in an urban environment than when used in a non-urban environment.

22 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, op. cit.*, paragraph 1963.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 51.5, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3.

24 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, op. cit.*, paragraph 1979.

Returning to the original question of whether the law now imposes on an attacker a proscription on particular weapons in populated areas, even if those weapons would be otherwise legal, the answer must be yes. As to the question whether International Human Rights Law imposes a standard of precision such that certain weapons are indiscriminate *per se* if used in urban areas, the answer must be no, not *per se*.

The answer is no, not *per se*, because the standard imposed by IHL is not a solely objective standard. Consequently, a use of 200 meters or 3,000 feet as the gauge of discriminatory attacks is not a matter of conventional or customary law. Rather, it is true as a matter of law that when a commander uses any weapon with any CEP, that commander must be more careful in urban areas than she or he would have to be in non-urban areas, in order to not violate the principles of discrimination.

Advanced technologies

Finally, the issue of emerging technologies and their impact on the law needs to be addressed. Advancing technologies can play a key role in assisting a commander who is engaged in urban operations. An active system of nanotechnology assisted sensors and unmanned aerial vehicles, for example, provides a commander with a multitude of effective means to ensure his weapon systems can discriminate in urban areas. The use of unmanned aerial vehicles to mark the potential area of CEP, to provide visual or audio signals that attacks are incoming, and to engage with less than lethal munitions in order to incentivise the movement of civilians are all possible options. Using micro drones to monitor the target area, including the presence and activities of civilians, will provide survivable, real time intelligence to the commander launching the attack. Similarly, the use of a system of sensors to provide extremely accurate information as to the movement of civilians in urban areas, environmental and other potential effects on weaponing, all in real-time, would also provide a commander with important data. As even more developed technologies enter the battlefield, their ability to impact on a commander's targeting decisions will only increase.

Conclusion

In conclusion, while there is no set standard as to what would make an otherwise lawful weapon indiscriminate in populated areas, an analysis of Article 51 of Additional Protocol I seems to indicate that States contemplated that such a result might occur. As technology increases, the pressure to take a more discriminating approach to conflict in urban areas is bound to increase – and rightly so.

SESSION 4 - THE PROHIBITION ON INDISCRIMINATE AND DISPROPORTIONATE ATTACKS

Following these three presentations, the audience raised questions on the following main issues:

1. Defining the military advantage

On the concept of military advantage, one of the panellists' suggestions regarding 'uncertainty' seemed quite worrying for a participant. The condition, from the definition, is one of threshold, i.e. either you are certain that the attack will offer a military advantage, or you are risking an indiscriminate attack without a specific military objective in mind, which is problematic in her opinion.

The panellist clarified that, in his view, when attacking a certain target, the commander has to be reasonably certain that a definite military advantage would result. So, he did not disagree with her on that, but there may be circumstances where the commander would be unsure as to what type of military advantage would result. If the commander is not reasonably certain that a definite military advantage would result, that would indeed be indiscriminate.

Concerning the *Gotovina* case, a participant would not read that as suggesting that you could attack objects that only bring a military advantage, because according to her, it was clear from that quote that only one out of two limbs of the definition was satisfied.

The panellist suggested another reading of the quote, but he considered that the conclusions were quite overbroad, considering that in any case, they will insist on the application of both provisions of Article 52(2) of the 1977 First Additional Protocol as it stands.

2. Incidental harm and reverberating effects

Another participant made a comment on the definition of injuries caused to civilians, mentioned during one of the presentations, stressing the importance of including the psychological and mental dimensions into the definition. The participant took sieges of cities as an example, underlining that after a siege, one of the biggest impact on the civilian population is the psychological one. From a humanitarian perspective, this constitutes an element that must be taken into account when dealing with this particular topic, because it has long-term consequences.

The panellist also mentioned that the most difficult issue here is how to assess it in terms of excessiveness.

One of the participants also agreed with the need to include psychological harm, raising the following question: when looking at harm that is likely to be caused, to what extent do you take into account facilities that may be available to mitigate it? For example, if you think that there is a risk of fire spreading, it would be relevant to know if fire services do have access to water. Similarly, if you are thinking of ‘causing injuries’ – as opposed to death – it may be relevant to know what the actual medical facilities are. In practice, does that issue serve us at all? If it does, does it serve us in a positive or a negative way, i.e. does the absence of those things aggravate the suffering or does the presence of them reduce it?

A panellist explained that commanders are always happy to receive this kind of information when advised by their lawyers, although this does not actually mean that they will always take the right decision. But in most cases, if they know that their decision may cause a significant secondary effect on the civilian population, then they would be much more hesitant to conduct that kind of attack.

3. The issue of indiscriminate weapons

Concerning the weapons that might be forbidden *per se* because they are indiscriminate, notably in densely populated areas, one of the participants mentioned the precedent of incendiary weapons, whose use is forbidden in some specific areas. Yet, he noted that this is not something you can decide solely on the basis of an experts’ evaluation, because in the end you will always need to have a governmental decision to ensure that one particular weapon will be limited or prohibited *per se*.

One of the panellists shared the same opinion, saying that State Parties are making the decision, as opposed to commanders. On the one hand, it is very difficult for a commander to make a decision about a *per se* illegality, but on the other hand, it is very easy for a commander to make a decision about it in the specific circumstances.

According to another panellist, it is very difficult to claim that the law explicitly considers that some weapons are *per se* indiscriminate in populated areas, but when you discuss Article 51(4) (b) and you refer to the fact that this concerns the use of indiscriminate means and methods of combat *per se*, he reads it otherwise: indeed, this article concerns attacks which employ a method or means of combat, and it is all about the circumstances. In practice, there are circumstances in which the use of a weapon, which is not *per se* indiscriminate, will make its use indiscriminate in those circumstances. What makes it problematic is the generalised assess-

ment of individual attacks in those circumstances. In the *Gotovina* case, the Tribunal criticised the fact that it was an *ex post facto* damage based on the impact rather than the expected precision. In the panellist's view, this is a fair approach because the decision has to be made on the basis of what is expected by the commander and not on what occurs. Somehow, the question is whether you have a 200-meter line, or any other line, in terms of what is expected and it is interesting to see that while the Appeal Court dismissed the conviction in the *Gotovina* case, in the *Martić* appeal judgment there was a discussion on the expected dispersion area and the Appeals Chamber concluded that 'a dispersion pattern of such proportion would hardly make the finding of the Trial Chamber that the weapon used was incapable of hitting specific targets unreasonable'. Basically, it means that it is not unreasonable to consider such dispersion patterns as being an indiscriminate attack.

Another panellist mentioned that he agrees with Schmitt's position, but when we talk about artillery and other types of technologies, we always assume that we are talking about 'targeting'. With respect to artillery specifically, you are using force that rises to the level of an attack and you are not really doing it in the context of 'targeting' because you are trying to achieve something else. And the assumption according to which you could use artillery in urban areas when you are not trying to target a specific structure is problematic.

One of the participants referred back to one of the panellists' presentation regarding force protection as a factor in proportionality evaluation. Although agreeing with the examples presented, he stressed that it is not the force protection of the attacking forces that is the feasibility factor, while obviously, if you protect other forces through the attack, this is indeed a military advantage to keep those forces you want to protect alive. If it was about your own forces, you could simply keep them at home. When it comes to military advantage, because these rules, as we all assume, also apply in non-international armed conflicts, they are also binding on non-state armed groups. In asymmetric warfare especially, it becomes much more difficult to apply the panellist's analysis, including the concept of 'aggregation', because, for example, if you are in a perfectly lawful armed conflict against the USA, what is the advantage of killing a small number of US soldiers – although they constitute legitimate targets? Realistically, you will not be able to really weaken the military potential of the USA in such a way that the USA no longer has enough soldiers. Or do we consider that the asymmetric enemy will no longer be able to kill soldiers, and perhaps the USA will withdraw from the country? This is not a traditional military advantage, as it is rather a psychological one.

The panellist explained that in the literature, some think that you may take the psychological or moral effects or deterrence more generally as part of the military advantage. In his view, this is a very dangerous conclusion, which paves the way for hitting targets which we would

otherwise think are not lawful military objectives or the attack would be disproportionate. In all the examples he could think of, the attack would not be lawful. Although this was an interesting point, the panellist noted that the law as it currently stands does not favour this kind of conclusion – while it might be taken into account. With regard to aggregation in itself, it does solve some problems: whenever the adversary has more operational capacities, it just requires you to have a larger number of attacks in order to achieve that military advantage.

On the issue of psychological impact and in the context of proportionality, a participant asked whether it should be analysed as cumulative, and what impact it would have on the issue of military advantage.

The panellist recalled that many States assert that the concrete and direct military advantage has to be assessed in view of the attack as a whole. Therefore, the cumulative harm might also need to be assessed. From a theoretical perspective, if you have civilians who have been injured by an attack, and there is a second attack, you expect the civilians to be injured again. As they were already weakened by the first injury, they would die of the second injury – even if they would not have died from that second injury, if they had not been injured in the first place. In the end, you will have to consider the situation as you know it. So, if you already have psychological harm and you have a new attack, you must take into account the harm existing before and that which your new attack will create. It will not be “recounted”, but it must undoubtedly be taken into consideration.

On the issue of the aggregation of military advantage, a participant asked: what are the boundaries of this approach? How does aggregation of incidental loss of life, injury and damage work practically speaking? As to attain the aggregated objective, you will be looking at different types of targets, in more or less densely populated areas, industrialised zones, residential areas, etc.

The panellist explained that there is some kind of tension between the wording of Articles 51 and 57 of the 1977 First Additional Protocol, which deal with indirect military advantage. In the end, the attacks must be interrelated or the value of one attack must depend on the value of another attack to be sufficiently connected and to make the aggregation possible. There may be situations where you may have to take into account many attacks: with regard to the prevention of rocket attacks for example, the more arms depots or rocket launching points the enemy has, the more attacks you will need in order to achieve the military advantage. Secondly, concerning the aggregation of collateral damage, if we are talking about States, *jus ad bellum* requires to take into account the overall effects of a campaign. In practice, one must not forget that collateral damage assessments are very difficult, and it becomes even more

difficult when you have to aggregate different attacks – although it is not impossible. Many resources would have to be invested in order to aggregate such damages.

Concerning interdiction fires, even if you might not be targeting something specific, you are seeking a military advantage. Hence, how does it work with the issue of incidental loss of life, injury and damage?

The panellist recalled the importance of the principle of proportionality and the need to assess collateral damage in this context.

Panel Discussion

How to Work towards Reducing the Human Cost of the Use of Explosive Weapons in Populated Areas?

Moderator: **Françoise Hampson**, *University of Essex*

Résumé

Lors de cette seconde table ronde, Françoise Hampson, Maya Brehm, Mark Zeitoun, le Lieutenant-Colonel Harry Konings et Thomas de Saint Maurice ont débattu de l'emploi d'armes explosives en zone peuplée et de leurs conséquences particulièrement dévastatrices pour les civils. Dans un contexte d'urbanisation croissante, que faire pour réduire ce phénomène ? Maya Brehm a d'abord défini ce que sont les « armes explosives », qui englobent les pièces d'artilleries, les mortiers, les roquettes, les grenades, les mines, les bombes, et autres engins explosifs improvisés. Toutes ces armes ont en commun leur large rayon d'impact, et notamment un puissant effet de souffle et de fragmentation, à l'origine de leurs effets particulièrement destructeurs en zone peuplée. Différentes études réalisées ces dernières années ont d'ailleurs montré que 90 pourcent des victimes directes de ces armes sont des civils. Mark Zeitoun s'est ensuite penché sur la question de l'impact de ces armes sur les infrastructures urbaines et les services essentiels offerts par ces dernières, tels que l'approvisionnement en énergie et en eau, les systèmes de gestion des déchets et les soins de santé. Tout au long de sa présentation, il a insisté sur le caractère interdépendant de ces infrastructures. Il a ainsi souligné que l'emploi de ces armes en zone peuplée a souvent des effets à plus long terme, au-delà des conséquences immédiates, tout en précisant que les dégâts à ces infrastructures ou leur destruction touchent à la fois les civils vivant à proximité comme ceux se trouvant hors de la zone d'impact. Pour continuer, le Lieutenant-Colonel Harry Konings a fait part de son expérience en tant qu'officier retraité de l'armée néerlandaise et casque bleu de la Force de protection des Nations unies (FORPRONU) durant le siège de Sarajevo. Tout au long de sa présentation, il a souligné l'importance d'assurer la protection de la population civile et la nécessité de contrôler l'utilisation des systèmes d'armes à tir indirect. Il est également revenu sur l'attaque du marché de la place Markale à Sarajevo, le 28 août 1995, expliquant son travail d'enquête sur le terrain et l'analyse du cratère provoqué par des tirs de mortier sur cette place. Son équipe fut également chargée de répertorier le nombre de civils morts et blessés. Enfin, il a souligné l'importance de la justice internationale, revenant sur son expérience en tant que témoin oculaire et expert qu'il déposa devant le Tribunal pénal international pour l'ex-Yougoslavie, aux procès de Milošević, Perišić, Karadžić, et Gotovina. Thomas de Saint Maurice a ensuite envisagé la thématique sous une perspective plus humanitaire, présentant notamment la position et les activités du Comité international de la Croix-Rouge (CICR). En 2011, le CICR demanda aux parties aux conflits armés d'éviter d'employer des armes explosives ayant un large rayon d'impact

dans les zones fortement peuplées en raison de la probabilité élevée d'effets indiscriminés. Il a également rappelé un certain nombre de règles du droit international humanitaire, telles que l'interdiction des attaques indiscriminées ou disproportionnées, rappelant que les parties n'ont pas un choix illimité des moyens et méthodes de guerre, et en insistant sur la nécessité de délivrer des avertissements efficaces avant l'attaque et de prendre toutes les précautions nécessaires pour protéger la population civile contre les dangers résultant des opérations militaires. En février 2015, le CICR a organisé une réunion d'experts sur le thème de l'emploi d'armes explosives en zones peuplées. L'objectif actuel est de continuer le dialogue, afin de comprendre les politiques et pratiques militaires existant en la matière, et d'en identifier les meilleures pour assurer un meilleur respect du droit. Par ailleurs, le CICR documente et évalue les conséquences de l'emploi d'armes explosives en zones peuplées, que ce soit au niveau des pertes civiles, des dommages subis par les habitations civiles et les infrastructures critiques, ou des dommages incidents. C'est d'ailleurs sur la base de son mandat interdisciplinaire que le CICR peut aborder cette question d'un point de vue tant humanitaire que juridique. Enfin, Maya Brehm est revenue sur les efforts politiques entrepris par la communauté internationale pour lutter contre l'utilisation des armes explosives à large rayon d'impact en zone peuplée, limiter leurs effets dévastateurs, et renforcer la protection des civils. Sur ce point, elle a notamment fait référence au Rapport du Secrétaire général des Nations unies sur la protection des civils en période de conflit armé publié en 2015, appelant les parties au conflit à « s'abstenir d'utiliser des engins explosifs à grand rayon d'action dans des zones peuplées » et invitant les Etats-membres à prendre « un engagement » dans ce sens. Maya Brehm a également partagé la position du Réseau international contre les armes explosives (INEW), selon lequel il est urgent que les Etats commencent à travailler à un engagement politique commun. Pour finir, elle a mentionné un certain nombre de réunions informelles d'experts qui se sont dernièrement tenues sur la question, et les défis actuels qui en ressortent, tout en soulignant l'intérêt et l'engagement grandissant d'un certain nombre d'acteurs internationaux et d'Etats en faveur d'un accord visant à réduire les pertes humaines liées à l'usage des armes explosives en zone peuplée. Dans ses quelques mots de conclusion, Françoise Hampson a également souhaité mettre en avant le rôle joué par les experts non-militaires présents sur le terrain pour évaluer l'ensemble des impacts liés à l'utilisation de ces armes.

EXPLOSIVE WEAPON USE IN POPULATED AREAS: A PREDICTABLE PATTERN OF CIVILIAN HARM

Maya Brehm

Article 36

I am going to speak on behalf of Article 36, which is a civil society organisation based in the United Kingdom, and one of the founding members of the International Network on Explosive Weapons (INEW) formed in 2011. Other members of INEW include Action on Armed Violence (AOAV), Human Rights Watch, Handicap International, PAX, Save the Children, Seguridad Humana en Latinoamérica y el Caribe (SEHLAC), and Women's International League for Peace & Freedom (WILPF), among others. The Network's aim is to promote stronger international standards to prevent and reduce harm to civilians from the use of explosive weapons in populated areas.

What do we understand by explosive weapons? This broad category of weapons includes air-dropped bombs, helicopter-launched rockets, ground-launched rockets, mortar and artillery shells, grenades, mines as well as improvised explosive devices. What these weapons have in common is that they affect an area around a point of detonation with blast and fragmentation. And it is mostly through this blast and fragmentation effect that explosive weapons cause harm.

When explosive weapons are used in populated areas, they cause a distinct and predictable pattern of harm, injury, death and destruction. This pattern of harm is different from other weapons, such as small arms, for instance. Explosive weapon incidents tend to cause multiple casualties and serious and complex injuries – injuries that the victims often do not survive or that can result in permanent physical disabilities. Explosive weapons also have an inordinate capacity to reduce the built-up environment to rubble.

When used in populated areas, that is to say areas containing concentrations of civilians, explosive weapons mostly harm civilians. Several studies conducted over the last years have shown that close to 90 percent of direct casualties from explosive weapons used in populated areas are civilians. This percentage is significantly lower outside populated areas. This is not surprising in itself, but it points to a serious humanitarian problem. Indeed, humanitarian actors and policy makers are increasingly recognising the use of explosive weapons in populated areas as a key challenge to the protection of civilians in armed conflicts.

Explosive violence is a geographically diverse phenomenon that affects some countries and locations more than others. Syria, Iraq, Pakistan, Afghanistan, Gaza, Nigeria and Yemen have been particularly heavily affected by this form of armed violence in recent years.

THE EFFECTS OF THE USE OF EXPLOSIVE WEAPONS ON URBAN SERVICES

Mark Zeitoun

School of International Development, University of East Anglia

Introduction

I am going to talk to you from an engineer's perspective, notably about the report that I have been working on with the International Committee of the Red Cross (ICRC) dealing with urban services during protracted armed conflict¹. This report is based on the analysis of 30 years of experience of the ICRC water and sanitation engineers, and specific case studies in Gaza and Iraq.

My objective here is to assess the implications of the use of explosive weapons in populated areas and the protection offered by International Humanitarian Law (IHL). I will start this presentation by sharing with you the four main lessons learnt from this report: urban services are more than just infrastructure; urban services are interconnected; the impact of explosive weapons on urban services can be direct or indirect; and finally, this impact can be cumulative. Then, I will argue that the consequences of the use of explosive weapons in populated areas go far beyond the intended impact zone and last long after the explosion occurred. Lastly, I will conclude with some thoughts on reducing the human cost of the use of explosive weapons in populated areas.

First lesson learnt: urban structures are more than just infrastructure

Generally, what we tend to do is to focus on infrastructure. And very rightly so: the work of humanitarian aid engineers is to repair the pipes once they have been destroyed. Yet, to run properly, urban services also depend on a broader set of hardware, as well as on consumables. Additionally, they also rely on people. The use of wide-impact explosive weapons will have immediate direct effects on the delivery of those services. It must be noted that IHL does offer a degree of protection: from the general protection of civilians and civilian objects to the very specific protection of objects indispensable to the survival of the population (including dams or dykes), and the special protection afforded to health services.

¹ ICRC, *Urban services during protracted armed conflict: a call for a better approach to assisting affected people*, International Committee of the Red Cross, 2015 Geneva, at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4249.pdf>

Second lesson learnt: urban services stretch beyond the city and are interconnected

If, for example, you target an infrastructure within the limits of a city in a densely populated area, and there is some collateral damage to a transformer which runs a water-treatment plant, then supplying water treatment will no longer be available. Equally, even outside a populated area, if you target the sources of the services, such as an electric power station, food production places, waste water plants or financial and digital information flows, there are also going to be impacts upon the population within the city. It is crucial to note that the people within the city are typically more vulnerable, in the sense that they are more dependent upon the services, and perhaps a bit less resilient than people living in rural areas. Thus, the indirect effect of explosive weapons goes far beyond the impact zone. Also, in my opinion, the protection offered by IHL in this case is actually limited, because IHL focuses on object- and person-specific protection, and not so much on the interconnectedness. This constitutes, from my perspective, a weakness in IHL.

Third lesson learnt: the greater impact of explosive weapons on urban services is often indirect

The research has shown that indirect impacts – inside or outside the city – are more consequential than direct impacts. This is similar to what we call the ‘reverberating effects’. In terms of hardware, there are pressure drops in water networks, which means that people install pumps at the entrance of their houses to suck the water from the network up to their rooftop reservoirs – and potentially contaminate their own water supply because of the risk of cross-contamination. Similarly, the looting of warehouses means less available spares, and price spikes means rationing of spares and eventual degradation of the service – even if there is no destruction of the service as such. Again, the most important component is people: the brain drain and trauma that was previously mentioned. The brain drain is very important because some of these services, especially in protracted conflicts, become so particular and specific that they cannot be run by just anyone. For instance, those urban services need people who know the system inside out to manage their own specificities.

Fourth lesson learnt: the direct and indirect impact of explosive weapons on urban services can be cumulative

Beyond a certain point, a system may become irreparable or a repair might just not be feasible, either because it is too expensive, or the people with background knowledge have fled, or simply because it makes no technical sense. Such a cumulative impact may be considered part of the so-called ‘aggregated collateral damage’ that other speakers have referred to at this Conference. The situation arising is one of vicious cycles of cumulative impact, which may lead to service decline, risks to public health and even more conflict. One of the implications

of the use of explosive weapons in populated areas is that its consequences last long after the explosion has occurred, and suffering continues long after the fighting has come to an end. The protection offered by IHL does not explicitly address that cumulative impact, nor does the object-specific and person-specific protection explicitly acknowledge interconnectivity.

Concluding remarks

Concerning the question we were asked by the Colloquium's organisers – how to reduce the human costs of the use of explosive weapons in populated areas – there are two main fields to be addressed. Firstly, the legal one. Mitigation is a key area and there are also implications for proportionality, distinction, and active or passive and feasible precautions. How much do we know about urban services, and how much can we claim that we did not know? Secondly, in terms of military operations, if the aim is really to avoid damage and not just to stay within the allowable limits of collateral damage, then armed forces should refrain from using explosive weapons with wide-area effects in populated zones. If they do use this kind of weapon, they should take adequate precautions to take into account this complex reality of interconnected urban services, notably by involving engineers in the planning and assessment. Additionally, site selection can reflect the level of importance of the infrastructure for the civilian population (i.e. primary, secondary or tertiary). For example, upstream targets like water treatment plants have a huge downstream impact and might be considered a primary target. Waste water treatment plants are at the end of the system, and so it will have less (public health) impact if located outside the city in an unpopulated zone. Efforts could be made, for instance, to link the preference for a specific target with the importance and the role of the infrastructure or service to civilians. Lastly, we can and we should foresee the consequences of an attack on urban services, and we should ensure that access is granted to repair crews.

A PRACTICAL MILITARY PERSPECTIVE

Lieutenant Colonel Harry Konings

Retired Dutch army officer and former UN military observer

Today, I do not represent the Dutch army, nor the Dutch Ministry of Defence. I will share with you my operational experiences, notably in Sarajevo, and give some thought on what we could do to improve the life of human beings in these contexts.

To begin with, this is a much younger Harry Konings, twenty years ago, on the observation post in Sarajevo. The physical reminders I kept are my decorations and my wounded medal for harm I encountered during my mission in Sarajevo. I look upon those things on a regular basis: although it might be twenty years ago, they still keep me thinking every day. I am also connected to the Dutch Veteran Institute, which allows me to go to schools, to talk with children about war and peace by telling them my own experiences. My main message to them: war or any form of armed conflict is a terrible thing, for the military and everyone involved in a war, but especially for the civilian population – civilians will suffer the most in those situations.

I would like to share some thoughts with you. First, the civilian population should always be priority number one, in each operation and in everything you do. This sentence is the most important one in the Allied Joint Publication on Countering Insurgency that I wrote with representatives from many nations (I was the custodian). If you forget that and if you think that other things are as important, you are wrong, in my opinion. The civilian population is the most important entity. It is what you have to protect. Second, you have to understand every aspect of the nation where you are located, from the cultural, to the social, the economic and the political factors, its leaders and its population. Because, if you do not understand it properly, it will cost human lives. Then, you need strong diplomacy to find solutions. One should not forget that military forces do not bring a solution, they only support it. In addition to that, you also need the local civilian population to solve the problems for themselves. For instance, I served in Albania as an Organization for Security and Cooperation in Europe (OSCE) observer, after the collapse of the State in 1998. The Albanian population said to us ‘well, solve the problem’, and we asked them what they wanted. They answered ‘we want democracy’ and we asked them what their vision of democracy was. They said ‘that you are allowed to do everything’. We explained that they were wrong, that this was a kind of anarchy, before telling them that democracy means that you care for each other, that you pay taxes, etc. Although the international community could help, the Albanian population had to work things out for themselves. Fourth, one should recognise the weaknesses of international organisations. I

came back from Sarajevo with a huge frustration about the United Nations (UN): the mission did not work at all. At that time, the UN used the term 'balance of nations', which in my view, weakens the organisation. I was leader of a team with twelve nationalities living in one house close to the frontline; we were targets for the Bosnian Serbs as well because blue helmets are nice to shoot at. My point is that it was an inadequate organisation, because people were put on post based on their nationality. I had observers in my team who could not speak English or drive a car. They did not want to go on patrol. The differences in such an organisation cost human lives, because we did not do our job properly. These last days, we have been talking about armed forces, but what about irregular parties? What about the use of irregular weapons systems? Then, concerning the mandate of international missions: when I was in Bosnia, the mandate was 'peacekeeping', and there was an agreement between the Bosnian Serbs and Bosnia and Herzegovina. Yet, nobody heeded that agreement and the fighting went on. Furthermore, the mandate of the UN forces was not adapted, and the peacekeeping force was not allowed to do anything. From the beginning, if the mandate is not correct, military forces cannot be part of the solution, nor can they protect the civilian population. Consequently, and once again, it will cost human lives. Lastly, military doctrine is also very important, especially international and coalition doctrines. For six years, I have been a Director of Doctrine in my army. It enables people to learn from each other through discussion. For example, what is meant by the term 'insurgent'? It took us weeks to find a definition of what is an 'insurgent'. Both military doctrine and understanding that concept are crucial.

There is a need to control the use of 'simple but very effective' indirect firing systems. During the Colloquium, we have been talking about smart weapons, and GPS-guided bombs. However, 120 millimetres mortars are much more dangerous, because they are widely used, I can assure you that such a mortar system is something I can teach you to use in one single day. Furthermore, these weapons systems can be used in any environment and they are easy to transport. Their ballistic characteristics enable them to be fired from an enclosed environment (e.g. a clearance in a forest) into another enclosed environment (e.g. a street between high buildings). Therefore, these were the favourite weapons of the Bosnian Serbs in Sarajevo, who fired projectiles indiscriminately into the city. They weigh twelve kilogrammes and each round produces between 5,000 and 7,000 shrapnel.

If you look at a very simple map of Sarajevo, you can see the encirclement was nearly complete at that time. With regard to yesterday's panel debate, we can call it a siege, because the only opening was the international airport, which was only accessible to international troops for flying in or out of the city, whenever it was possible. When I was there, even that was closed because it was too dangerous, and for that reason UN personnel could only leave via Mount Igman. The Serbs, who completely encircled the city, were located all along the red line. I was

working on the left hand side of the map, in the old city part. Now, I would like to show you a short video about the impact of a 1-20 mortar. Although it was not taken in Sarajevo, you can see the debris falling, which causes casualties as well. I will come to a specific case to show you what a projectile can do, when fired into a city. I used the word 'harassing' at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague – notably in front of Radovan Karadžić, who became very angry at that time – and I could have similarly used the word 'terrorising' because that is what I have learnt from yesterday's presentations. Here is a piece of my diary, dated 28 August 1995, after the Markale incidents in Sarajevo. The first occurred in 1994. With three observer colleagues, we had to investigate and count the people who had been killed or wounded. I remember it was a very tense situation that day, because everybody in the city blamed the UN for not being able to protect the lives of these people in the area. For instance, the attack occurred on a spot where there was no military objective. A video clip of this attack,² used by the ICTY during the trials, shows the tile of one mortar, which killed 40 civilians and wounded 100, by blast, shrapnel and glass from the windows around. Following the investigations, the commander of the UN Protection Force (UNPROFOR) concluded that it had come from the Bosnian Serb side. After investigating on the spot, we wrote a crater analysis report on the following criteria: What happened? Where? In what time frame? What were the results of the attack? For every incident, we had to write such a report, which all ended up at the ICTY. Here is also a picture of the street after the attack, a very narrow area where blast and shrapnel have had an extra effect.

This brings me to my last point: international justice. If human lives have been at stake, the people who are responsible should be brought before an international court. From 1996 to 2010, I testified as an eye witness against three individuals: General Milošević, General Perišić, and Radovan Karadžić. I also testified as an expert witness in the case of General Gotovina. I thought I could do something about the situation; and if you do not bring people responsible for the loss of civilians' lives to justice, you fail in your mission. In my view, this is what the international community should do for the civilian population.

2 International Criminal Tribunal for the former Yugoslavia, *The Tribunal Remembers: Markale Market Massacre - 28 August 1995*, Youtube video, 2:13, August 27, 2014, at: <<https://www.youtube.com/watch?v=ToSSJrWU78&feature=youtu.be>>

A HUMANITARIAN PERSPECTIVE

Thomas de Saint Maurice

ICRC Legal Division

Since yesterday, we have been hearing that globally, urbanisation has been a growing phenomenon, and therefore, urban warfare is increasingly becoming a common feature of contemporary armed conflicts. This trend will continue. It is even compounded by the fact that certain parties to armed conflicts, notably – but not only – non-state armed groups, intermingle with the civilian population in urban centres, sometimes deliberately.

An unfortunate but logical consequence of that phenomenon is the problem that we can observe with regard to the types of weapons used in such environment, where there are concentrations of civilians. In these last months alone, we have seen parties to armed conflicts fighting in towns, cities and camps, including in Syria, Gaza, Ukraine, Afghanistan, Yemen, Iraq, Somalia, Libya, etc. Beyond the issue of a blatant lack of respect for the basic rule of IHL prohibiting direct attacks against civilians and civilian objects, which generates a major part of the humanitarian consequences, the problem is that even armed actors targeting military objectives too rarely adapt their methods and means of warfare (i.e. tactics and weapons used) to the urban environment in which they are fighting. Weapons systems that are originally designed to be used in open battlefields, or at least designed to create area effects, are used against targets in urban areas. When these explosive weapons have wide-area effects, their use in densely populated areas can have devastating humanitarian consequences. Civilians die or are injured due to the blast or fragmentation effects, or due to collapsing buildings. Civilian houses and critical infrastructures are destroyed or damaged. Ensuing consequences for the survivors are long-term disabilities, trauma, loss of housing and livelihood, problems of access to water, diseases, and when a city is shelled for weeks, months or years, as we have seen, the civilians try to leave, increasing the flow of displaced persons.

The International Committee of the Red Cross (ICRC) has been observing and addressing these consequences for years in many contexts. In 2011, it made public its official position that ‘explosive weapons with a wide-impact area should be avoided in densely populated areas due to the significant likelihood of indiscriminate effects’. In other words, we consider that using explosive weapons that have wide-area effects against an objective located in a concentration of civilians entails an extreme risk of violating the rules of International Humanitarian Law regulating the conduct of hostilities, and in particular, the rules prohibiting indiscriminate and disproportionate attacks. We believe that this position is reasonable and that is why we call on States to endorse it.

Maya and Harry explained what is meant by ‘explosive weapons with a wide-impact area’. These are weapons that have a wide-area effect due to the large destructive radius of the individual munition (e.g. large bombs or big missiles); because of the lack of accuracy of the delivery system (e.g. unguided indirect fire weapons such as mortars and artillery), or because the weapon system is designed to deliver multiple munitions over a wide area (e.g. multiple rocket launchers that can launch dozens of rockets in a few seconds). It is quite obvious that in many instances, when used to target military objectives located in or near a concentration of civilians, the effects of such kinds of weapons will be devastating beyond the perimeter of the legitimate target itself. This is because either a number of munitions will not land on the intended target – because the inaccuracy of the weapon necessitates several rounds to achieve the objective – or because even if the weapon is precision-guided and lands exactly on a military target, the effects of the explosion will extend further than the target itself, notably due to the amount of explosive it carries.

The title of this panel discussion is ‘How to work towards reducing the human cost of the use of explosive weapons in populated areas?’ There are certainly several ways of working towards this objective, and it is important to underline that many of the solutions lie in the hands of the parties themselves. What can be the ICRC’s specific contribution to reducing the human cost of the use of explosive weapons in populated areas? Actually, we have our own independent approach. An important specificity of the ICRC is that it is a multidisciplinary humanitarian organisation: on the one hand, it allows us not only to collect information in conflict zones on possible violations of the law and discuss these findings confidentially in a protection dialogue with the parties concerned and, on the other hand, it also enables us to gather knowledge on the humanitarian consequences directly in the affected areas and to address them through our assistance programmes providing support in health, water and habitat or economic security. In addition to that, our role as a “guardian of IHL” combined with sustained dialogue with military armed forces allows us to have confidential discussions on the interpretations of the rules of IHL and their integration in military practice. We try to rely on all these aspects to address the issue of explosive weapons in populated areas. Let me describe more the nature of the dialogue we seek to have with States on these issues. I will naturally dwell more on the legal aspects.

Last February, the ICRC hosted an expert meeting on explosive weapons in populated areas. Militaries and other experts from different regions with different experiences were invited to have a fact-based discussion on the humanitarian, legal, technical and military aspects of the use of explosive weapons in populated areas. The report of the meeting was published last June³. We now want to build on this report, notably to foster further discussions on the issue

3 ICRC, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects*, Expert Meeting, Chavannes-de-Bogis, 24-25 February 2015, available at: <<https://www.icrc.org/en/download/file/10297/icrc-explosive-weapons-report.pdf>>

with relevant and interested States and other organisations, for instance military alliances. Indeed, the ICRC seeks to have a dialogue, notably with armed forces, aiming at understanding and identifying their current policies and practices in relation to the use of explosive weapons in populated areas. We also seek to have a better understanding of States' positions, not only on the issue in general, but in particular on how they interpret the existing rules of IHL about the use of explosive weapons in populated areas. An example of such a legal aspect we want to discuss is: some weapon systems have an inaccurate mode of delivery, for instance unguided mortars or artillery rockets. Those are indirect fire weapons, which means that when you are using them you do not have an eye on your target directly. These weapons are 'area weapons', i.e. they have been designed to create an effect over a large area using multiple munitions – this is their military value – so, their intended use is not to be precise and to destroy a specific well-defined target. This morning, we discussed the prohibition of indiscriminate attacks, and I have in mind here particularly the prohibition of using weapons that cannot be directed at a specific military objective (Article 51(4)(b) of the 1977 First Additional Protocol). The question is the following: in an urban setting, can this type of weapons, as just described, be directed at a specific military objective as required by this IHL rule? This is an example of a specific issue we would like to discuss further with all the actors concerned: what is the level of accuracy of a weapon that would be acceptable to comply with the law?

Another legal issue we would like to discuss with States is the interpretation of the IHL requirements in relation to the prohibition of disproportionate attacks. As mentioned this morning by my colleague Laurent, the incidental harm that must be taken into account by the military commander includes not only the direct effects of the attack – death, injuries and destructions, many at the point of impact – but also the 'indirect effects', or what we often call the 'reverberating effects' of the attack. This point is particularly relevant in the discussion about the use of explosive weapons in populated areas, especially those having wide-area effects. Mark just presented some of the main reverberating effects we have in mind, i.e. the indirect and cumulative effects on critical infrastructures providing essential services to civilians in urban areas. How do military armed forces concretely take reverberating effects into account, including in their targeting processes, in lessons-learned exercises and in intelligence gathering? This remains unclear to us for the moment and we encourage States to engage in a dialogue with the ICRC to discuss their interpretation of their legal obligation under this specific rule and on how they integrate this rule in their military practice.

A lot was said yesterday on the precautions in attack and their particular relevance in urban warfare. However, I will just mention a few words about it again as it constitutes a way of reducing the harm caused to civilians. Clearly, to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, or minimising, incidental harm on

civilians is one of the precautionary measures which is most relevant in relation to the issue of the use of explosive weapons in populated areas. A careful proportionality assessment prior to an attack, which takes into account the foreseeable indirect effects we just mentioned, is an instance of such precautions to be taken by military commanders. In that matter, the choice of the weapon to be used for the attack might be critical, and also the manner in which it will be used: choosing specific types and sizes of warheads, the kind of fuse equipping the weapon (i.e. making the explosive detonate before impact, on impact or after having penetrated the target), choosing the delivery system, the distance from which to launch the munitions, the angle and the timing of the attack are some of the measures that can minimise collateral damage. It is important to remember here that Article 35 of the First Additional Protocol states that the Parties to the conflict are not entitled to an unlimited choice of methods and means of warfare, and by 'means of warfare', we mean 'weapons'. The choice of weapons is therefore constrained by the general rules of IHL even when no specific regulations exist concerning a specific type of weapon. However, in certain circumstances, with the weapon at your disposal, because it has wide-area effects and due to the populated environment around your target, excessive collateral damage is to be expected whatever the precautions taken beforehand. In that particular case, the law is very clear: there is an obligation to suspend or cancel an attack that is expected to cause excessive incidental harm to civilians and civilian objects. Another precaution that is required by IHL is the obligation to give effective advance warning of attacks that may affect the civilian population. It is obvious that attacks carried out in a populated area are likely to affect the civilian population. So, in these contexts, effective advance warnings are particularly important and must be given, unless circumstances do not permit. All these aspects were clearly presented by Clive yesterday, so I will not further elaborate on these.

Before concluding, just a word to go beyond the issue of the *use* of explosive weapons in populated areas: it is obvious that the other side of the coin is particularly important too. To reduce the human cost of the use of explosive weapons in populated areas, there are certain precautionary measures that have to be taken by all parties to armed conflict. They were presented yesterday by Lieutenant Colonel Nathalie Durhin: notably the basic requirement to not place military objectives in or near densely populated areas.

In conclusion, I would say that ICRC's work to contribute to the efforts reducing the human cost of the use of explosive weapons in populated areas relies very much on its multidisciplinary mandate. As a humanitarian organisation, we are witnessing and documenting the humanitarian consequences of the use of explosive weapons in populated areas, and we try to respond to these consequences on a daily basis in the most affected countries with our humanitarian activities. The humanitarian work in the affected areas feeds our reflections on

how to generally address the issue of explosive weapons in populated areas, from a legal and policy viewpoint and, hopefully, allows us to have relevant discussions with military armed forces. With all these aspects combined, we trust that we could identify some good practices and concrete recommendations to reduce the human cost of explosive weapons in populated areas.

EFFECTIVELY ADDRESSING HARM FOR THE USE OF EXPLOSIVE WEAPONS: TOWARD A POLITICAL RESPONSE

Maya Brehm

Article 36

In addition to what Thomas explained, I would like to mention international political efforts aimed at addressing this issue: since the use of explosive weapons in populated areas was first identified as a key humanitarian challenge by the United Nations (UN) Secretary-General in his Report on the Protection of Civilians in Armed Conflicts of 2009, this issue has been consistently raised in protection of civilians related debates in the United Nations Security Council, as well as in other multilateral fora, including discussions regarding the protection of children in armed conflict. Furthermore, several expert meetings have been held, including the participation of State representatives: in June 2014, an informal expert meeting was convened by Norway and the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) to explore ways to strengthen the protection of civilians from the use of explosive weapons in populated areas. More recently, in September 2015, Austria, together with UNOCHA, convened a meeting in Vienna, Austria, to explore ways of addressing harm from the use of explosive weapons in populated areas, including through a possible political commitment.

The UN Secretary-General has repeatedly called on parties to conflict to refrain from using explosive weapons with wide-area effect in populated areas. In his last Report on the Protection of Civilians (UN doc. S/2015/453 of 18 June 2015), he recommended that UN Member States should make a commitment to this effect (paragraph 63). In addition, the UN Secretary-General has called for better data gathering on the use and impact of explosive weapons, and he has invited UN Member States to share their national policies and practices on explosive weapons in populated areas, with a view to identifying good practices.

From the perspective of the International Network on Explosive Weapons, States should urgently come together to start working on a joint political commitment – in the form of a declaration, for example – that would set out concrete actions for States to take in order to address this humanitarian problem. Such a commitment would, first of all, aim to end the use of wide-area effect explosive weapons in populated areas. It would set a shared and specific standard against which military practice can be judged and can help create a situation where all explosive weapon users, including non-state forces and States not taking part in this initiative, can be held to a stronger normative standard of protection.

A joint political commitment would provide a formal framework for engaging further on this issue and supporting programmes that reduce risk of harm and harm to civilians; for promoting the review of national policy and practice, and elaborating good practice; for promoting efforts to improve the situation of victims and survivors of explosive weapons; and for supporting data-gathering and sharing, which is fundamental to our efforts. Indeed, we need to have data to understand the humanitarian impact, but also to provide protection and assistance, and to formulate effective policies in this regard.

Naturally, such a political commitment by States is not going to immediately solve all problems. There are important issues that those working toward addressing harm from the use of explosive weapons in populated areas need to resolve together. How should we understand the notions of 'populated areas' and 'wide-area effects' for the purposes of enhancing the protection of civilians from explosive weapons? How should the 'risk of harm to civilians' be best characterised and assessed, and where should we draw the line between 'unacceptable harm' or 'risk of harm' to civilians? Should we describe the boundaries of what is acceptable when it comes to using explosive weapons near civilians and civilian infrastructure in terms of the technical features of (certain) explosive weapons (e.g. lack of a guidance mechanism), or in terms of how these features interact with the context (e.g. zone affected by the blast and fragmentation for various munition-fuse-platform combinations in different environments)? Is it possible to articulate a metric standard as we heard during the last panel, and how exactly would we do that?

In addition to these issues of a more conceptual nature, there are also a number of practical challenges to solve. Firstly, military challenges inherent in urban warfare, which were raised in the beginning of this Colloquium. In light of changing operational environments, there is a need to review and adapt military practice and policy to better protect civilians. Then, there are also political challenges. Who should be driving this political process? Which States will support it? Are the States that are most affected by explosive violence involved? What of those most likely to use explosive weapons? On that particular point, we need to be mindful of the different military capabilities of States and how this initiative orients toward that. And of course, there is the question of how to involve non-state actors in work aimed at reducing civilian harm from explosive violence. And, finally, there is the question of how this political initiative relates to existing legal frameworks, in particular to International Humanitarian Law.

Whilst recognising these challenges, I think it is worth reminding ourselves that, historically, there is a clear positive trajectory away from blanketing large areas with explosive force. Area bombardment, as we have seen in the Second World War and afterwards in South-East Asia, for example, is no longer deemed acceptable. In present practice, militaries adopt various

operational and policy measures to reduce harm to civilians from the use of explosive weapons in their vicinity, going beyond preventing clear violations of the prohibition on indiscriminate attacks (including area bombardment).

Furthermore, it is encouraging to observe that different actors concerned about civilian harm from bombing and shelling in cities increasingly frame their concerns in terms of the devastating effects of explosive weapons in populated areas. Consider, for example, the report of the Independent Commission of Inquiry on the 2014 Gaza conflict (UN doc. A/HRC/29/CRP.4 of 24 June 2015): in light of the devastation and immense human suffering documented by the Commission, one of its key recommendations to the international community is '[t]o accelerate and intensify efforts to develop legal and policy standards that would limit the use of explosive weapons with wide-area effects in populated areas with a view to strengthening the protection of civilians during hostilities' (paragraph 684).

So far, about 40 States have spoken out and publicly acknowledged the humanitarian problem caused by the use of explosive weapons in populated areas. Some of them have publicly endorsed the recommendations made by the UN Secretary-General with regard to addressing this issue. About 20 States were represented at the meeting held in Vienna in September 2015 and it is encouraging that there was strong support for starting discussions on a political commitment with a view to reducing the human cost of the use of explosive weapons.

CONCLUDING REMARKS

Françoise Hampson¹

University of Essex

I have often heard it said by members of armed forces and civilians from Ministries of Defence, that the only people who can talk about anything to do with armed conflict are the military, because they are the only ones to understand it. I hope that, with the presentations made by non-military experts, the military will recognise that in many respects, the people best qualified to evaluate the impact of a weapon are those on the ground – and that may not exclusively be members of armed forces. One practical suggestion that we hope we will not lose is Mark's idea to make sure that engineers are involved in the evaluation of proportionality.

Furthermore, it is important to distinguish three different situations. One is a deliberate intent to kill civilians because in order to address that, you need specific methods and tactics. A second issue is where an armed force would like to spare civilians but it cannot with regard to what it is in its arsenal, e.g. when it only has mortars that are incapable of being used in a discriminate way. Again, that is different from the third situation, where States say that 'there is a military objective there and we are using something that we consider can be lawfully used.' This involves knowing about a deliberate violation of International Humanitarian Law. There are people who would like to do what is best but cannot in the way of equipment, and there are those who are actually arguing about the meaning of the law – and the approach that needs to be taken with each of those people is different. Last but not least, we also need to distinguish between the harm outside the area of the military objective and foreseeable long-term or cascading consequences.

1 This contribution has been written on the basis of audio record and has not been reviewed by the speaker.

PANEL DISCUSSION : HOW TO WORK TOWARDS REDUCING THE HUMAN COST OF THE USE OF EXPLOSIVE WEAPONS IN POPULATED AREAS?

Following this second panel discussion, the audience raised questions on the following main issues:

1. Complementing efforts at legal and political levels to effectively enhance the protection of civilians

In the countries most affected by explosive weapons in populated areas: taking Nigeria as an example, one participant stressed that it is the wilful and planned strategy of Boko Haram that is conducive to this effect, namely to produce the highest possible impact on civilian lives, including through the use of explosive devices, or suicide bombing in markets. The question would not be how to reduce the human cost of explosive weapons in populated areas, but rather how to have International Humanitarian Law's (IHL) basic principles respected by non-state actors and groups?

One of the panellists, however, considered that ignoring the effects that come with explosive devices or weapons on the civilian population is not an adequate problem formulation for effectively enhancing the protection of civilians.

According to one of the panellists, the debate naturally revolved around the question of compliance with IHL rules, and the following point was raised: it is presumed that all participants share a clear understanding of what these rules require and, therefore, can determine whether something is or is not in compliance with these rules. This is very contentious, because some key rules allow a wide margin of interpretation, and there is ambiguity as to what they require in concrete circumstances. On the one hand, efforts aimed at clarifying these rules are very important, but on the other hand, these efforts are not new. This type of forum, such as the Bruges Colloquium, aims at complementing these efforts, to take the cornerstones of the legal framework and work within that framework to improve the protection of civilians. The panellist stressed that to enhance the protection of civilians at a political level, there is no need to know whether or not that is legally required, but rather to know whether it is likely to have an effect to reduce the human cost.

2. Using the appropriate weapon at the appropriate time

Although weapons with precision-guided munitions are very expensive, one of the participants underlined that it does not negate the requirement to comply with all aspects of IHL. The question is more about where to use the appropriate weapon at the appropriate time.

One of the panellists added that in a given situation, you do not necessarily have to use the most precise weapon in your arsenal, because if you use the most precise weapon first, then later you will be left with no options but less discriminate weapons. On condition that you strictly observe the rules, any weapon can be used, although in some circumstances, it might require the most sophisticated weapons available.

Another panellist emphasised that increasing the accuracy of weapon systems might help in reducing the effects of those weapons and minimising collateral damage. Yet, precision-guided munitions are not the solution to the issue of use of explosive weapons in populated areas. For example, with the use of large calibre munitions, even if they are precise and accurate, they might still have wide-area effects, especially when the lethal area of the weapon is bigger than the size of the military objective. In that case, it can create significant humanitarian consequences. He also mentioned that an alternative to low-accuracy weapons is not only precision-guided munitions, but other tactics and methods of warfare. It would also be useful to consider in what circumstances and to what extent States are able to use force protection arguments.

As most of the issues that were looked at during the debate concerned the impact of weapons outside the area of the military objective, another panellist reminded us that we should not forget the foreseeable reverberating effect. To assess the impact on the military objective, one needs to take into account aspects such as the consequences on the electricity supply and services. Both the foreseeable depth of an attack, in addition to the wide-area impact, need to be kept in mind.

A third panellist also explained why the targeting process is also very important for any armed force, because it is during that process that you will make sure – at least, you will try to make sure – that the right weapon is used in the right spot at the right time. In the end, explosive devices will always harm. When armed forces have weapons which are expected to exceed the military objective, an analysis must be made during the targeting process, notably the collateral damage evaluation, which shows on a map where the nearest collateral concerns are located and whether the effects of the weapon will reach them directly or indirectly, or not at all.

3. Comments on the concluding remarks

One of the participants agreed with the fact that different issues need different solutions. Yet, he underlined that some issues are also related, as for example the deliberate intent to kill civilians and the fact of arguing about the meaning of the law. For instance, the clearer the law

is, the easier it would be to point to violations, but also to increase respect for the law. The participant stressed that efforts to clarify the law will also help efforts to have it respected.

Concerning the fact that the best qualified people to evaluate the effects are the ones on the ground, one of the participants remarked that in his country's targeting process, there is a battle damage evaluation done by the military on the ground after the strike, to assess whether the use of the weapon was effective or not. The results are then incorporated to improve the whole targeting process.

The panellist, however, underlined the fact that in many circumstances, armed forces cannot be sent on the ground to make this assessment and that humanitarians or other personnel may sometimes be better placed to know what is actually going on.

Closing Remarks

CONCLUSIONS DU COLLOQUE DE BRUGES 2015

Yves Sandoz

Membre honoraire du Comité, CICR

Mesdames, Messieurs, chers participants à ce 16^{ème} Colloque de Bruges,

Il serait fort prétentieux de ma part de prétendre pouvoir déjà tirer de véritables conclusions de notre Colloque. Je me contenterai donc de partager avec vous quelques réflexions personnelles que m'ont inspirées nos débats, sans mentionner tout ce qui devrait l'être. Chacun, j'en suis persuadé, aura trouvé matière à réflexion dans les présentations et remarques qui ont été faites sur la base de recherches et d'expériences pratiques aussi diverses que complémentaires. Mais c'est dans les Actes du Colloque, pour nous tous comme pour ceux qui les liront, que se retrouvera toute la richesse des exposés et des débats.

Comme on a pu encore le constater, les règles du droit humanitaire sur la conduite des hostilités reposent sur la définition et l'identification des objectifs militaires, d'abord, et sur la prise en compte des éventuels dommages collatéraux et de la possibilité de les réduire en prenant toutes les précautions voulues, ensuite. Et c'est donc à partir de là qu'une décision doit être prise sur la base du principe de proportionnalité : l'objectif est-il assez important pour justifier les dommages collatéraux que l'on peut escompter ? La meilleure, et peut-être la seule manière d'approcher cette question, est de le faire avec des exemples pratiques. C'est le grand mérite de ce Colloque, qui nous a permis de confronter la théorie à la pratique, à travers des situations actuelles, analysées et parfois directement vécues par certains d'entre nous.

Cela a notamment été le cas pour la notion d'objectif militaire, à travers la présentation très bien documentée de différents cas pratiques, aiguissant notre appétit à approfondir la question par la lecture du livre récemment publié par Madame Jachec-Neale sur le sujet. Les obligations d'un commandant dans l'identification de l'objectif militaire ont également fait l'objet de commentaires très utiles. Il en va de même pour la distinction à faire entre l'attaque d'un objectif et sa destruction ou entre la nécessité militaire et l'avantage militaire, qui ont permis de clarifier les conditions qui doivent être remplies pour que l'attaque d'un objectif soit licite. En soulignant les difficultés particulières que représente à cet égard la guerre urbaine, on nous a expliqué la manière dont on procède dans la pratique pour vérifier qu'un objectif donné est bien un objectif militaire, à travers des procédures souvent très complexes. Cette

évaluation est aussi faite dans la perspective de ne pas gaspiller ses propres ressources, nous a-t-on rappelé. Cela me paraît particulièrement intéressant aujourd'hui, lorsque l'on sait, et c'est encore plus vrai dans certaines guerres contemporaines, qu'il ne s'agit pas seulement de s'assurer d'une victoire militaire, mais aussi de gagner « le cœur et l'esprit » des populations.

En fait, on touche là quelque chose qui me paraît essentiel. Dans de nombreuses guerres actuelles, la ligne de démarcation entre l'avantage militaire et l'objectif politique poursuivi s'est estompée. Quand on a l'ambition non pas d'occuper ou d'annexer un territoire, mais de mettre en place ou de restaurer un régime démocratique et respectueux des Droits de l'homme, on ne peut pas se contenter d'une victoire militaire. On doit effectivement gagner la population à sa cause, et cela requiert une réflexion et des stratégies qui vont souvent au-delà du respect des normes du droit humanitaire. Même si un édifice religieux est utilisé à des fins militaires et pourrait légitimement être attaqué, on hésitera à le faire au vu de l'exploitation qui serait faite de sa destruction. C'est d'autant plus délicat que, conscients de cela, certains belligérants sans scrupule, utilisent délibérément des boucliers humains : ils savent pertinemment que l'image d'une église ou d'une mosquée détruite, ou celle d'enfants tués, aura un impact émotionnel sur la population ; impact qu'une démonstration juridique démontrant qu'ils l'ont été dans le respect du principe de proportionnalité ne parviendra pas à infléchir. C'est pourquoi, s'il faut vivement dénoncer l'utilisation de boucliers humains (à ne pas confondre, comme il l'a été souligné, avec les obligations passives prévues à l'article 58 du Protocole additionnel I, dont la violation n'a pas le même caractère de gravité), il ne faut pas non plus tomber dans le piège d'ignorer leur présence, la différence que certains voudraient faire entre les boucliers humains volontaires et ceux qui ne le sont pas étant finalement trop subtiles et difficiles à vérifier pour que l'on puisse en tenir compte.

Tout cela signifie concrètement que, pour des raisons politiques, les militaires sont contraints de parfois fixer à leur action des limites qui vont au-delà des exigences du Droit international humanitaire (DIH). Par ailleurs, cela doit aussi se traduire dans la formation des soldats, dont l'importance a été rappelée, notamment de ceux qui doivent affronter la complexité de la guerre urbaine. Si l'on doit prendre conscience de cette réalité, je ne pense toutefois pas personnellement qu'elle puisse ou doive pour autant se traduire dans une évolution des normes du droit humanitaire. Mais je ne saurais prétendre clore ce débat.

Il a également été souligné que l'obligation de provoquer le moins de dommages possibles dans l'attaque d'un objectif militaire peut aller au-delà du respect du principe de proportionnalité, alors que ce principe du petit dommage est souvent assimilé, à tort, à celui-ci. Certes, la possession d'armes très précises a l'avantage de permettre d'attaquer certains objectifs militaires dans le respect du principe de proportionnalité alors que ce ne serait pas le cas

avec des armes moins précises : le poids des dommages collatéraux n'est évidemment pas le même si on peut atteindre son but en détruisant une pièce dans un immeuble, plutôt que tout l'immeuble. Mais la possession de ces armes entraîne aussi l'obligation de les utiliser de préférence à des armes moins précises, même si le principe de proportionnalité serait respecté lors de l'utilisation de ces dernières.

Est-ce toutefois vraiment une obligation ? Cette question est contestée et la réponse doit probablement être nuancée à travers une grande diversité de scénarios. Une réflexion autant éthique que juridique mérite donc d'être entreprise à ce sujet. Elle a d'ailleurs déjà été entamée. Mais j'ai personnellement le sentiment qu'elle mériterait un débat ouvert et plus approfondi, en vue de fixer des critères reconnus et acceptables pour chacun.

Les avancées technologiques, si elles doivent être suivies avec vigilance – comme par exemple la question des armes dites « autonomes » – devraient par ailleurs aussi faciliter des solutions innovantes face aux problèmes posés par la guerre en milieu urbain.

En ce qui concerne le principe de proportionnalité lui-même, diverses interventions faites lors de ce Colloque ont démontré la difficulté de donner une signification juridiquement claire de ce principe qui est au cœur du DIH. On a bien perçu la tension qui existe entre les impératifs militaires et les exigences humanitaires. Présentée avec des exemples clairs, la notion d'objectifs « agrégés » ou d'objectifs identifiés avec des évaluations de la proportionnalité faites sur l'ensemble d'une attaque, conformément aux déclarations interprétatives faites par de nombreux Etats lors de la Conférence diplomatique de 1974-1977, tend à permettre d'augmenter le poids des impératifs militaires et, donc, l'importance des dommages collatéraux admissibles. En prenant en compte tous les dommages, y compris psychiques, et tous les effets indirects d'une attaque dans la durée, on fait en revanche peser plus lourdement les dommages collatéraux dans l'autre plateau de la balance. Reste aussi la question délicate, soulevée sans être vraiment débattue, de la difficulté de mesurer avec les mêmes critères les actes commis par chacune des parties au conflit dans les guerres « asymétriques » (lorsque l'un des belligérants a des moyens très nettement inférieurs à l'autre). Si notre débat a donc permis de clarifier certains éléments du principe de proportionnalité, je crois qu'il faut honnêtement reconnaître que l'on est encore loin d'avoir une réponse claire et unanimement agréée aux nombreuses questions que ce principe soulève. On ne saurait certes ignorer les impératifs militaires, mais il faut aussi rester conscient que si l'on place le principe dans un cadre trop large, on lui fait perdre toute signification concrète sur le plan humanitaire.

J'aimerais aussi ne pas passer sous silence les réflexions faites sur l'avertissement prévu « dans la mesure du possible » pour épargner la population civile. Ce n'est pas seulement un acte

bureaucratique, puisqu'il implique également l'obligation de s'assurer que l'avertissement est bien parvenu à ceux qui doivent le recevoir, et qu'il a bien été compris par ceux-ci.

Très riches furent également les exposés et les débats sur les différentes possibilités envisageables dans la guerre urbaine, de stratégies visant à éviter la pénétration de combattants dans la ville, au déplacement, voire à l'évacuation forcée de civils – qui peut rester, en fonction des circonstances, conforme aux dispositions interdisant les déplacements forcés – et tous les problèmes délicats que cela peut poser, notamment lorsque les structures étatiques sont quasi inexistantes ou lorsqu'il y a un non-respect délibéré du DIH. En complément, une clarification bienvenue nous a été apportée sur la notion de siège ou « d'encerclement » comme on semble parfois préférer le dire, mais qu'il faut bien distinguer du blocus. Il en est ressorti que le siège n'est clairement pas illicite en soi, pour peu que certaines conditions soient remplies : notamment, il faut bien distinguer le siège de l'assaut d'une ville, qui demande des moyens beaucoup plus considérables. En outre, l'assaut n'est pas forcément la continuation du siège, le but de celui-ci pouvant être d'isoler l'ennemi physiquement, mais aussi psychologiquement, voire électroniquement. On a aussi relevé que la situation juridique et l'application du DIH variaient en fonction de qui était l'assiégeant et de qui était l'assiégé. Il a également été souligné que les habitants d'une ville assiégée n'étaient pas forcément du côté des assiégés, pouvant parfois souhaiter leur libération par l'assiégeant. Réflexion intéressante aussi que celle faite sur le contenu de l'obligation de ne pas utiliser la famine comme moyen de guerre et sur le lien que l'on peut faire entre cette obligation, l'évacuation et l'autorisation du passage des secours. Si l'alternative est l'évacuation ou bien l'autorisation donnée au passage des secours, il paraît difficilement défendable de refuser l'une et l'autre.

Je me permettrai ici deux remarques plus personnelles que m'inspire ma propre expérience. Il a été relevé, à juste titre, la très grande difficulté que représente l'évacuation de civils d'une zone assiégée, qui nécessite un accord des deux parties impliquées. Mais difficile n'est pas impossible, et c'est précisément l'un des rôles principaux du Comité international de la Croix-Rouge (CICR) que de jouer le rôle d'intermédiaire neutre pour régler des problèmes humanitaires. Le CICR a d'ailleurs pu jouer ce rôle à quelques reprises dans ce type de situations.

Ma seconde remarque concerne la question des secours. On a évoqué l'article 18 du Protocole additionnel II, qui donne à la Haute partie contractante (c'est-à-dire le Gouvernement, sauf dans les cas exceptionnels où la légitimité même de celui-ci est contestée sur le plan international), le droit de donner son accord à l'acheminement des secours dans la partie dissidente, même si ceux-ci ne doivent pas transiter par le territoire que la Haute partie contractante contrôle. Cette anomalie, dans la mesure où l'on déroge sur ce point à l'égalité des droits et devoirs en DIH des parties au conflit, est le résultat d'une négociation de dernière minute du

Protocole additionnel II. Il ne faut toutefois pas exagérer l'importance de cette disposition. Elle doit, en effet, être mise en perspective avec celle de l'article 14 du même Protocole, qui interdit d'utiliser la famine des civils comme méthode de combat. La partie gouvernementale ne saurait donc refuser le passage de secours indispensables pour la survie de la population sans violer cette disposition. Par ailleurs, même s'il n'est pas expressément mentionné, l'accord de la partie dissidente qui reçoit les secours est implicite : il n'est tout simplement pas envisageable, pour des raisons évidentes de sécurité, de prétendre conduire une action de secours sans l'accord de ceux qui contrôlent le territoire où ceux-ci sont acheminés. Mais je souhaiterais aussi souligner que l'expérience a démontré qu'il ne faut pas avoir une approche trop rigide dans la pratique. Dans certaines situations, j'ai pu le constater, il est préférable de faire preuve de doigté en ce qui concerne l'accord de la partie gouvernementale concernée, qui peut accepter de tolérer l'acheminement de secours dans la partie non-gouvernementale, mais ne souhaite pas que cela fasse l'objet d'un accord formel.

En ce qui concerne les armes explosives, on constate les dommages qu'elles provoquent dans les zones urbaines et l'importance d'établir des standards de bonnes pratiques, et peut-être à terme, de parvenir à formuler une norme spécifique. Celle-ci pourrait s'inspirer du Protocole de 1980 sur l'interdiction ou la limitation de l'emploi des armes incendiaires, qui vise à exclure l'usage de ces armes dans les zones à forte concentration de civils.

Je m'arrêterai ici dans ces réflexions, dont je tiens à souligner qu'elles sont personnelles et ne prétendent pas refléter l'opinion de l'ensemble des participants. En revanche, je suis convaincu de pouvoir parler au nom de tous en reconnaissant le grand intérêt de ce Colloque, la manière parfaite dont il a été organisé, la qualité de nos interprètes et la chaleur de l'accueil qui nous a été réservé. Mille mercis donc à tous ceux qui ont assuré le succès de ce Colloque, soit dans son organisation, soit par leurs très riches présentations ou leurs interventions tout au long de ces deux journées.

Mais j'aimerais donner le dernier mot au Lieutenant-Colonel Harry Könings, qui vient de nous faire une émouvante présentation sur son expérience avec les forces de l'Organisation des nations unies dans les conflits qui ont déchiré l'ex-Yougoslavie, et nous a rappelé ce que nous devons toujours garder à l'esprit : *« War or any form of armed conflict is always an awful thing for the civilian population »*.



PARTICIPANTS LIST

LISTE DES PARTICIPANTS

- **AICHELER Miriam**
NATO
- **ARAI Yutaka**
Brussels School of International Studies - University of Kent
- **ARNOULT Thierry**
Centre interarmées de concepts, de doctrines et d'expérimentations
- **BALDWIN Clive**
Human Rights Watch
- **BARNETT Charles**
Ministry of Defence, United Kingdom
- **BATACLAN Victoria**
Embassy of the Philippines to Belgium
- **BEHRMANN Christian**
European External Action Service
- **BERGMANN Anika**
NATO
- **BERMAN Paul**
Council of the European Union
- **BERNARD Vincent**
ICRC
- **BIDOUNG Josué Noel**
Ambassade du Cameroun auprès de la Belgique
- **BRAIBANT Thomas**
College of Europe
- **BREHM Maya**
Geneva Academy of International Humanitarian Law and Human Rights
- **BUCHKOSKI Michael**
NATO
- **CARIO Jérôme**
Centre interarmées de concepts, de doctrines et d'expérimentations
- **CASIER Frédéric**
Croix-Rouge de Belgique (FR)
- **COBO PEREZ Rocio**
NATO
- **DE COCK Chris**
Ministry of Defence, Belgium

- **DE GREVE Laura**
Belgian Red Cross (Flanders)
- **DE KOKER Cedric**
Ghent University
- **DE SAINT MAURICE Thomas**
ICRC
- **DE VIDTS Baldwin**
International Institute of Humanitarian Law
- **DEPREZ Christophe**
Université de Liège
- **DIAZ Carolina**
Embassy of Colombia to Belgium
- **DOUCET Ghislaine**
ICRC Paris
- **DUCROT Charlène**
Croix-Rouge française
- **DUMOULIN André**
Université de Liège
- **DURHIN Nathalie**
Ministry of Defence, France
- **EPRINCHARD Audrey**
ICRC Brussels
- **FONSECA Ignacio**
NATO
- **FÜLLEMANN Walter**
ICRC Brussels
- **GALLAGHER Peter**
National University of Ireland Galway
- **GAVIRA DIAZ Pablo**
NATO
- **GEILING Axel**
Ministry of Defence, Germany
- **GHELARDUCCI Martina**
MSF Belgique
- **GISEL Laurent**
ICRC
- **GOES Benjamin**
SPF Chancellerie du Premier Ministre, Belgique

- **GUTTER Jeroen**
Ministry of Foreign Affairs, The Netherlands
- **HAMPSON Françoise**
University of Essex
- **HAYASHI Nobuo**
International Law and Policy Institute
- **HEINEN David**
Ministry of Foreign Affairs, Luxembourg
- **HILL Steven**
NATO
- **HOFFMANN Jan**
NATO
- **HUSZTI-ORBAN Krisztina**
Office of the United Nations High Commissioner for Human Rights
- **INIGO Laura**
University of Seville
- **ISSA Mays**
Université Catholique de Louvain
- **JACHEC-NEALE Agnieszka**
Chatham House
- **JAWARA Isata Nyuma**
Embassy of Gambia to Belgium
- **JENSEN Eric**
Brigham Young University
- **KARMI Salma**
Al Haq
- **KEINAN Guy**
Israel Defence Forces
- **KEUR Dianne**
The Netherlands Red Cross
- **KHOMYAK Vitaly**
Permanent Mission of the Russian Federation to the EU
- **KOKE Katinka**
College of Europe
- **KOLANOWSKI Stéphane**
ICRC Brussels
- **KONINGS Harry**
Retired army officer and former UN military observer

- **KOPETSKI Matthew**
361st Civil Affairs Brigade (US)
- **KOUTROULIS Vaios**
Université Libre de Bruxelles
- **KRAUZE Maris**
Ministry of Foreign Affairs, Latvia
- **KUSHLEYKO Anastasia**
ICRC Moscow
- **LAHAR Libby**
Mission of Israel to the EU
- **LATOUR Julie**
Croix-Rouge de Belgique (FR)
- **LENDENMANN WINTERBERG Sandra**
Mission de la Suisse auprès de l'UE
- **MATLOCK John Farrow**
NATO
- **MAYNER Gustavo**
Ambassade de Bolivie auprès de la Belgique
- **McGOWAN-SMYTH Iverna**
Amnesty International - European Institutions Office
- **MICCINILLI Katherine**
College of Europe
- **MIKOS-SKUZA Elzbieta**
University of Warsaw
- **MINGA Artida**
Organisation of the United Nations
- **MONGELARD Eric**
Office of the United Nations High Commissioner for Human Rights
- **MOROZOV Dmitry**
Permanent Mission of the Russian Federation to NATO
- **MULLER Guillaume**
Leiden University
- **MUNOZ MOSQUERA Andres**
NATO
- **MURZAEVA Alina**
ICRC Bishkek
- **NAERT Frederik**
Council of the European Union

- **ORZEL GAETA Sera**
NATO
- **PÉREZ CUSÓ Nuria**
Leiden University
- **PERON Camille**
Ministry of Defence, France
- **PEYS Marijke**
Belgian Red Cross (Flanders)
- **PUHL Detlev**
NATO
- **PULVIRENTI Alessandro**
Ambassade de la Suisse auprès de la Belgique
- **RUIZ Rodrigo**
Mission of Chile to the EU
- **SAGON Hilde**
ICRC
- **SALOME Zoe**
Université Catholique de Louvain
- **SANDOZ Yves**
ICRC
- **SASSÒLI Marco**
University of Geneva
- **SOKOLOVA Natalia**
Moscow State Law University
- **STAAL Nynke**
Ministry of Foreign Affairs, The Netherlands
- **STEINMYLLER Eric**
PROMAR Shipping Services
- **TAPOV Asker**
Permanent Mission of the Russian Federation to NATO
- **TOPUZ Ali Kilicarslan**
Delegation of Turkey to the EU
- **TOSATO Mattia**
UN Office for the Coordination of Humanitarian Affairs
- **UPENIECE Vita**
Ministry of Defence, Latvia
- **VAANANEN Eleonoora**
European Commission

- **VAN DEN BOOGAARD Jeroen**
Netherlands Defence Academy
- **VANDECASTEELE Jean-Pierre**
Belgian Air Component
- **VERA Ludwig**
Embassy of Venezuela to Belgium
- **VERLINDEN Nele**
KU Leuven
- **VETTING Kim**
NATO
- **WARNOTTE Pauline**
Ministry of Defence, Belgium
- **WATTS Sean**
Creighton University
- **YEN Jefferson**
European Commission
- **ZEITOUN Mark**
University of East Anglia

Urban Warfare

16th Bruges Colloquium – October 15 and 16, 2015

Simultaneous translation into French and English will be provided.

Traduction simultanée en Anglais et Français.

DAY 1: Thursday, 15th October 2015

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Prof. Michele Chang**, College of Europe

9:40 – 9:55 **Welcome address by Mr. Walter Füllemann**, ICRC Brussels

9:55 – 10:15 **Keynote address by Prof. Yves Sandoz**, Honorary Member of the Committee, ICRC

Session One: IDENTIFYING MILITARY OBJECTIVES IN CITIES

Chairperson: **Elzbieta Mikos-Skuza**, University of Warsaw

10:30 – 10:50 **How can my home, school or church ever be a military objective? Loss of protection by use, purpose or location**

Speaker: **Agnieszka Jachec-Neale**, Chatham House

10:50 – 11:10 **Can a civilian object that has lost its protection against direct attack be destroyed for imperative military reasons?**

Speaker: **Nobuo Hayashi**, International Law and Policy Institute

11:10 – 11:30 **The obligation to take all feasible precautions to verify that a target is a military objective when using indirect fire in urban areas**

Speaker: **Col. Charles Barnett**, British Army Legal Services

11:30 – 12:15 **Discussion**

12:15 – 14:00 **Sandwich lunch**

Session Two: PRECAUTIONS WHEN CARRYING OUT ATTACKS IN CITIES

Chairperson: **Andres Muñoz**, SHAPE Legal Office, NATO

14:00 – 14:20 **All feasible precautions in the choice of means and methods**

Speaker: **Vaios Koutroulis**, Université Libre de Bruxelles

14:20 – 14:40 **Effective advance warning**

Speaker: **Clive Baldwin**, Human Rights Watch

14:40 – 15:10 **Discussion**

15:10 – 15:30 **Coffee break**

Session Three: PROTECTING CIVILIANS LIVING IN CITIES AGAINST THE EFFECTS OF HOSTILITIES

Chairperson: **LtCol. Chris de Cock**, Belgian Ministry of Defence

15:30 – 15:50 **Moving the cities' inhabitants away from the fighting, and moving the fighting from the inhabitants**

Speaker: **LtCol. Nathalie Durhin**, French Ministry of Defence

15:50 – 16:10 **The obligation to take all feasible passive precautions and the prohibition on the use of human shields: can military considerations, including force protection, justify not to respect them?**

Speaker: **Marco Sassoli**, University of Geneva

16:10 – 16:40 **Discussion**

16:40 – 18:00 **PANEL DISCUSSION: CAN SIEGE WARFARE STILL BE LEGAL?**

Moderator: **Steven Hill**, Secretary General Legal Office, NATO

Panellists:

Françoise Hampson University of Essex

Sean Watts Creighton University

19:30 – 22:30 **Dinner (registration required)**

DAY 2: Friday, 16th October 2015

Session Four: THE PROHIBITION ON INDISCRIMINATE AND DISPROPORTIONATE ATTACKS

Chair person: **Paul Berman**, Legal Service of the Council of the European Union

9:00 – 9:20 **Defining and assessing the military advantage in urban warfare**

Speaker: **Cpt. Guy Keinan**, Israel Defence Forces

9:20 – 9:40 **Relevant incidental harm for the proportionality principle**

Speaker: **Laurent Gisel**, ICRC Legal Division

9:40 – 10:00 **Shelling in urban areas, when does imprecision become indiscriminate?**

Speaker: **Eric Jensen**, Brigham Young University

10:00 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: HOW TO WORK TOWARDS REDUCING THE HUMAN COST OF THE USE OF EXPLOSIVE WEAPONS IN POPULATED AREAS?**

Moderator: **Françoise Hampson**, University of Essex

Panellists:

Maya Brehm Article 36

Mark Zeitoun University of East Anglia

LtCol. Harry Konings Retired army officer and former UN military observer

Thomas de Saint Maurice ICRC Legal Division

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**

Yves Sandoz, Honorary Member of the Committee, ICRC

CURRICULUM VITAE DES ORATEURS SPEAKERS' CURRICULUM VITAE

Michele Chang joined the College of Europe as Professor of European Political and Administrative Studies in 2006. Prior to joining the College, she worked at the Centre for European Policy Studies and Colgate University in New York. She obtained a doctorate in political science at the University of California at San Diego and has received fellowships from Fulbright, the Picker Foundation, the Deutscher Akademischer Austausch Dienst and the Institute on Global Conflict and Cooperation. Her research interests include European economic, monetary union and financial crises. Dr Chang currently serves on the Executive Board of the European Union (EU) Studies Association, the largest academic association dedicated to the study of the EU based in the United States.

Walter A. Füllemann has been working for the International Committee of the Red Cross (ICRC) since 1989. His field missions include Nicaragua (1989-1990), Peru (1991), South Africa (1992-1994), as well as Croatia and Bosnia-Herzegovina (1994-1995). He also served as Head of the ICRC Delegation in Baku (Azerbaijan) from July 1996 to July 1997. From 1997 to 1999, he worked as delegate and spokesperson for the ICRC Delegation to the UN in New York. At ICRC Headquarters in Geneva, he headed the operational desk for the former Yugoslavia from 1995 to 1996. From 1997 to 2002, he was Deputy Head of the External Resources Division (donor relations and fundraising), and the ICRC Deputy Director of Operations from 2002 to 2009. In July 2009, he was appointed as Head of Delegation and Permanent Observer of the ICRC to the United Nations in New York. In October 2015, Mr Füllemann has become the ICRC Head of Delegation to the EU, NATO and the Kingdom of Belgium in Brussels. He holds a Master's degree in international relations from the University of Saint-Gallen (Switzerland).

Né le 27 janvier 1944, **Yves Sandoz** est marié et père de trois enfants. Il a fait ses études à Neuchâtel et obtenu la licence puis le doctorat en droit de l'Université de cette ville. Entre 1968 et 1973, il a effectué des missions pour le Comité international de la Croix-Rouge (CICR), notamment au Nigéria, en Israël (et dans les territoires occupés), en Jordanie, au Liban, au Bangladesh et au Yémen du Sud (avant la réunification). Il a pendant cette période poursuivi la rédaction de son travail de doctorat et assuré la réédition d'un Commentaire du Code pénal suisse. M. Sandoz a rejoint le CICR, en 1975, au sein de la Division juridique et est resté rattaché à l'Institution jusqu'à fin 2000, dont 18 ans en tant que Directeur du droit international et de la doctrine. Il a également poursuivi des activités académiques, à travers de nombreux cours dans différentes Universités et Hautes écoles, des séminaires et de nombreuses publications. Il a quitté l'administration du CICR à la fin de l'année 2000 et élaboré le concept d'un Centre Universitaire du droit international humanitaire (CUDI) au lancement duquel il a

participé. Dès 2002, il a donné le cours général (francophone) de droit international humanitaire dans le cadre du Diplôme d'Etudes approfondies (DEA) organisé par ce Centre et un cours semestriel en droit international humanitaire à l'Université de Fribourg. Il a également donné un séminaire bloc de trois jours au Collège d'Europe, à Bruges et à Natolin, et a collaboré avec de nombreuses autres Universités ou Hautes écoles. Il participe fréquemment à des séminaires ou conférences d'experts dans le domaine du droit international général, pénal et, surtout, humanitaire. Membre du CICR et de sa Commission de contrôle de 2002 à 2014, M. Sandoz est depuis lors membre honoraire. Il est également membre de l'Institut international des droits de l'homme ainsi que de l'Institut international de droit humanitaire et de nombreuses associations de droit international. Il est l'auteur d'une centaine de publications, essentiellement dans le domaine du droit international humanitaire.

Elzbieta Mikos-Skuza is an associate professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw. Since 2008, she is the Director of the Network on Humanitarian Action (NOHA) at the same university. She served as Faculty's Vice-Dean from 2008 to 2012. For thirty years, she has been volunteering with the Polish Red Cross. From 2004 to 2012, she was Vice-President of the Polish Red Cross and from 1999 to 2012, President of the Polish Red Cross Commission for Dissemination of International Humanitarian Law. Dr Mikos-Skuza is also a member of the International Humanitarian Fact Finding Commission established under 1977 Protocol Additional I to the 1949 Geneva Conventions on the protection of victims of war, and a member of the San Remo International Institute of Humanitarian Law. She is the author and co-author of numerous publications on Public International Law and International Humanitarian Law, including the collection of IHL documents published in Polish language.

Agnieszka Jachec-Neale is an expert researcher with practical insight into how international law is applied during armed conflict and in post-conflict environments. She has over five years' experience working with the Organization for Security and Cooperation in Europe (OSCE) in south-eastern Europe, where she specialised in monitoring domestic war crimes trials and in the enforcement of human rights standards in emerging democracies. Dr Jachec-Neale has been involved in managing and implementing major projects and producing analytical as well as multi-disciplinary reports in the fields of International Humanitarian Law and International Human Rights. She has also taught at the Centre for International Studies and Diplomacy at SOAS and at the University of Essex and she currently teaches at Brunel University London. In the past few years, Dr Jachec-Neale has given conference papers around the world, including at the annual meeting of the American Society of International Law and to specialist gatherings such as the UK branch of International Society of Military Law and Laws of War. Her main fields of expertise include *inter alia* law of armed conflicts, specifically conduct of hostilities;

military targeting doctrine and its relationship with international law; legal interoperability in coalition operations; the application of technological advancements in modern warfare; post-conflict situation management: stabilisation and development/enforcement of human rights and rule of law standards. Her monograph entitled *The Concept of Military Objectives in International Law and Targeting Practice* has recently been published by Routledge.

Nobuo Hayashi is a Senior Legal Advisor at the International Law and Policy Institute, based in Oslo, Norway (2012-present), and a Researcher at PluriCourts, University of Oslo Law Faculty (2014-present). He specialises in International Humanitarian Law, International Criminal Law, and Public International Law. He has fifteen years' experience in these areas, performing advanced research, publishing and editing scholarly works, authoring court submissions, advising international prosecutors, and speaking at academic and diplomatic conferences. His most significant works cover military necessity, threat of force, and the law and ethics of nuclear weapons. Mr Hayashi also regularly teaches at defence academies, Red Cross conferences and professional workshops, as well as university faculties of law, political science, and peace and security studies. He trains commissioned officers, military lawyers, judges, prosecutors, defence counsel, diplomats and other government officials, humanitarian relief specialists, and NGO representatives from all over the world. Major positions held are the following: Visiting Lecturer, UN Interregional Crime and Justice Research Institute, Turin, Italy (2007-present); Visiting Professor, International University of Japan (2005-present); Researcher, Peace Research Institute Oslo (2008-2012); Legal Advisor, Norwegian Centre for Human Rights (2006-2008); Legal Officer, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia (2000-2006).

Colonel Charles Barnett was commissioned into the Army Legal Services in 1995, having previously qualified as a Solicitor and practiced law in Norfolk. He studied law at Exeter University, the London School of Economics and Political Science and at Guildford Law School. His military appointments have included defence lawyer, Divisional legal adviser, Service Prosecutor and operational legal adviser. He has a variety of operational experience from tours in Northern Ireland, Bosnia, Former Yugoslav Republic of Macedonia and Iraq. He was awarded the MBE in the operational honours list in 2001. He has completed an LLM in International Law and an MA in Defence Studies. He has served at the Headquarters (HQ) Land Forces Operational Law Branch, United Kingdom Ministry of Defence (UK MOD) and the Permanent Joint Headquarters operational HQ between 2007 and 2009 where his responsibilities covered all UK deployments overseas including Iraq and Afghanistan. He then completed five years as a senior Service Prosecutor, before moving to his current post as Assistant Director International Law in the UK MOD in October 2014.

Andres B. Munoz Mosquera was born in Poissy, France, on 20 May 1965. After his secondary education, he joined the Spanish Armed Forces where he served in two cavalry regiments as “*Secretario de Causas*” until 1991 when he was appointed to the Defence Staff. During that time, Mr Munoz Mosquera was a permanent participant in the Spanish inter-ministerial delegation before the International Telecommunications Union until 1999. He joined the Supreme Headquarters Allied Powers Europe (SHAPE) in February 2006 as a civilian, where he was the International Branch Chief from a previous NATO assignment at the NATO Joint Command South West Legal Office (Madrid, Spain) that he joined in April 2000. Mr Munoz Mosquera has been deployed twice in Bosnia Herzegovina (1994 and 1997). In 1994, he performed press information duties at General Rose’s staff and was involved in the anti-sniping agreements and exchange of prisoners and corpses in Sarajevo. In 1997, his duties were related to identification and collection of evidence related to war crimes committed during the war period. During his active duty, Mr Munoz Mosquera pursued law and international relations studies. He also holds a Masters in Legal Practice by the Law and Business Institute of Madrid, an *honoris causa* Master in International Relations and Trade by the *Universidad Iberoamericana de Ciencia y Tecnología* (UNICIT) of Managua (Nicaragua). He is also a graduate of the Fletcher School of Law and Diplomacy (Tufts University, Boston, MA, United States). In 1996, Mr Munoz Mosquera was awarded the Honor Graduate for his academic achievement at the IRFMS course at the Keesler Technical Centre, Biloxi (United States). Mr Munoz Mosquera is author of three books (“*International law and the Arab-Israeli Conflict*”; “*International Law and International Relations, The Stepsisters*”; and “*Peacekeeping Regimes*”) and of several articles in specialized legal reviews; he is also co-author of a number of other publications. He was a visiting professor of the UNICIT in Nicaragua and is a permanent professor of the Organization for Security and Cooperation in Europe course “*Rapid Expert Assistance and Cooperation Teams - REACT*” at the Faculty of Law of the Complutense University of Madrid. He is a member of the Society of the Military Law and Law of War, the Madrid Bar Association and a Council of Bars and Law Societies of Europe (CCBE) European Lawyer. Mr Munoz Mosquera has been awarded several decorations, among them is the French Republic medal of the Ex-Yugoslavia, the NATO Meritorious Medal and he is *Caballero de la Orden de San Hermenegildo*.

Vaios Koutroulis is Lecturer at the International Law Centre of the Université Libre de Bruxelles since 2013. He studied law at the University of Athens and the Université Libre de Bruxelles (ULB). He received his PhD in 2011 for a thesis on the relations between *jus contra bellum* and *jus in bello*, currently under publication from Bruylant editions (Brussels). Vaios teaches at the *Université Libre de Bruxelles*, the Catholic University of Lille and the Royal Belgian Military School. His courses include law of armed conflict, international criminal law, law of international responsibility, and public international law. He was also an adviser to the Counsel and Advocate of Belgium in the case concerning *Questions relating to the Obligation*

to *Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. His publications focus mainly on *jus in bello* and *jus contra bellum* and include a monograph on belligerent occupation published by Pedone editions (Paris).

Clive Baldwin works as Senior Legal Advisor for the legal and policy office at Human Rights Watch, where he has been working on issues of international law since 2007. His areas of focus include the Middle East, North and West Africa and discrimination law. Prior to joining Human Rights Watch, he was a practicing lawyer in London for the human rights law firm, Bindman and Partners, and also worked on European human rights litigation at the AIRE Centre. He subsequently worked for the Organization for Security and Cooperation in Europe (OSCE) Mission in Kosovo, and later served as Head of Advocacy for Minority Rights Group International. While at Minority Rights Group, he implemented the organization's first global litigation programme, which brought cases to international legal bodies on behalf of the rights of minorities around the world. One of the cases he litigated and won included the *Endorois Community v Kenya*, the first indigenous land rights case at the African Commission on Human and Peoples Rights. In *Finci v Bosnia-Herzegovina*, he successfully challenged the Bosnian constitution's exclusion of Jews from the Presidency and upper house of Parliament in the first such ruling of the European Court of Human Rights. Most recently, Mr Baldwin helped Human Rights Watch initiate a case with two other organizations against Libya at the African Commission on Human and Peoples' Rights based on allegations that numerous human rights violations had occurred. His efforts resulted in the first ruling against a state by the African Court on Human and Peoples' Rights. Mr Baldwin received a bachelor's degree in international history and politics from the University of Leeds, a masters in international relations from the Woodrow Wilson School at Princeton University and studied law at City University, London.

After obtaining his Master degree in the fields of Aeronautical and Military Sciences, and graduating from the Belgian Royal Military School, **Lieutenant-colonel (GS) Chris De Cock** served in the Belgian Air Force as Platoon and Company Commander for the Force Protection Units. After two years of being a Military Instructor, and having obtained Master degrees in the fields of Law, Political Sciences, Public Management, Security and Defence, he taught at the Law Department of the Belgian Royal Military School for five years. He became Legal Advisor from 2004 to 2007, prior to which he joined a course at the Royal Defence College and after which he participated in an Advanced Staff and Command Course at the National Defence College in the Netherlands. In 2008, he took up the position as the Head of the International Law Section, and from April 2012 until June 2015, he served as the Head of the Operational Law Section. He currently holds the position as the Chief of Staff at the Legal Department of the Belgian Armed Forces. Lieutenant-colonel (GS) De Cock has participated in several operational deployments as legal advisor in Afghanistan, during counter-piracy and counter-narcotics op-

erations with the Navy, during operation Unified Protector and operation Inherent Resolve. He is also a member of the visiting teaching staff at the International Institute of Humanitarian Law in San Remo, and senior lecturer at the Royal Military School in Brussels in the fields of the Law of Armed Conflict and Arms Control Law.

Lieutenant-colonel Nathalie Durhin graduated from *Institut d'études Politiques Paris - Sciences Po Paris* in 1992 (Public Law). She joined the French Air Force in 1995, as a "*Commissaire*". She then obtained a diploma of advanced studies in Military History, Security and Defence (Aix Marseille, 1997) and two masters degrees in Management and Logistics (*Ecole Supérieure des Sciences Economiques et Commerciales - ESSEC*, 1998) and International Relations and Military Strategy (Universities of Milan and Rome, 2010). Lieutenant-colonel Durhin has been heading the Operational Law Section at the French Joint Staff since 2013 where she advises the Joint Command Operations Center Chief and the Joint Chief of Staff on matters relating to the Law of Armed Conflicts (LOAC). Prior to this and in the field of operational law, she was Legal Advisor for the Balkans region at JFC Naples in 2001 and 2002, and Head of LOAC office within the Department of legal affairs (DAJ) at the French Ministry of defence from 2010 to 2013. She has also been Chief Admin (HR, Finances, Logistics, Audit) and Legal advisor of Nancy Air Base from 2006 to 2009. She was designated as a French War College attendant for an exchange with the Italian War College (*Istituto Superiore di Stato Maggiore Interforze*) in 2009-2010. She was deployed in Kosovo and Bosnia, two times in Afghanistan as legal advisor to the French Air Senior representative (2005 and 2007), at Naples CJTF for Operation Unified Protector (Lybia) in 2011, and from May to August 2014 for the French operations Serval and Barkhane in Mali and other countries of the sub region, as the Force Commander's Legal Advisor.

Marco Sassòli, a citizen of Switzerland and Italy, is Professor of International Law and Director of the Department of International Law and International Organisation at the University of Geneva (Switzerland). From 2001 to 2003, he has been Professor of International Law at the *Université du Québec à Montreal* (Canada), where he remains Associate Professor. He is commissioner and alternate member of the Executive Committee of the International Commission of Jurists (ICJ). Mr Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. He has worked from 1985 until 1997 for the International Committee of the Red Cross (ICRC), at the Headquarters, *inter alia* as Deputy Head of its Legal Division, and in conflict areas, *inter alia* as Head of Delegation in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC Delegation in Islamabad. He has also served as registrar at the Swiss Supreme Court, and from 2004 to 2013 as chair of the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules. He has published on International Humanitarian

Law, Human Rights Law, International Criminal Law, the sources of International Law and the responsibility of States and non-State actors.

Steven Hill is Legal Adviser and Director of the Office of Legal Affairs at NATO. His role is to advise the Secretary General and International Staff on all legal aspects of NATO operations and coordinate NATO activities in the legal field. Mr. Hill came to NATO after serving as Counselor for Legal Affairs at the United States (U.S.) Mission to the UN. Prior to his work in New York, Mr Hill led the legal unit at the International Civilian Office in Kosovo. In both roles, his responsibilities included a strong policy component focused on supporting the rule of law in conflict- and post-conflict situations. He previously worked in the Office of the Legal Adviser at the U.S. Department of State, where he advised on the law of armed conflict, human rights law, economic sanctions, and the law governing diplomatic premises. He was responsible for negotiating a wide range of bilateral and multilateral instruments, including as chief U.S. negotiator for the landmark UN Convention on the Rights of Persons with Disabilities. He was assigned to the U.S. Embassy in Baghdad from 2004 to 2005. He also served as Counsel in proceedings before the International Court of Justice in 2003 and in several cases before the Inter-American Commission on Human Rights from 2006 to 2007. Mr Hill also actively engages in teaching and research on international law, including as Visiting Professor of Law at the Hopkins-Nanjing Center in China during the 2010-2011 academic year. Mr. Hill graduated from Yale Law School and Harvard College.

Françoise Hampson is an Emeritus Professor of Law at the University of Essex. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the United Kingdom (UK), United States, Canada and Ghana. She represented Oxfam and Save the Children Fund (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. From 1998 to 2007, she was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded Human Rights Lawyer of the Year in 1998 jointly with her colleague from the Human Rights Centre, Professor Kevin Boyle. More recently, together with her colleague Professor Noam Lubell, she has submitted third party interventions to the European Court of Human Rights on the relationship between Law of Armed Conflicts and the European Convention on Human Rights (ECHR). She has taught, researched and published widely in the fields of armed conflict, International Humanitarian Law and on the ECHR.

Sean Watts is a Professor of Law at Creighton University Law School. He is also Senior Fellow at the NATO Cooperative Cyber Defence Centre of Excellence. He is assigned to the United States (U.S.) Strategic Command Office of the Staff Judge Advocate as an Army Reservist. For three years, he served as a member of the defence team in the case *Prosecutor v. Gotovina* at the International Criminal Tribunal for Former Yugoslavia. His research and academic writing focus on international regulation of emerging forms of warfare. Mr Watts teaches subjects including U.S. Constitutional Law, Federal Courts, Federal Habeas Corpus, International Criminal Law, and the Law of War. He is a former active duty Army officer who served in a wide range of duty positions as both a military lawyer and an Armor officer in a tank battalion.

Paul Berman is Director for External Relations in the Legal Service of the Council of the European Union. Mr Berman holds degrees from the Universities of Oxford and Geneva and is qualified as a barrister in England and Wales. He joined the legal cadre of the British Diplomatic Service in 1990. As well as working in the Foreign and Commonwealth Office in London, he served as Legal Adviser in the Advisory Service on International Humanitarian Law in the International Committee of the Red Cross (ICRC) Legal Division in Geneva, as International and European Law adviser to the UK Attorney General, as Legal Counsellor at the UK Permanent Representation to the European Union in Brussels and as Director of the Cabinet Office European Law Division. He was appointed a Director in the Council Legal Service in February 2012.

Captain Guy Keinan is a legal adviser at the Israel Defence Forces's International Law Department, where he heads the Legal Development Section. He specialises in International Humanitarian Law and has been advising commanders on various issues, especially on targeting, since 2010. Captain Keinan holds an LLB from Tel Aviv University and is expecting an LLM in International Law from the Hebrew University in Jerusalem.

Laurent Gisel has been working for the International Committee of the Red Cross (ICRC) since 1999. From 1999 to 2003, he carried out assignments in Israel and the Occupied Territories, Eritrea, and Afghanistan, and from 2003 to 2005 held the position of Deputy Head of Delegation in Nepal. From 2005 to 2008, he served as Diplomatic Adviser to the ICRC Presidency. Since 2008, Mr Gisel works in the ICRC Legal Division. As Legal Adviser to the Operations from 2008 to 2013, he covered notably the Western countries, Iraq and Afghanistan. He is currently working in the Thematic Legal Advisers' Unit. Prior to joining the ICRC, Mr Gisel became attorney-at-law in Geneva and worked at the Public and Administrative Law Court of the Canton de Vaud. He holds a degree in law from the University of Geneva and a Master in international law from the Graduate Institute of International Studies (Geneva, Switzerland).

Eric Talbot Jensen is a Professor of Law at Brigham Young University Law School in Provo, Utah. He teaches in the areas of Public International Law, U.S. National Security Law, Criminal Law, and the Law of Armed Conflict and has authored several books, numerous articles and blog posts and made presentations across the globe on these and other topics. Prior to his current position, he spent 20 years in the U.S. Army, serving in various positions including as the Chief of the Army's International Law Branch; Legal Advisor to U.S. military forces in Iraq and Bosnia and to UN military forces in Macedonia; and as Professor of International and Operational Law at The Judge Advocate General's Legal Center and School. Professor Jensen is a graduate of Brigham Young University (B.A., International Relations), University of Notre Dame Law School (J.D.), The Judge Advocate General's Legal Center and School (LL.M.) and Yale Law School (LL.M.).

Maya Brehm is a researcher in weapons law at the Geneva Academy of International Humanitarian Law and Human Rights (ADH). She also works with the UK-based civil society organization, Article 36, a founding member of the International Network on Explosive Weapons (INEW). Previously, Ms Brehm led a research project on norms on explosive weapons at the UN Institute for Disarmament Research (UNIDIR) and worked as a protection delegate with the International Committee of the Red Cross (ICRC). Ms Brehm holds an MA in International Relations and an LL.M in International Humanitarian Law.

Lieutenant-colonel Harry Konings was born in southern Netherlands, on 7 September 1951. After completing high school in the summer of 1970, he started training and education at the Royal Military Academy in Breda. On 1 August 1974, he was commissioned to 2nd Lieutenant in the artillery of the Royal Netherlands Army. Between this date and January 1982, Lieutenant-colonel Konings held the posts of battery officer and battery commander in the 11th artillery battalion Royal Horse Artillery (105 mm howitzers). From January 1982 until July 1982, he studied at the Army Staff College and the three following years, he worked as a captain in the Army Staff in The Hague. In the summer of 1985, he was posted to the 41st Armoured Brigade in Germany to become brigade fire support coordination officer (promoted to major). After this tour, Lieutenant-colonel Konings became S3 (operations officer) of the 107th mechanized artillery battalion (8 inch howitzers) back in the Netherlands, followed in 1990 by two years in the Headquarters of the Artillery Army Corps as major operations (responsible for forward observers and nuclear operations). In May 1992, he was promoted Lieutenant-colonel and posted as chief of the artillery and mortar bureau of the Directorate of Materiel, responsible for acquiring, maintaining, testing and evaluating all artillery and mortar ammunition of the Royal Netherlands Army and Marines. From April 1998 until January 2001, he commanded the Fire Support School, responsible for training and education of RNLA artillery personnel. After this period, Lieutenant-colonel Konings became Head of the Centre of Expertise of the Fire

Support Training Centre, responsible for developing and teaching Fire Support doctrine. His last function from August 2005 until July 2012 was the post of Director of Doctrine at the Land warfare centre, responsible for developing army doctrine. During his career, he executed three operational missions: Team leader of a UN Military Observer team in Sarajevo (April 1995 - October 1995); Chief Operations of the EU mission in Croatia (July 1997 - December 1997); and Security advisor during the Organization for Security and Cooperation in Europe (OSCE) presence in Albania (December 1997 - April 1998). From 1996 to 2010, he also acted as witness for the office of the prosecution of the International Criminal Tribunal for the former Yugoslavia – in five cases, among which Radovan Karadžić. In December 2011, Lieutenant-colonel Konings was awarded the Defence wounded medal.

Thomas de Saint Maurice joined the International Committee of the Red Cross (ICRC) in 2001, working both in the field (Africa) and at Headquarters where he occupied several positions dealing with humanitarian action and International Humanitarian Law and policy. He notably worked as a legal adviser to operations for five years (covering Near East and Africa) and as an adviser in the Policy Unit for three years. In January 2015, Mr de Saint Maurice joined the ICRC Arms Unit as a legal adviser, focusing on the use of explosive weapons in populated areas and their humanitarian impact. He has a degree in political sciences (Institut d'Etudes Politiques de Lille), a LL.M. in public international law from the Université Libre de Bruxelles and an MA in international relations from the University of Kent.

Mark Zeitoun is Founder of the UEA Water Security Research Centre, and reader at the School of International Development, University of East Anglia. His research on environmental policy and politics follows three themes: a) transboundary water conflict and cooperation, at international, sub-national and trans-national levels; b) water policy and social justice issues; and c) urban water supply and treatment during and immediately following armed conflict. This stems from his work as a humanitarian-aid water engineer and advisor on water security policy, hydro-diplomacy, and transboundary water negotiations in conflict and post-conflict zones throughout Africa and the Middle East.

