

# Obligations of International Humanitarian Law

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It is an understatement to say that armed conflicts fought in densely populated areas can and do cause tremendous human suffering. Civilians in particular have historically paid a high price in the form of death, injuries, and permanent disabilities. They have also paid indirectly through the effects of widespread damage to their homes, the impact on their livelihoods, and the destruction of the infrastructure that supplies the necessities of life. With modern conflicts increasingly fought in urban areas, civilians are increasingly caught in the midst of hostilities. Such a trend will surely continue into the future.

Urban areas are by nature complex environments, and military operations in or against such areas confront a variety of significant challenges. These include the co-mingling of combatants and military objectives with civilians and civilian objects, the fluid and often unconventional tactics used by defending combatants, and the risk of sudden interaction with civilians. Such factors may make it difficult for the attacker to properly identify enemy forces and military objectives. It may also complicate assessment of the incidental civilian casualties and damage that may result from operations. Managing the safety of one's own troops and minimizing the impact of the fighting on civilian populations in such situations is often a challenging task for every armed force.

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In spite of these challenges, there is an important body of international law that applies in these situations, regulating the behavior of combatants and protecting those not taking part in the hostilities. The rules on the conduct of hostilities that will be addressed in this article are mainly found in the 1977 Additional Protocol I (AP I) to the Geneva Conventions. These rules apply in international armed conflicts, and since their adoption have become customary international humanitarian law (IHL) – and thus are also binding on states that have not ratified the AP such as the United States and Israel. Most of them are also widely accepted as customary law applicable in non-international armed conflicts.

These rules are complemented by additional rules relative to specific weapons. These rules were meant and drafted to be applied in all types of situations, including warfare in urban settings. This is also the reason why they are formulated in a fairly general and abstract way, in order to cover all situations and all methods and means of warfare. Therefore they are a priori capable of and appropriate in dealing with developments in modern warfare that arose after the rules were adopted. Furthermore, the rules were negotiated in the 1970s against the backdrop of guerrilla warfare and asymmetries in warfare, and as such, these issues affected the negotiations. These rules were also developed with awareness that there may be situations where the other side will violate the rules. Moreover, since international humanitarian law is not built on a legal concept of reciprocity, the rules must apply even when violations have been committed by the other side. The rules provide a degree of appreciation, which is necessary in volatile, complex combat situations, for commanders who sometimes have to make decisions in a matter of seconds. Compliance with the rules is assessed based on the information available to the commander at the time of deciding on an attack and an assessment of what a reasonable commander with that information should do in such a situation.

### **The Rule of Distinction**

Considering the legal framework more specifically, the starting point is the fundamental IHL rule on distinction, that is to say, the requirement that the parties to an armed conflict must at all times distinguish between civilians and combatants as well as between civilian objects and military objectives. From this fundamental rule of IHL flow a number of specific obligations aimed at protecting civilians from the dangers arising from

military operations. These rules regulate the conduct of hostilities, and they contain requirements for all parties to an armed conflict and all operations undertaken in attack and in defense.

Two questions arise in any discussion of the laws regulating the conduct of hostilities. First, it must be determined who can legitimately be attacked, and second, which objects can be legitimately attacked. International humanitarian law distinguishes between two categories of persons. The first category encompasses members of the armed forces, meaning those who conduct the hostilities on behalf of the parties to an armed conflict. This category includes the regular and irregular armed forces of states, and also the members of an organized armed group fighting on behalf of a non-state party in a non-international armed conflict. Civilians, the second category, are defined as those persons who are not members of the armed forces of a party to the conflict. Only members of the armed forces and of organized armed groups are legitimate targets of an attack. It is absolutely prohibited to attack civilians or the civilian population. Civilians are entitled to protection from direct attack unless and for such time as they directly participate in hostilities. The notion of direct participation in hostilities as it relates to civilians only comes into play when they are carrying out an act cumulatively fulfilling the following three requirements:

- a. The act must be likely to affect adversely the military operations or military capacity of a party to an armed conflict, or alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attacks.
- b. There is a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.
- c. The act is specifically designed to support one party to the conflict against another.

Any person who is neither a direct participant in hostilities nor a member of an organized armed group as defined above is entitled to the full protection accorded to civilians.

The question of who belongs to organized armed groups and who can be seen as participating directly in hostilities, and thus loses protection against direct attack, has been debated for years. At a certain point the International Committee of the Red Cross (ICRC) engaged in an expert process to clarify this issue and subsequently published an interpretive guide that clarified

the question.<sup>1</sup> In the view of the ICRC, the term “organized armed group” refers exclusively to the “armed” or “military” wing of a non-state party to an armed conflict, namely its armed forces in a strictly functional sense – in other words, those who are charged with the conduct of hostilities on its behalf. Only persons assuming a continuous combat function (i.e., a continuous function involving their direct participation in hostilities) can be regarded as belonging to an organized armed group and as such can be legitimately attacked.

A reliable determination of membership in an organized armed group (i.e., continuous combat function) or of direct participation in hostilities may not always be straightforward. This is particularly true in an urban setting where various actors intermingle and where places to hide or positions from where to launch an attack abound. Such a context normally demands rapid military decisions and actions. Thus, the determination of membership or direct participation in hostilities may not be an easy task for military forces. It is therefore all the more crucial that all feasible precautions be taken to determine whether a person is a civilian, and if so, whether he or she is directly participating in hostilities. In case of doubt, IHL mandates that a person is presumed to be a civilian and protected against direct attack.

It is important to bear in mind that once a person has been identified as assuming a continuous combat function for an organized armed group or as a civilian directly participating in hostilities, the attacker is not automatically free to attack this person. Indeed, an attack against such a person may still be prohibited under other rules of IHL. For example, such an attack would be prohibited under the rule of proportionality if it would lead to excessive incidental civilian casualties and/or damage.

Concerning the question of what objects can be attacked, the rule of distinction prescribes that only military objectives can be attacked. According to customary international law, military objectives are limited to those objects that by their nature, location, purpose, or use make an effective contribution to military action; and in addition, whose total or partial destruction, capture, or neutralization, in the circumstances at the time, offers a definite military advantage.

With regard to the first of those two criteria, a close link must be established between the potential target and “an effective contribution to military action.” The term “military action” denotes the enemy’s war

fighting capabilities. This nexus is established through the four criteria outlined in the rule, namely its nature, location, purpose, or use. “Nature” refers to the intrinsic character of an object. For example, a weapon system or a missile launching site are objects that make an effective contribution to military action by their very nature. Objects that are not military by nature may also make an effective contribution to military action by virtue of their particular location, purpose, or present use. However, it is important to keep in mind that the contribution must be effective, and must also be directed towards the actual war-fighting capabilities of a party to the conflict. This second point follows from the reference in the definition to “military action.” If an object merely contributes towards the war-sustaining capability of a party to the conflict, i.e., its general war effort, it does not qualify as a military objective.

Regarding the second criterion, namely that the total or partial destruction, capture, or neutralization of the target in the circumstances ruling at the time offers a definite military advantage, an object is a military objective if an attack on it would bring about “a definite military advantage.” It follows from the word “definite” that the advantage must be concrete and perceptible, and not merely hypothetical or speculative. From the word “military,” it can be inferred that the anticipated advantage must not be of a mere political nature. Even when the military advantage is derived from the “attack as a whole,” it bears emphasis that the “attack as a whole” constitutes a finite operation with defined limits and must not be confused with the entire war effort. Finally, the military advantage to be gained must be evident “in the circumstances ruling at the time.” If the destruction of a given object does not yet offer or no longer offers a definite military advantage, the object would not constitute a military objective and must not be attacked.

Again, it is important to bear in mind that once an object has been identified as a military objective on the basis of these criteria, the attacker is not free to launch an unrestrained attack on this object. Indeed, even if a military objective has been properly identified, an attack may still be prohibited under other IHL rules, in particular if it would lead to excessive incidental civilian casualties and/or damage to civilian objects. In densely populated areas and other circumstances, whether or not an object constitutes a military objective must be assessed on a case-by-case basis in view of the ruling circumstances at the time. Sweeping or

anticipatory qualifications of an object are not allowed. For example, it would clearly be contrary to IHL if all objects somehow related to, owned by, or associated with a party to the conflict were collectively considered as military objectives.

When assessing whether or not something is a military objective, one difficult issue is the question of dual use objects, which are often found in densely populated areas. A dual use object is an object that has simultaneous military and civilian functions. One example is the electricity power grid, which is used by the military to operate air defenses and is also used to power hospitals and other civilian activities. If the standards relating to military objectives mentioned above are applied, even a secondary military use may turn a civilian object into a military objective. However, such use must be carefully verified and any attack would need to be consistent with other rules on the conduct of hostilities.

### **Indiscriminate Attacks and the Rule of Proportionality**

Among such rules are the prohibition of indiscriminate attacks and the rule of proportionality. Indiscriminate attacks are those that are not directed at a specific military objective; that employ a method or means of combat which cannot be directed at a specific military objective; or that employ a method or means of combat whose effects cannot be limited as required by IHL; and consequently, in each such case, are of a nature that strike military objectives and civilians or civilian objects without distinction.

In an area where civilian objects and military objectives are mixed, the attacking party must assess with particular care which objects are civilian objects and which ones are military objectives. Only those objects that qualify as military objectives can be directly attacked with weapons that are capable of being directed at them and that have effects that can be limited as required by IHL. Attacks by bombardment or any method or means that treat a number of clearly separated and distinct military objectives located in a city, town, village, or other area as a single military objective containing a similar concentration of civilians or civilian objects are prohibited under IHL.

Once a legitimate target of an attack has been properly identified, the rule of proportionality must be assessed. This rule prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which

would be excessive in relation to the concrete and direct military advantage anticipated.” Again, direct attacks against civilians and civilian objects are prohibited. The rule of proportionality, therefore, only becomes relevant when military objectives are the intended targets. Note that it is not only excessive civilian casualties and injuries that are prohibited by the rule of proportionality, but also excessive damage to civilian objects. This fact is often overlooked or forgotten.

The damage to civilians must be balanced by the military advantage that will be gained by a particular attack. Weighing the military advantage against the civilian damage is often very difficult, particularly because they are not easily comparable. How can one weigh something concrete in terms of loss of life and destruction against something that is more relative, such as the military value of an operation? Yet despite all the uncertainties in the interpretation of the rule of proportionality, there are nevertheless very clear limitations set by the rules. Only the “concrete” and “direct” “military” advantages can legitimately weigh in the determination as to whether the consequence of an attack would be excessive. Hypothetical, indirect, and long term political advantages must be excluded from the calculation of military advantage. Simply winning the war cannot be considered a criterion for calculation of proportionality. When assessing the incidental damages to civilians and civilian objects, the foreseeable reverberating effects of the attack on the civilian population must also be taken into consideration. For example, if attacks are launched against electrical grids or telecommunications infrastructures, which may be military objectives in a particular situation, these may potentially cause incidental damage to the future wellbeing of the civilian population, through the death of patients in medical facilities or the long term disruption of electricity supplies. Such consequences must be factored into the equation.

There is much debate regarding the use of certain explosives in densely populated areas. Certain weapons, by virtue of the way they function or because of their substantial explosive power, may be more likely to have indiscriminate effects and an increased likelihood of causing excessive incidental civilian casualties and damage to civilian objects when used in densely populated areas. Weapons that have a significant degree of inaccuracy or that have a wide destructive radius may not be much of a concern on an open battlefield far away from civilian installations, but their use against military objectives positioned in an urban setting and in the

vicinity of civilians or civilian objects may be troublesome. The ICRC has therefore expressed concern about the use of high explosive air dropped bombs, artillery, mortars, and munitions containing white phosphorus in urban areas. The concern about high explosive air dropped bombs, artillery, and mortar shells is generally due to the difficulty of directing such weapons at specific military objectives, and their potentially wide explosive footprint. Their use in densely populated areas raises serious concerns under the prohibition of indiscriminate attacks and the rule of proportionality, among others. The attacking army is obligated to take all feasible precautions to avoid and minimize incidental civilian casualties and damage to civilian objects. This also applies to the choice of weapons and means of warfare. Alternatively, more discriminative weapons and means of attacking military objectives located in densely populated areas must be chosen instead of, for example, free flight projectiles fired by artillery or mortars. In light of this and despite the absence of an express legal prohibition for specific types of weapons, the ICRC believes that explosive weapons with a wide impact area should be avoided in densely populated areas.

### **Precautions Required of Both Sides**

In the conduct of military operations, constant care must be taken to spare the civilian population, individual civilians, and civilian objects. The particular precautions required by IHL include doing everything feasible to verify that targets are military objectives and taking all feasible precautions in the choice of means and methods of warfare with a view to avoiding and in any event minimizing incidental civilian casualties and damages to civilian objects. In densely populated areas, special attention must be paid to the type of weapons and munitions used in order to spare, as much as possible, civilians and civilian infrastructure.

Advance warning to the civilian population is one of the core precautions that must be taken prior to an attack. Effective advance warning must be given regarding attacks that may affect the civilian population, unless circumstances do not permit. The aim is to provide civilians with the opportunity to protect themselves. The main requirement in this regard is that an advance warning must be “effective.” The effectiveness of a warning should be evaluated from the point of view of the civilian population that receives it. An effective advance warning will allow civilians to adequately



protect themselves. Generally, this would mean that the advance warning should be constructed so as to reach as many civilians as possible in the concerned area of the planned attack. It should also be in a language that the civilian population understands and it must give civilians enough time to evacuate. In addition, such a warning should not be issued prematurely or in an untimely fashion, so as to lead the civilian population to believe that the threat of an attack is no longer real.

Advance warnings do not relieve an attacker from the obligation to take other precautionary measures. Indeed, as mentioned above, effective advance warnings amount only to one of several precautions prescribed by IHL. The fact that a warning has been given does not mean that an attack may automatically proceed. An assessment of distinction and proportionality must still be made, and the attacker is obliged to take precautions in order to avoid and in any event to minimize the incidental loss of civilian life, injury to civilians, and damage to civilian objects. In particular, even if advance warnings are given, experience shows that often a number of civilians remain in the area. It is not permissible to consider everyone who remains in an area after advance warnings to be legitimate targets.

Several of these obligations to take precautions are not absolute, but depend on what is “feasible” at the time. Thus, again, certain discretion is given to those who plan or decide upon an attack. According to various interpretations, feasible precautions are those that “are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” In this context, it is debatable what weight should be given to the understandable aim of ensuring the safety of the attacking side’s armed forces (“military consideration”) when an attack is launched. To the ICRC, it does not seem appropriate to resort to such considerations as a justification for not taking any precautionary measures in the implementation of the rules of distinction or proportionality and thereby exposing the civilian population or civilian objects to a greater risk. There would also certainly be no justification to resort, for example, to indiscriminate fire in violation of the mentioned IHL rules in order to avoid exposure of one’s troops. While national regulations may require military commanders to protect their troops, under IHL combatants may be lawfully attacked. This is the corollary of their right to directly participate in hostilities. Civilians – as

long as they do not participate directly in hostilities – as well as civilian objects must not be made the object of an attack. Thus, the provisions of IHL clearly emphasize the protection of civilians and civilian objects.

The side that is the object of an attack also has obligations under international humanitarian law. It must also take necessary precautions to protect civilians and civilian objects under their control against the effects of military operations. Such precautions include removing them from the vicinity of military objectives or avoiding the location of military objectives within or near densely populated areas to the maximum extent feasible.

In addition, under no circumstances may civilians be used to shield military objectives from attack or to shield military operations. It is a well-established rule of IHL that the use of human shields is prohibited and constitutes a war crime. Therefore, the party facing an attack is prohibited from abusing the obligations of the attacker not to target civilians and civilian objects by using the civilian population, individual civilians, or civilian objects to shield a military objective. This rule also covers the transferring of civilians to the vicinity of a military objective as well as placing military objectives in or near civilian areas.

What is the consequence for the commander ordering an attack if human shields are nevertheless used? The use of human shields does not necessarily prevent him from proceeding with the attack. However, any violation of the prohibition on using civilians as human shields does not release the attacker from his obligations with respect to the civilian population and individual civilians, including the obligation to take the required precautionary measures. Can voluntary human shields be considered direct participants in hostilities with the consequence that they lose protection against direct attack and would not count in the proportionality equation? The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection from direct attack in order to shield military objectives does not, without the fulfillment of other conditions, entail the loss of their protection and their liability to direct attack independently of the shielded objective. This, in the view of the ICRC, would only be the case if they create a physical obstacle to military operations of a party to the conflict. This scenario may become particularly relevant in ground operations, such as in urban environments where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.

Even if voluntary human shields are not directly participating in hostilities, they will be particularly exposed to the dangers of military operations through their presence near legitimate military objectives, and therefore incur an increased risk of suffering incidental death or injury during attacks against those objectives.

### **The Asymmetric Nature of Modern Armed Conflicts**

Significant disparities between the military capacities of the belligerent parties, or in other words, asymmetric warfare, bring significant challenges for the application of IHL, in particular its rules on the conduct of hostilities. For instance, a belligerent party that is weaker in military strength and technological capacity may, when under attack, be tempted to hide from modern sophisticated means and methods of warfare. Consequently, it may be led to engage in practices prohibited by IHL, such as feigning protected status, mingling combatants and military objectives with the civilian population and civilian objects, or using civilians as human shields. As for the militarily superior belligerent, it may be tempted to relax the standards of protection of civilian persons and civilian objects in response to constant violations of IHL by the adversary. For example, confronted with enemy combatants and military objectives that are persistently hidden among the civilian population and civilian objects, an attacker – who is legally bound by the prohibition of disproportionate attacks – may, in response to the adversary’s strategy, progressively revise his assessment of the rule of proportionality and accept more incidental civilian casualties and damage.

The ICRC has observed that in a number of recent conflicts, there is an increased pressure on the military to protect its forces due to the reluctance of the states’ constituencies to tolerate casualties and capture of their soldiers on the battlefield. In this context, it is debatable what weight is to be given to the legitimate aim of ensuring the safety of the attacking side’s armed forces when an attack is launched. In any case, this consideration cannot lead to circumventing the principles of distinction, proportionality, and precaution. Nor does force protection take on increased weight in asymmetric warfare because of the military or political goals of the adversary. For instance, considerations of force protection cannot override the principle that when there is a doubt whether a person is a civilian or not, he or she must be considered to be a civilian. Also, as stated before, force

protection cannot lead to indiscriminate firepower by troops as a measure to avoid the exposure of its own forces. In this context, it must be borne in mind that new technologies can in some cases reduce the risk for the attacking force's soldiers, but might also in some cases – in particular in densely populated areas – increase the risk of incidental civilian casualties and damage, such as, for instance, the use of air strikes, the use of indirect fire, or the use of white phosphorus munitions to create smokescreens.

The real danger in asymmetric conflicts is that the application of IHL will be perceived as detrimental by all the parties to a conflict. This will ultimately lead to all-around disregard for IHL and undermine its basic tenets. In light of this, it is perhaps logical to ask, where does IHL go from here? What are the best ways to address the challenges raised by the waging of war in densely populated areas and the asymmetries in warfare? The ICRC believes that the challenges posed to IHL by asymmetric and urban warfare cannot a priori be solved by developments in treaty law. It must be stressed that in such circumstances, it is generally not the rules that are at fault, but the will or the ability of the parties to an armed conflict – and of the international community – to enforce them, in particular through criminal law.

### Conclusion

The ICRC recognizes that today's armed conflicts, especially asymmetric ones and those fought in densely populated areas, pose serious threats to the rules derived from the principle of distinction. It is crucial to resist these threats and to make every effort to maintain and reinforce rules that are essential to protecting civilians, who so often bear the brunt of armed conflicts. The rules themselves are as pertinent to "new" types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted. The fundamental values underlying the rules of the conduct of hostilities need to be safeguarded and are timeless. While it is conceivable that developments in IHL might occur in specific areas, such as in relation to restrictions and limitations on certain weapons, a major rewriting of existing treaties does not seem necessary for the time being.

At the same time, there is an ongoing need to assess the effectiveness of existing rules in protecting civilians and civilian objects, to improve the implementation of those rules or to clarify the interpretation of specific

concepts on which the rules are based. However, this must be done without disturbing the framework and underlying tenets of existing IHL, whose aim is precisely to ensure the protection of civilians. Despite certain shortcomings in some of the rules governing the conduct of hostilities, mostly linked to imprecise wording, these rules continue to play an important role in limiting the use of weapons. Any further erosion of IHL may propel mankind backwards to a time when the use of armed force was almost boundless. The challenge is to examine and interpret how the rules of international humanitarian law should be applied in particular circumstances, but the values and principles inherent in international humanitarian law must remain unchanged, and be defended and upheld in the future.

### Notes

- 1 See the ICRC interpretive recommendations in Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009).