

Regulating the conduct of urban warfare: lessons from contemporary asymmetric armed conflicts

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Abstract

A survey of contemporary armed conflicts indicates that major military powers are increasingly facing militarily weaker adversaries and being drawn into unconventional engagements in cities, towns, and villages. Given the asymmetry of military capabilities in such conflicts, it is submitted that higher standards of reasonableness be imposed upon military commanders of major military powers to ensure constant care for civilian populations, and furthermore that civilian populations be spared more effectively from the effects of urban warfare by applying customary law ab initio, in order to avoid gaps in protection that may arise from the premature classification of armed conflicts.



The dialectics of asymmetric urban warfare

Modern history has often borne witness to what can be described as conventional international armed conflicts between two or more sovereign states that are similarly matched in terms of high-intensity air, sea, and land capabilities.¹ Illustrations

of such symmetrical inter-state conflicts include both World Wars, the Iran–Iraq War, the Falklands War, and the Persian Gulf War. Parties to these conventional inter-state symmetrical conflicts sought to ‘weaken the military forces of the enemy’ by disabling ‘the greatest possible number of men’² on the battlefield, typically located away from urban centres. In other words, the goal was to create an asymmetric state of affairs through a material trial of strength, in order to force the adversary to capitulate. Although this model of conflict cannot be ruled out as the shape of conflict to come, the potentially devastating consequences of any form of symmetrical inter-state conflict render it unlikely. Instead, disparities in military power resulting from technological development continue to create the material conditions for a wide spectrum of asymmetric conflicts that are internal in character (i.e. between states and non-state entities or between non-state entities alone), as well as those that are international in character (i.e. between states themselves or between states fighting by proxy).

The twenty-first century has also borne witness to an explosion in the size of urban populations. The United Nations (UN) Department of Economic and Social Affairs has highlighted the growing urbanization in both developed and developing countries. For example, in 1950 only 86 cities had a population of more than one million, whereas by 2002 their number had risen to approximately 400.³ A 2003 UN–HABITAT Working Paper indicates that in many conflict-afflicted countries a significant percentage of the urban population live in slum conditions, characterized by ‘overcrowding, poor or informal housing, inadequate access to safe water and sanitation, and insecurity of tenure’.⁴ Notably, the *World Development Indicators* report published by the World Bank in 2002 estimated that the urban population accounted for 22% of the total population in Afghanistan, 77% in Iraq, and 52% in the then Federal Republic of Yugoslavia⁵ – all countries that have sustained major United States air offensives.

When military asymmetry combines with urbanization, the result is asymmetric urban warfare in which militarily weak parties do not directly engage militarily strong adversaries by using the conventional means and methods typical of inter-state wars. Modern conflicts in Vietnam, Chechnya, Gaza, the West Bank, Afghanistan, and Iraq are prime examples of this type of conflict, characterized by a major imbalance *ab initio* of the opposing armed forces’ military capabilities. In such conflicts, militarily strong parties may apply direct offensive strategies, using

- 1 Brian Steed, *Piercing the Fog of War: Recognizing Change on the Battlefield*, Zenith Press, Minneapolis, 2009, ch. 2.
- 2 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November/11 December 1868, paras. 2 and 3.
- 3 UN Department for Economic and Social Affairs, Population Division, *World Urbanization Prospects, 2001 Revision*, New York, 2002; Mike Davies, *Planet of the Slums*, Verso, London, 2007, pp. 1–3.
- 4 M. Davies, above note 3, p. 23; UN–HABITAT, *The Challenge of the Slums: Global Report on Human Settlements 2003*, London, 2003, p. 3; UN–HABITAT, *Slums of the World: The Face of Urban Poverty in the New Millennium?*, Working Paper, Nairobi, 2003, Annex 3.
- 5 World Bank, *World Development Indicators 2002*, Table 3.10, available at: www.worldbank.org/data/wdi2002/pdfs/table%203–10.pdf (last visited 9 May 2010).

conventional means and methods of warfare such as infantry, armour, and air-power to capture, destroy, or neutralize military objectives and thus destroy the opponent's physical capacity to resist.⁶ They may also apply indirect offensive strategies such as 'barbarism', a term that Arreguín-Toft defines as the deliberate and systematic harm of non-combatants in order to destroy a weaker opponent's will and capacity to fight; examples he gives of this include the bombing of civilian infrastructure, as well as the internment in concentration camps, murder, torture, and rape of non-combatants.⁷ For militarily weak parties, defeat would invariably be the outcome of fighting on the stronger party's conventional terms, for instance on the open battlefield.⁸ They may therefore employ indirect offensive and defensive strategies such as guerrilla warfare, concealing themselves among supportive civilian populations in cities, towns, and villages, which provide both cover for them to launch attacks and also protection from counter-attack.⁹

In its report to Congress entitled 'Conduct of the Persian Gulf War', the United States Department of Defense stated that 'to engage in military operations in urban terrain' is 'a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects'.¹⁰ This assertion is supported by Herold's finding that the majority of civilian deaths that occurred in the 2001 US military operations in Afghanistan were recorded in areas of high population density.¹¹ In this respect it can be said that asymmetric urban armed conflict exposes the militarily superior side's political vulnerabilities, for, in the process of attacking and counter-attacking its weaker opponent, the militarily superior side will face a major challenge. On the one hand, it may perceive that full compliance with international humanitarian law (IHL) lessens its ability to quickly and decisively achieve strategic objectives such as a ceasefire, surrender, regime change, restoration of international peace, security, and the rule of law. On the other hand, it may find that, in trying to achieve its strategic objectives, the presence of military objectives within densely populated urban areas makes it difficult to stay within lawful parameters. This is to the weaker side's strategic advantage, for it can then seek to exploit any direct or indirect attacks upon civilians through media coverage, well aware that the stronger side is subject to international and domestic political pressure to achieve a quick and decisive military victory at a minimum cost of human lives and material resources.

Clausewitz once stated that 'war is a mere continuation of policy by other means'.¹² This still holds true for contemporary armed conflicts, but with the added

6 Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2008, p. 4.

7 *Ibid.*, pp. 31–32, 34, and 43.

8 *Ibid.*, pp. 34 and 204–205.

9 *Ibid.*, p. 33.

10 US Department of Defense, 'Report to Congress on the conduct of the Persian Gulf War', ILM, 1992 (3), p. 721.

11 Marc W. Herold (ed.), *A Dossier on Civilian Victims of the United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting*, March 2002, available at: <http://cursor.org/stories/appendix5.htm> (last visited 10 May 2010), Appendix 5: 'The spatial distribution of Afghan civilian casualties caused by the US air war, October 7 – December 6th'.

12 Carl von Clausewitz, *On War*, N. Trübner, London, 1873, Book 1, ch. 1, para. 24.

proviso that humanitarian law may serve as a continuation of war by other means. In other words, militarily stronger parties to a conflict can either adopt and employ IHL-compliant military strategies as a prerequisite for both military and political success, or risk sacrificing ‘victory in peace for victory in war’.¹³ The latter has been described as a poor policy, because forms of direct or indirect ‘barbarism’ generally promote and stimulate militarily weak adversaries rather than deter them.¹⁴ Also, it results in protracted and costly conflicts that either do not attain the desired political objective, as in Vietnam, or are otherwise not conducive to a stable political outcome, as in Iraq and Afghanistan.¹⁵

The scope *ratione materiae* of treaty-based IHL

The practical challenge of classifying armed hostilities

The discretion of military and political decision-makers to classify an armed conflict as either international or non-international is limited by the ability of courts of law to make *ex post facto* determinations to this effect.¹⁶ Nonetheless, in the absence of any capable and recognized determining body, such preliminary self-classification and self-regulation by parties to a conflict is unavoidable. The application of this binary classification system poses an acute practical challenge for decision-makers on the ground, in that they may face complex factual situations that are oscillating, changing, or mixed in character.¹⁷ In this respect, and despite all the good will in the world, a major difficulty that will often arise for warring parties during the constraints of hostilities, especially in the initial phase, is in identifying where a given situation that may be in constant flux is to be placed on the sliding scale ranging from internal tensions and disturbances to internal and international armed conflicts.¹⁸ The rationale of the following discussion and critique of treaty-based IHL is to stress the importance of applying customary IHL to urban armed conflicts *ab initio*.

Classifying international armed conflicts

The Trial Chamber in *The Prosecutor v. Dusko Tadić (Tadić)* set the threshold for the existence of an international armed conflict at a relatively low level, namely ‘whenever there is a resort to armed force between States’.¹⁹ The detailed

13 I. Arreguín-Toft, above note 6, p. 225.

14 *Ibid.*, p. 224.

15 *Ibid.*, p. 213.

16 International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 603.

17 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Merits (Appeals Chamber), 2 October 1995, para. 72.

18 Andrew J. Carswell, ‘Classifying the conflict: a soldier’s dilemma’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 4.

19 ICTY, *Tadić*, above note 17, para. 70.

humanitarian protections contained in the Fourth Geneva Convention²⁰ and Additional Protocol I²¹ will not apply where one or both parties to a conflict do not qualify, or indeed are not recognized, as a contracting state within the meaning of Article 2 common to the Geneva Conventions and Article 1(1) of Protocol I or as a national liberation movement within the meaning of the latter's Article 1(4).²² These limitations are problematic, given that states such as India, Israel, and the United States of America have not ratified Protocol I,²³ and that movements such as Hezbollah and Hamas have not generally been recognized as state entities, despite their status as *de facto* authorities that perform quasi-state functions.²⁴ The main exception to the said limitations is where the conduct of a non-state entity can be attributed to a foreign state, and the test for this is whether the latter has 'overall control' over the former.²⁵ For a conflict to become internationalized in this way, there must be 'extensive and compelling evidence' pointing to the foreign state's role in organizing, directing, co-ordinating, or planning the military actions of the non-state entity, in addition to evidence pointing to other forms of control, including financing, training, and equipping or providing operational support.²⁶ Even though this approach may extend the humanitarian protections of the Fourth Geneva Convention and Protocol I to civilians caught up in proxy wars – that is, international armed conflicts between states fought indirectly through third parties (states or non-state entities) as substitutes – this evidential burden creates the risk of under-classification, especially during the initial stages of armed hostilities, when adequate intelligence is likely to be at a premium.

Classifying non-international armed conflicts

The Appeals Chamber in *Tadić* ruled that the minimum threshold for the application of Article 3 common to the Geneva Conventions is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State',²⁷ as opposed to lesser forms of armed violence such as 'banditry, unorganized and short-lived insurrections, or terrorist activities', which are covered by municipal criminal law and applicable international human

20 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art. 2(1).

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

22 Nils Melzer, *Targeting Killing in International Law*, Oxford University Press, Oxford, 2009, p. 248.

23 See International Committee of the Red Cross, Treaty Ratification Table, available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/israel-event-ihl-040509/\\$File/Treaty-Ratification-Table-IL-competition-2009.xls](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/israel-event-ihl-040509/$File/Treaty-Ratification-Table-IL-competition-2009.xls) (last visited 9 May 2010).

24 Ekaterina Stepanova, *Terrorism in Asymmetrical Conflict: Ideological and Structural Aspects*, Stockholm International Peace Research Report No. 23, Oxford University Press, Oxford, 2010, pp. 114–115.

25 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras. 84–141.

26 *Ibid.*

27 ICTY, *Tadić*, above note 17, para. 70.

rights norms.²⁸ Such a distinction is to be made on a case-by-case basis and involves an evaluation of whether the parties have a sufficient level of organization, and whether the hostilities are of a sufficient intensity.²⁹ In both these regards, the Trial Chamber in *The Prosecutor v. Boškoski (Boškoski)* set out a number of ‘indicative factors’ that serve as ‘useful practical guidance to an evaluation’³⁰ of whether or not a factual situation of armed hostilities can be classified as a non-international armed conflict. First, factors to consider in evaluating whether the hostilities are of a sufficient intensity to qualify as an armed conflict include whether the attacks can be considered sufficiently serious and whether there has been an increase and a spread of armed clashes over territory and over a period of time.³¹ Secondly, factors to consider in evaluating whether an armed group possesses the requisite level of organization include, *inter alia*, the existence of a command structure;³² the ability to carry out military operations in an organized fashion and control territory;³³ logistics and communications capabilities;³⁴ the level of discipline and the ability to implement common Article 3;³⁵ and the ability to ‘speak with one voice’ in the course of political negotiations in order to negotiate and conclude agreements such as ceasefire or peace accords.³⁶ Although common Article 3 is *prima facie* limited to armed conflicts ‘not of an international character’ that occur ‘in the territory of one of the High Contracting Parties’, contemporary jurisprudence and academic discourse indicate that it applies to armed conflicts with a ‘transnational’ dimension: in other words, to conflicts that involve cross-border hostilities, either between state and non-state entities or between non-state entities.³⁷

The *Commentary* by the International Committee of the Red Cross (ICRC) points out that the threshold of applicability of Additional Protocol II is set at a higher level than that of common Article 3.³⁸ It explicitly does not apply to internal disturbances, a term that the ICRC interprets as serious acts of violence

28 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562.

29 *Ibid.*

30 ICTY, *The Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 193.

31 *Ibid.*, para. 177.

32 *Ibid.*, para. 199.

33 *Ibid.*, para. 200.

34 *Ibid.*, para. 201.

35 *Ibid.*, para. 202.

36 *Ibid.*, para. 203.

37 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 218; Supreme Court of the United States, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, No. 05-184, Judgment, June 29, 2006, p. 67; ICTY, *Tadić*, above note 17, para. 102; N. Melzer, above note 22, p. 258; Andreas Paulus and Mindia Vashakmadze, ‘Asymmetrical war and the notion of armed conflict: a tentative conceptualization’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 119.

38 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 1(1); Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987 (hereinafter *Commentary*), Protocol II, paras. 4447ff.

that are carried out by ‘more or less organized groups’ and that ‘call upon extensive police forces, or even armed forces, to restore internal order’.³⁹ The Trial Chamber in *The Prosecutor v. Akayesu* has interpreted Protocol II’s requirement that non-state entities must have the ability ‘to carry out sustained and concerted military operations’ as meaning that ‘operations must be continuous and planned’,⁴⁰ as opposed to common Article 3’s criterion of ‘protracted’ armed conflict, a standard that may include sporadic violence. Protocol II in addition requires non-state groups to be able to exercise ‘control over a part of [the] territory’ of the state in question. The Trial Chamber further elucidated this criterion as ‘usually that which has eluded the control of the government forces’ to the extent that a non-state entity is able to ‘dominate a sufficient part of the territory’ and ‘impose discipline in the name of a *de facto* authority’.⁴¹ The Trial Chamber in *Boškoski* set out a number of ‘indicative factors’ of territorial control, such as the establishment of alternative structures of authority and liberated territories, zones, cities, and even villages.⁴² Protocol II is limited in that it is not applicable where a state is engaged in hostilities against non-state parties in the territory of a foreign state, or where a conflict is taking place on the territory of a state that has not ratified it. In the context of asymmetric conflicts, the elements of organization and control of territory are likely to be highly contentious and difficult to determine in practice. One of the main reasons for this is that, if a weaker party does adopt conventional forms of territorial control, organization, and military engagement, this is likely to result in its swift isolation, suppression, and destruction. The dynamics of asymmetric conflict force weaker adversaries into a counter-strategy of ‘organic organizational adaptation’ whereby they adopt horizontal, clandestine, and hybrid systems and networks of command and control, as well as ‘defenceless defence’ in order to promote their survivability.⁴³ Such tactics of asymmetric warfare render it extremely difficult for military analysts and decision-makers to identify the material conditions necessary to make appropriate legal classifications.⁴⁴ Again, where adequate intelligence is at a premium, there is the risk of under-classification.

Customary IHL obligations relating to the conduct of urban warfare

According to the estimates made in the Geneva Declaration’s report *Global Burden of Armed Violence*, in the period 2005–2007 civilian deaths in armed conflicts far

39 *Commentary*, above note 38, Protocol II, paras. 4475–4477.

40 ICTR, *Akayesu*, above note 16, para. 626.

41 *Ibid.*

42 ICTY, *Boškoski*, above note 30, paras. 242–249.

43 E. Stepanova, above note 24, p. 105; Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Penguin Books, London, 2006, p. 329; B. Steed, above note 1, ch. 9.

44 E. Stepanova, above note 24, pp. 104–134; I. Arreguin-Toft, above note 6, p. 33.

exceeded combatant fatality rates,⁴⁵ and three-quarters of all direct conflict deaths that occurred during that period were concentrated in ten conflict-affected countries, including Iraq, Afghanistan, Sri Lanka, India, Somalia, and Pakistan.⁴⁶ The report also found that the significant increase in the global number of direct conflict deaths witnessed during that period was primarily due to the armed conflicts in these countries,⁴⁷ and it is noteworthy that most of the major conflicts referred to in the report involved states, including the United States of America and Israel, that are not signatories to either Protocol I or Protocol II.⁴⁸ In addition to the reports and studies cited above, this report further demonstrates the importance of customary IHL. In comparison with civilians caught up in armed conflicts classified as non-international, Protocol I provides civilians caught up in international armed conflicts with a broader and more detailed framework of humanitarian protection, which is arguably better suited to regulating urban armed conflicts than Protocol II and common Article 3, because it includes rules on, *inter alia*, distinction, proportionality, and precautionary measures.⁴⁹ Be that as it may, it is suggested that reliable evaluations of the precise dynamics of an armed conflict can only be made from the vantage point of hindsight.⁵⁰ In view of the enduring humanitarian quandary of classification lagging behind the actual situation, the inherent substantive limitations of Protocol II and common Article 3, the non-applicability of treaty-based IHL to a range of contemporary asymmetric conflicts, and the grave risks posed by insufficiently regulated urban conflict, application of the ‘corpus of customary international law’ relating to precautions in attack, proportionality, and humanitarian assistance is warranted ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.⁵¹ This body of customary law is ‘applicable to all armed conflicts irrespective of their characterization as international or non-international’⁵² and thus avoids any substantive gaps in humanitarian protection that may precede a reliable evaluation and concomitant application of treaty-based IHL, especially where there is likely to be disagreement, doubt, or divergence as to the precise legal character of the hostilities in question *inter* and *intra* parties to a conflict.⁵³ As discussed above, this is

45 The Geneva Declaration on Armed Violence and Development, *Global Burden of Armed Violence*, Geneva Declaration Secretariat, September 2008, p. 11, available at: <http://www.unhcr.org/refworld/docid/494a455d2.html> (last visited 1 July 2010).

46 *Ibid.*, p. 22.

47 *Ibid.*, p. 9.

48 See ICRC Ratification Table, above note 23.

49 Protocol I, above note 21, Art. 48, 51(1)–(5), 52, and 57.

50 A. J. Carswell, above note 18, p. 151.

51 ICTY, *Tadić*, above note 17, para. 70; ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11-I, Rule 61 Decision, 8 March 1996, para. 11; Statute of the International Court of Justice, Art. 38(b); James G. Stewart, ‘Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict’, in *International Review of the Red Cross*, Vol. 85, No. 850, June 2003, p. 346.

52 ICTY, *Martić*, above note 51, para. 11.

53 ICTY, *Boškoski*, above note 30, para. 245.

especially so in relation to situations such as proxy wars and ‘low-intensity conflicts’ whose precise character can be hard to gauge as events unfold on the ground.⁵⁴ The advantage of applying the body of customary IHL when such uncertainty prevails is that it avoids parties to a conflict under-classifying a situation and subsequently being found to have violated a particular legal framework applied by a court of law on an *ex post facto* basis.⁵⁵ Furthermore, it is in the strategic interests of parties to an armed conflict (major military powers in particular) to incorporate customary obligations into their military doctrine and practice when using military force in urban areas, as this can enhance the utility of force in contemporary asymmetric armed conflicts.⁵⁶

Precautions in attacking military objectives situated within urban areas

The concealment of military objectives within urban areas makes it difficult – if not impossible – to distinguish, as required by treaty-based and customary IHL, between the civilian population and combatants and between civilian objects and military objectives.⁵⁷ Within both legal frameworks, military objectives are defined as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’.⁵⁸ In asymmetric armed conflict, the weaker side will often deem concealment within urban areas to be a necessity to survive any onslaught by its militarily superior adversary. While the presence of military objectives among civilian populations in urban areas does not deprive the latter of their civilian character,⁵⁹ the presence of protected persons does not necessarily render the area in which such objectives are located immune from attack *per se*.⁶⁰ Whether or not the weaker side is merely benefiting from ‘the presence or movements of the civilian population or individual civilians’,⁶¹ or is violating international law by using them or directing their movements so as to create shields from attack or cover for military operations, Article 60(5) of the Vienna Convention on the Law of

54 Robin Geiss, ‘Armed violence in fragile states: low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, p. 136.

55 A. J. Carswell, above note 18, pp. 154–159.

56 *Ibid.*, p. 159; I. Arreguín-Toft, above note 6, pp. 151–164; R. Smith, above note 43, p. 330–331.

57 Protocol I, above note 21, Art. 48; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, ICRC and Cambridge University Press, Cambridge, 2005, (hereinafter *Customary IHL Study*), Rule 7.

58 Protocol I, above note 21, Art. 52(2); *Customary IHL Study*, above note 57, Rule 8; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) 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, 10 October 1980, Art. 2(6); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, Art. 1(f).

59 Protocol I, above note 21, Art. 50(3).

60 *Ibid.*, Art. 51(7); GC IV, Art. 28.

61 Protocol I, above note 21, Art. 51(7).

Treaties does not allow the militarily stronger adversary to suspend the operation of IHL.⁶² On the contrary, it is still legally bound by those treaty-based obligations, of which some, according to the ICRC, ‘now bear the stamp of customary law’.⁶³

Customary IHL thus stipulates that ‘constant care shall be taken to spare the civilian population, civilians and civilian objects’ and that ‘all feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects’.⁶⁴ Compliance with this customary obligation must be assessed according to the precautionary measures that were ‘feasible’ in the circumstances prevailing at the time.⁶⁵ Increasingly, non-governmental organizations, international governmental organizations, and international criminal tribunals have a major role in scrutinizing the legality of attacks. This involves an examination of capabilities and capacities in terms of intelligence, surveillance, and reconnaissance (ISR) and operational planning. Military superiority will often mean that, as capabilities render more precautions feasible in practice, higher standards of reasonableness become attainable and are thus expected, especially in urban areas, where the effects of hostilities are more acutely felt by the civilian population because such areas are usually the most densely populated.⁶⁶

Customary IHL obligations to verify military objectives, take all feasible precautions in the choice of means and methods of attack, and carry out ex ante proportionality assessments

Recent conflicts in Gaza, Chechnya, Iraq, and Afghanistan have seen major military powers employing means and methods of high-intensity conventional warfare against weaker adversaries concealed among civilian populations in urban areas, rather than on the open battlefield. As pointed out above, the impact that these conflicts have had on civilian populations and civilian objects calls for a reappraisal of the customary rule that parties to a 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 minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects’,⁶⁷ as well as the rule that parties to an armed conflict are prohibited from ‘[l]aunching 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’.⁶⁸ Assessing compliance with this obligation calls for an examination of the capabilities and circumstances prevailing at the material time.

62 See also *ibid.*, Art. 51(8).

63 *Commentary*, above note 38, Protocol I, para. 1989.

64 *Customary IHL Study*, above note 57, Rule 15.

65 Protocol I, above note 21, Art. 57(2).

66 See *Commentary*, above note 38, Protocol I, para. 2190.

67 *Customary IHL Study*, above note 57, Rule 17.

68 *Ibid.*, Rule 14.

A vital aspect of the principle of distinction is the obligation to do everything feasible to verify that prospective targets are indeed military objectives.⁶⁹ Military planners and decision-makers must exercise great care, vigilance, and precision at the planning stage to ensure that they are fully cognizant of all the facts and circumstances prevailing within their field of operations.⁷⁰ To do this, they must verify military objectives in good time⁷¹ and carefully evaluate the accuracy and reliability of target information.⁷² In particular, they must make careful and detailed assessments of the number and location of both civilians and civilian objects surrounding prospective military objectives. The element of feasibility indicates that the ability to carry out an accurate and timely identification of military objectives is an obligation of means, which depends to a large extent upon the ISR capabilities available in the circumstances. In other words, the reasonableness of the precautionary measures taken is entirely context-dependent. Essentially, parties can be expected to satisfy different standards of care according to their capabilities, their perception of the urgency of the situation, and the military constraints upon them.⁷³ This does not amount to an obligation to actively acquire and employ state-of-the-art ISR technologies, but merely to employ the full range of feasible means in order to gather the most accurate intelligence possible and ensure that the object of attack is a military one. Where this is even in the slightest doubt, it is the responsibility of military planners and decision-makers to issue orders for additional information or the gathering of further intelligence. A failure to exercise due diligence and reasonableness in that regard, or a failure to carry out a serious evaluation of the accuracy of information, will amount to a violation of this precautionary rule.⁷⁴

The prohibition of indiscriminate attacks, defined in customary IHL, *inter alia*, as attacks ‘which employ a method or means of combat which cannot be directed at a specific military objective; or ... the effects of which cannot be limited as required by international humanitarian law’,⁷⁵ is accentuated in situations of urban armed conflict, as military objectives will often be in close proximity to protected persons and objects. A core aspect of this prohibition is the obligation to avoid or minimize incidental loss by taking all feasible precautions in the choice of means and methods of attack.⁷⁶ This general requirement is to be applied on a case-by-case basis and does not amount to a prohibition of specific means or methods of warfare, or an obligation to actively acquire the most discriminating means of warfare.

As with the obligation to verify military objectives to the best of one’s means, this obligation is entirely context-dependent and looks to what was feasible

69 *Ibid.*, Rule 16.

70 *Commentary*, above note 38, Protocol I, paras. 2194 and 2195.

71 *Ibid.*, para. 2198.

72 *Ibid.*, para. 2195.

73 *Ibid.*, para. 2199.

74 *Ibid.*, para. 2195.

75 *Customary IHL Study*, above note 57, Rule 12(b) and (c).

76 Protocol I, above note 21, Art. 57(2)(a)(ii); *Customary IHL Study*, above note 57, Rule 17.

for the military decision-makers in their particular circumstances. Again, the feasibility element serves to modulate the underlying principle that IHL applies equally to parties to a conflict by varying the precautionary standards according to means and circumstances. This customary rule will be deemed violated where it can be demonstrated that, in the particular circumstances, it was feasible for a party to choose certain means and methods of attack over others that could have avoided or minimized incidental loss, and there was an omission in this regard.⁷⁷ In such circumstances, it would be unlawful not only to choose weapons that are by their nature indiscriminate when used against military objectives concealed among civilian populations in urban areas, but also wilfully or recklessly to create the conditions in which their use becomes inevitable under the stress and pressure of combat – or, in other words, to include certain conventional means of warfare within the operational arsenals of units deployed in urban areas to the exclusion of feasible alternatives that are more appropriate. The types of inappropriate weapon referred to here are those that have wide fatal and destructive impact zones and includes mortars, flechettes, artillery shells, and shells containing hazardous materials that may remain in the urban environment after the cessation of hostilities, such as depleted uranium and white phosphorous. Although these weapons are not currently subject to specific treaty-based prohibitions, it must be assumed that a decision to choose such weapons over feasible and more discriminating alternatives in such circumstances is a reckless violation of this obligation.⁷⁸ Those alternatives may include weapons of various lethality and destructiveness, including precision weaponry and non-lethal weaponry that is designed to incapacitate rather than destroy combatants and matériel. However, although there is no legal obligation to acquire and use such forms of weaponry *per se*, their use reduces the risk of violating the customary rule of proportionality.⁷⁹ This will be discussed in more detail below.

Ex ante proportionality assessments by those who plan or decide upon an attack are an integral feature of precautionary measures and must persist right up to the point at which an attack is launched.⁸⁰ Furthermore, an attack must be cancelled or suspended if it becomes apparent that the attack would be, *inter alia*, disproportionate.⁸¹ One of the main issues with the principle of proportionality is that it requires military planners and decision-makers to strike a balance between military and humanitarian considerations in good faith. This involves a subjective

77 For some examples see *Commentary*, above note 38, Protocol I, para. 2200; *Customary IHL Study*, above note 57, Rule 17.

78 United Nations Human Rights Council (UNHRC), *Human Rights in Palestine and Other Occupied Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 15 September 2009, paras. 698–699.

79 Michael N. Schmitt, *War, Technology, and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series No. 4, Summer 2005, p. 23; Danielle L. Infeld, 'Precision-guided munitions demonstrated their pinpoint accuracy in Desert Storm: but is a country obligated to use precision technology to minimize collateral civilian injury and damage?', in *George Washington Journal of International Law and Economics*, Vol. 26, 1992, p. 109.

80 See Protocol I, above note 21, Art. 57(2)(a)(iii); *Customary IHL Study*, above note 57, Rule 18.

81 Protocol I, above note 21, Art. 57(2)(b); *Customary IHL Study*, above note 57, Rule 19.

evaluation of whether the attack may be expected to cause incidental loss that is excessive in relation to the anticipated military advantage.⁸² The ICRC *Commentary* notes that *ex ante* proportionality assessments should take into account factors such as the location of civilians and civilian objects in relation to the military objective; the accuracy of the weapons; the nature of the military objectives, including whether they can release dangerous forces; and the stability of the terrain, especially with regard to the risk of floods and landslides.⁸³ Wilfully launching an indiscriminate attack in the knowledge that it will cause disproportionate incidental loss constitutes a serious violation of treaty-based and customary IHL applicable to conflicts of both an international and a non-international character and may attract criminal sanction.⁸⁴ Where courts of law or political inquiries come to assess whether constant care has been taken to spare the civilian population from the effects of attacks, detailed examinations of the particular ISR, targeting, and weapons capabilities and capacities will be made. In this sense, parties to a conflict will be judged according to the extent of their own means, and the greater the feasible means, the less scope there is for plausible deniability.⁸⁵

A higher standard of due diligence is likely to apply in relation to attacks upon 'planned' targets where there is time for the application of rigorous precautionary measures. The joint targeting doctrine of the United States Joint Chiefs of Staff describes 'planned targets' as those that have been identified within an operational theatre and are then pursued in accordance with operational plans and schedules or attacked whenever the circumstances permit.⁸⁶ In contrast, the joint targeting doctrine categorizes 'immediate' targets as those that are known in advance but not operationalized or those targets of which there is simply no prior knowledge.⁸⁷ This doctrine has major implications for regulating the conduct of urban warfare, as the respective categories of 'planned', 'on-call', 'unplanned', and 'unanticipated' targets may be designated as 'time-sensitive', because they pose an immediate threat or because they constitute high value but 'fleeting' military objectives that may be lost if not immediately attacked.⁸⁸ The dynamics of asymmetric conflict may lead to a prevalence of 'unplanned' and 'unanticipated' military objectives because, in the face of their opponent's overwhelming and insurmountable military capabilities, the weaker side may have no option but to employ unconventional methods, such as 'defenceless defence' (whereby rather than defending specific objectives they are organized into small and highly manoeuvrable units that can disperse to another location immediately upon launching an attack) and 'concealment warfare' (which makes it difficult or

82 *Commentary*, above note 38, Protocol I, para. 2208.

83 *Ibid.*, para. 2212.

84 Protocol I, above note 21, Art. 85(3)(b); *Customary IHL Study*, above note 57, Rule 155.

85 Jean-François Quéguiner, 'Precautions under the law governing the conduct of hostilities', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, p. 978.

86 Michael N. Schmitt, 'Precision attack and international humanitarian law', in *International Review of the Red Cross*, Vol. 87, No. 859, September 2005, p. 450.

87 *Ibid.*

88 *Ibid.*

impossible for the stronger side to distinguish between combatants and civilians until the former suddenly emerge to execute an attack).⁸⁹ In response, there is the increased risk that the militarily superior side will classify most military objectives as ‘immediate targets’ and subject them to truncated precautionary measures or take no precautionary measures whatsoever. Such an approach may be justified on the grounds that the application of diligent precautionary measures is not feasible in the circumstances. Although this does not necessarily violate rules on precaution, the results of such attacks may still be disproportionate and thus amount to indiscriminate forms of attack. That said, for parties to a conflict with advanced ISR capabilities, rapidly launching attacks upon purportedly ‘time-sensitive’, ‘unplanned’, and ‘unanticipated’ targets within urban areas may nevertheless be difficult to justify from tactical and legal viewpoints.

In asymmetric armed conflicts, unconventional tactics such as emerging, attacking, and disappearing in a fleeting moment may mean that rapid responses directed at the *location* of an attack from within an urban area are as ineffectual as a delayed response, and there is the further risk that responding to such provocative tactics increases the likelihood of violations of IHL. This argument has been made by Human Rights Watch, which claims that rapid responses directed at ‘immediate’ targets by US forces in Iraq have resulted in excessive incidental loss.⁹⁰ The general principle of proportionality will be discussed in greater detail below, but at this stage of the discussion it is suggested that incidental loss caused by attacks upon ‘immediate’ targets that emerge among civilian populations within urban areas is likely to be indicative of a failure to take adequate precautionary measures.⁹¹ This, as noted above, constitutes a serious violation of customary IHL. As an alternative, and where feasible, advanced ISR capabilities should increasingly be used to identify, pursue, verify, and destroy military objectives in real time, so as to ascertain the military objective and choose the most reasonable means, methods, and locations of attack in order to avoid or minimize collateral damage.

Effective warnings

Customary IHL requires that: ‘Each party to the conflict must give effective advance warning of attacks which may affect the civilian population’.⁹² This particular obligation applies insofar as the circumstances permit, and parties therefore have considerable latitude to derogate from it. Derogation may, for instance, be made purely on grounds of convenience, the most obvious example being where the element of surprise is deemed to be a necessary condition for the success of an attack.⁹³ In other words, if military planners or decision-makers expect an attack

89 B. Steed, above note 1, ch. 9.

90 Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, New York, 2003, pp. 20, 23, and 38; R. Geiss, above note 54, pp. 798–799.

91 See J.-F. Quéguiner, above note 85, p. 799.

92 *Customary IHL Study*, above note 57, Rule 20; Protocol I, above note 21, Art. 57(2)(c).

93 *Commentary*, above note 38, Protocol I, para. 2223.

that may affect the civilian population to be proportionate, they are in principle required to give a warning, unless to do so would undermine the success of the attack or otherwise render the attack useless. Adherence to the precautionary measures outlined above means that attacks on military objectives concealed among civilian populations in urban areas can be perfectly proportionate even though no warning, or no effective warning, has been given. Considering that precautionary measures, such as giving an effective warning, are of ‘greatest importance in urban areas because such areas are most densely populated’⁹⁴ and there is thus an increased risk of incidental loss or damage, it is suggested that in circumstances where there is a significant inequality of arms between parties to an urban armed conflict, the stronger attacking side’s discretion to derogate from this obligation should be limited by careful scrutiny of any justifications for non-compliance, as part of any *ex post facto* judicial or political inquiries.

Indeed, the ICRC *Commentary* suggests that the possibilities of giving warning are increased where an attacking side has complete air supremacy over an urban area concealing a weaker side that has either no air defences or only very basic capabilities, such as rocket-propelled grenade launchers or surface-to-air missiles.⁹⁵ Even so, where these basic capabilities exist, they may be negated by the superior side’s own defensive capabilities. These considerations are extremely important in asymmetric urban armed conflicts, as one aspect of taking constant care of civilians is ensuring that they are given the chance to protect themselves.⁹⁶ Examples given by the ICRC of measures to facilitate this include giving notice by radio or pamphlets that particular objectives or categories of objective will be subject to attack.⁹⁷

More recently, the Report of the UN Fact Finding Mission on the Gaza Conflict elucidates in greater detail the practical means of warning civilians, and the form and degree of specificity required for warnings to be considered effective.⁹⁸ First, warnings can be issued through various media, such as announcements on television, radio, or public address systems, automated telephone calls, and leaflets. Essentially, effective warnings are those that actually reach the civilians likely to be exposed to the attack. Secondly, warnings should be as clear as possible. They should specify the particular individuals or groups to whom the warning is addressed and, ‘unless the circumstances do not permit’, the warning should state the location and the approximate time of the impending attack. In this regard, general information about an upcoming attack will not normally constitute an effective warning, as civilians should not be left guessing its meaning.⁹⁹ Moreover, warning shots from light weapons can not be considered as effective advance warnings, as it is unclear whether they constitute a warning of an impending attack or the actual attack itself, and civilians cannot reasonably be expected to evacuate an area that

94 *Ibid.*, para. 2190.

95 *Ibid.*, para. 2224.

96 *Ibid.*, para. 2225.

97 *Ibid.*, paras. 2224–2225.

98 UNHRC, above note 78, paras. 528–532.

99 *Ibid.*

they perceive to be already under attack. Thirdly, warnings should give civilians sufficient time to react. Fourthly, warnings should advise civilians on the steps they need to take to avoid harm. In particular, they should inform the persons concerned where they can and should seek safety, so that the civilian population does not in fact flee in terror and confusion to areas that may be considered similarly unsafe. Where armed forces are capable of making detailed advance plans, the warnings will need to be part of comprehensive and joined-up contingency measures to evacuate the civilian population to areas that can be considered or have been designated by both sides as safe. Such a warning must include the location of emergency shelters and safe areas, as well as safe routes to get to them and the necessary precautions to take. Finally, the warnings should be credible: that is, civilians must be in no doubt that they are intended to be acted upon.¹⁰⁰

The UN Secretary-General has made the important point that modern technology can enable a major military power to exercise effective control over a territory even though it has no military presence on the ground.¹⁰¹ While this does not necessarily amount to a form of occupation,¹⁰² it is submitted that the greater the means of an attacker, the more it must do to comply with the obligation to give advance warning, as suggested above, when confronted with an insurgency or resistance within and across urban areas that are under its effective control;¹⁰³ for, in such circumstances, inequality of arms and the availability of advanced ISR and weapons technologies have generally reduced the importance of the element of surprise as a necessity of war. Also, given that the risk of incidental loss or damage in densely populated urban areas is greater, the militarily superior side should in such circumstances operate on the basis that not giving an effective advance warning is likely to violate that precautionary rule of customary law, because civilians in close proximity to military objectives are then not given the chance to protect themselves.

Proportionality in urban warfare

The customary IHL principles of precaution and proportionality are closely interrelated and are of fundamental importance in situations of armed conflict in densely populated urban areas. Generally speaking, the normative functions underlying these rules are that parties to a conflict must keep civilians out of harm's way as far as possible¹⁰⁴ or otherwise that the danger and harm to which civilian populations are exposed must be 'reduced to a minimum'.¹⁰⁵ As will now be

¹⁰⁰ *Ibid.*

¹⁰¹ Note by the UN Secretary-General, *Situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/61/470, 27 September 2006, para. 7; see also Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 83–85.

¹⁰² S. Vité, above note 101, pp. 83–85.

¹⁰³ N. Melzer, above note 22, pp. 365–366.

¹⁰⁴ *Commentary*, above note 38, Protocol I, para. 1923.

¹⁰⁵ *Ibid.*, para. 1935.

explored, the practical application of these rules comes under great strain in situations of asymmetric urban armed conflict.

Customary IHL requires *ex ante* proportionality assessments¹⁰⁶ to be carried out, not only as part of the obligation to take all feasible precautions in attack, but furthermore because, even if all other conditions for a legitimate attack are fulfilled, ‘incidental civilian losses and damages must not be excessive’.¹⁰⁷ In this respect customary IHL prohibits the actual launching of 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’.¹⁰⁸ Launching such a disproportionate attack is to be considered as a form of indiscriminate attack,¹⁰⁹ and may constitute a war crime.¹¹⁰ In this context, one of the key challenges to fixing the ‘technical limits at which the necessities of war ought to yield to the requirements of humanity’¹¹¹ is that the test of proportionality is designed to be made *ex ante*, while its practical application will be assessed *ex post facto*. In particular, for an indiscriminate attack to constitute a war crime, the prosecution must prove ‘that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties’.¹¹² Thus, because proportionality is to be assessed according to a subjective *mens rea* standard, there is nothing *prima facie* that the law can do to prevent normative relativism, or, in other words, the phenomenon of military planners and decision-makers assigning particularistic values to relative terms such as ‘excessive’ and ‘military advantage’ that are entirely in keeping with their own idiosyncratic military, social, cultural, and historical perspectives and imperatives. The challenge this creates with regard to ensuring the general protection of civilians, especially those caught up in urban armed conflicts, is that the practical application of this aspect of IHL requires not only ‘complete good faith on the part of belligerents’ but also ‘the desire to conform with the general principle of respect for the civilian population’.¹¹³ These are qualities that may be in short supply in asymmetric conflicts, where pushing the rules of IHL to their vanishing points – or indeed their outright violation – is deemed to be justified by military necessity.

Calculating proportionality

Military objectives are defined in customary law as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action

106 *Customary IHL Study*, above note 57, Rule 18.

107 *Commentary*, above note 38, Protocol I, para. 1979.

108 *Customary IHL Study*, above note 57, Rule 14; Protocol I, above note 21, Art. 51(5)(b).

109 Protocol I, above note 21, Art. 51(5)(b); *Commentary*, above note 38, Protocol I, para. 1967.

110 See, for instance, Rome Statute of the International Criminal Court, 17 July 1998, Art. 8(2)(b)(iv).

111 St. Petersburg Declaration, above note 2, Preamble.

112 ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber I), 5 December 2003, para. 59; Protocol I, above note 21, Art. 85(3)(b); *Customary IHL Study*, above note 57, Rule 156.

113 *Commentary*, above note 38, Protocol I, para. 1978.

and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.¹¹⁴ Military planners and decision-makers are responsible for assessing whether the expected incidental loss, injury, or damage will be excessive in relation to the military advantage anticipated. As there is no accepted standard of comparison in this regard, there is a wide margin of discretion to assign greater weight or importance to the advantages anticipated by the destruction or neutralization of particular military objectives than to the humanitarian consequences.¹¹⁵ The 'difficult constraints of battle',¹¹⁶ as well as political and military indoctrination, may serve to skew this "balancing" or "equation" between the necessities of war and the requirements of humanity',¹¹⁷ with the result that military commanders can easily refute claims of excessiveness in view of seemingly extensive, widespread, and systematic collateral damage. State practice, as evidenced from reservations entered on ratifying Additional Protocol I, indicates that an attack can be considered at a tactical or even a theatre level rather than at an operational level.¹¹⁸ The consequences of such diverging interpretations are, first, that incidental damage resulting from an individual operation or 'isolated attack' may be balanced against the military advantage from an attack consisting of a number of discrete operations considered as a whole; and, secondly, that states have adjusted their legal obligations to varying levels, with the concomitant increased risk of humanitarian law being applied inconsistently.

This cumulative approach to calculating proportionality, whereby a number of discrete attacks are valued together to form an aggregate military advantage that is then balanced against net incidental loss, is one that can be distorted and used to conceal and justify isolated attacks that arguably – from the perspective of 'public consciousness' and 'humanity' as opposed to purely legal and military perspectives – result in unacceptable levels of collateral damage. In such situations and on the basis of such an approach, the censure of such acts is unlikely because the military planners and decision-makers responsible for applying the proportionality principle are to be judged solely according to 'the information reasonably available to them at the relevant time' and not according to 'information that has subsequently come to light'.¹¹⁹ The principle of proportionality is designed to be applied *ex ante* and is concerned exclusively with a military commander's subjective appreciation of the quantum of risk and the military advantage at the time of making a decision.

114 *Customary IHL Study*, above note 57, Rule 8; see also Protocol I, above note 21, Art. 52(2).

115 Antonio Cassese, *The Human Dimension of International Law*, Oxford University Press, Oxford, 2008, p. 246.

116 *Commentary*, above note 38, Protocol I, para. 1981.

117 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, Dissenting Opinion of Judge Higgins, para. 20.

118 See United Kingdom, Reservation of 28 January 2002, available at: <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (last visited 15 June 2010): 'the military advantage anticipated from the attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack'.

119 See Canada, Reservation of 20 November 1990, available at: <http://www.icrc.org/ihl.nsf/NORM/172FFEC04ADC80F2C1256402003FB314?OpenDocument> (last visited 15 June 2010).

The spatial and temporal scope of the proportionality principle

The concept of a military objective is broad in scope and means that 'dual-use' infrastructure, such as electric power stations, may lose immunity from attack because they supply power for both civilian and military uses and can thus be deemed to be making an effective contribution to military action. The approach of assessing the 'concrete and direct' military advantage anticipated from the attack as a whole does not similarly take into account any indirect incidental loss and damage caused 'as a whole', but merely the immediate and direct incidental loss caused by blast or fragmentation. Thus one of the limitations of the *lex lata* is that the 'cascading effects'¹²⁰ of attacks may be discounted from proportionality assessments: that is, even though attacks upon objectives such as electric power stations may be justified on the basis that they make an effective contribution to military action by powering military communications and weapons systems, attacking them may cause civilian mortality rates to rise over time because they are also necessary for civilian health and survival by powering hospitals, sewerage, and water treatment systems.

It may be argued that, from the point of view of military planners and decision-makers, such information on the 'cascading effects' of attacks is generally not available within the 'fog' of battle and is thus outside their scope of appreciation. Hence, judging commanders upon the information available to them at the time of an attack can only serve to limit the timeframe within which incidental loss can be calculated. The effect of such a restrictive interpretation is to render the rule of proportionality less effective as a protective measure. However, modern technology combined with advanced scientific knowledge and techniques allows the likely impact of destroying key dual-use infrastructure to be reasonably foreseeable. For instance, the declassified Defense Intelligence Agency memorandum on 'Iraq water treatment vulnerabilities' identified already in 1991 that a failure to secure supplies for water treatment 'could lead to increased incidences, if not epidemics, of disease and to certain pure-water-dependent industries becoming incapacitated, including ... pharmaceuticals, food processing ...'.¹²¹ It is submitted that, where such predictions are possible and reasonably available, they should be taken into account as part of detailed advance target analysis and operational planning, as well as in *ex post facto* assessments of proportionality. As will now be discussed, recent moves to strengthen the proportionality principle by forging an objective approach indicate that plausible deniability on the part of military and political decision-makers of superior military forces is increasingly untenable.

120 M. N. Schmitt, above note 86, p. 452.

121 Defense Intelligence Agency, 'Water treatment vulnerabilities', Washington DC, available at: http://www.gulflink.osd.mil/declassdocs/dia/19950901/950901_511rept_91.html (last visited 10 May 2010); Joy Gordon, 'When intent makes all the difference in the world: economic sanctions on Iraq and the accusation of genocide', in *Yale Human Rights and Development Law Journal*, Vol. 5, 2002, pp. 70–74.

The development of an objective approach to proportionality

The ‘Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’¹²² shows signs that the general approach to the principle of proportionality is changing in character. Such a change makes IHL stronger and able to protect civilians more effectively from the use of conventional high-intensity means and methods of warfare against forces concealed within urban areas. In seeking to further substantiate the concept of ‘military advantage’, the Committee considered a number of questions. The first was: (a) what are the relative values to be assigned to the military advantage gained, the injury to non-combatants, and the damage to civilian objects, and (b) what is included or excluded in totalling the sums? Unlike the relative values assigned to chess pieces, the Committee noted that in reality these issues cannot be definitively answered *in abstracto*. To date there exists no universal quantitative or qualitative standard of comparison, although in many cases a quantitative approach to comparing humanitarian and military considerations will be the most obvious and practical one for assessing excessiveness. The second question was: what is the standard of measurement in time or space? On the basis of the discussion above, it is suggested that, if military advantages can be defined very broadly, then the timescales for calculating the incidental damage should be construed in a similarly broad manner, rather than being limited to the immediate and direct effects of isolated attacks – especially in a paradigm where this can be reliably predicted and thus factored into projections. Thirdly, the Committee asked: to what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects? It is suggested that limiting the risk to which matériel and combatants are exposed constitutes a concrete and definite military advantage, but within the emerging paradigm of unmanned surveillance systems and precision-weapon platforms, this issue should become obsolete as technological innovations lead to a greater coincidence of military and humanitarian interests.¹²³

The crux of this discussion is the Committee’s statement that ‘there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained’.¹²⁴ The approach of reasonableness in balancing the necessities of war with the requirements of humanity has been affirmed in *Galić*, where it was 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

122 ICTY, *Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia*, June 2000, 29 ILM 1257.

123 *Ibid.*, paras. 48–50.

124 *Ibid.*, para. 50.

perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.¹²⁵

This is a legal breakthrough, as it marks the development of a much-needed objective approach to proportionality that can determine on a case-by-case basis whether an attack was excessive in view of the evidence indicating the actual circumstances and consequences, rather than just the military planner's subjective appreciation. The ruling in *Galić* means that attacks that cause an apparently excessive level of loss, injury, or damage, or a combination thereof, 'may give rise to the inference that civilians were actually the object of attack'.¹²⁶ Looking into the circumstances of the actual perpetrators and examining their ISR capabilities may allow for higher objective standards of reasonableness to be imposed, on the basis that excessive incidental loss will generally be foreseeable and thus intended.

Obligations to ensure the survival of civilians and the civilian population in urban conflict

Even though parties may claim that hardship, suffering, and loss among the civilian population are inevitable consequences of urban armed conflict,¹²⁷ it does not relieve them of their customary obligations to provide at all times for the safety and needs of the civilian population by ensuring the protection of objects indispensable to its survival, ensuring protection and care for wounded civilians, and ensuring humanitarian relief for civilians in need.

Access to emergency medical services in urban conflicts

It is inevitable that, despite the most diligent precautions taken, civilians will often be severely injured in urban warfare. Nevertheless, customary IHL requires that 'The wounded ... must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition'.¹²⁸ This has been interpreted as an 'obligation of means', meaning that armed forces must use their best efforts to provide protection and care for the wounded, including humanitarian organizations to provide for their protection and care.¹²⁹ Organizations such as the International Committee of the Red Cross, *Médecins Sans Frontières*, and the World Health Organization will often also play a major role in searching for, evacuating, and providing protection and care for wounded civilians. Although in practice humanitarian organizations such as these need permission from the party in control of a particular area in order to operate, they cannot arbitrarily be denied such permission.¹³⁰ As with many of the customary

125 ICTY, *Galić*, above note 112, para. 58.

126 *Ibid.*, para. 60.

127 UNHRC, above note 78, para. 1313.

128 *Customary IHL Study*, above note 57, Rule 110.

129 *Ibid.*, Rule 110.

130 *Ibid.*

rules discussed above, alleged violations of this rule require a detailed investigation into the circumstances of each particular case. Typical examples include unnecessarily and arbitrarily preventing or delaying ambulances from reaching wounded civilians or taking them to hospital, and even knowingly directing attacks against personnel and units using the distinctive emblems of the Geneva Conventions in conformity with international law. This obligation requires that soldiers in control of checkpoints be adequately briefed as to when and where combat operations will be taking place, so that permission is denied only when absolutely necessary.¹³¹ Inspections must take place without undue delay and, to avoid violating the above-mentioned provisions of customary IHL, reasonable commanders of armed forces engaged in asymmetric urban warfare should arrange for a daily unilateral suspension of military operations, during which access to emergency medical services and supplies can take place.¹³²

The passage of humanitarian relief in urban conflicts

In situations of asymmetric urban conflict, the militarily superior side will often be able to lay siege to urban areas that conceal the weaker adversary or at least impose severe restrictions on them, such as embargoes and blockades. Military necessity may be argued in an attempt to justify the suffering and hardship caused to the civilian population by such measures, which have indeed been used as a method of war in order to isolate, suppress, and destroy the enemy, but which can also be designed to create the type of intolerable conditions in which a civilian population is effectively coerced into withdrawing support from armed forces hiding in urban areas. In the face of such measures, it is the right of a civilian population to receive impartial humanitarian relief delivered in accordance with IHL. Customary IHL requires that parties ‘allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.¹³³ Organizations do require the consent of the parties to a conflict before they can deliver humanitarian relief, and the content and delivery thereof can be monitored by means of searches and supervision, but relief must not be deliberately withheld.¹³⁴ Such conduct can be construed as using starvation of the civilian population as a method of warfare, in violation of international treaty-based¹³⁵ and customary IHL.¹³⁶ To avoid violating the above-mentioned obligations of customary IHL, reasonable commanders of armed forces engaged in asymmetric urban conflict should arrange for a daily unilateral suspension of military operations, during which co-ordinated humanitarian assistance can be delivered to ensure that facilities, services, and

131 See *ibid.*, Rules 25, 28, 29, 109, and 110.

132 *Ibid.*, Rule 109.

133 *Customary IHL Study*, above note 57, Rule 55.

134 Protocol I, above note 21, Art. 70(3).

135 *Ibid.*, Art. 54(1); Protocol II, above note 38, Art. 14; Rome Statute, above note 110, Art. 8(2)(b)(xxv).

136 *Customary IHL Study*, above note 57, Rule 53.

installations indispensable to the survival of the civilian population continue to function and that the population's basic needs are met.

Objects indispensable to the survival of the civilian population

During urban armed conflicts, objects indispensable to the survival of the civilian population are often under serious threat. To attack such objects will generally constitute a violation of the cardinal customary principle of distinction, which prohibits attacks against civilian objects.¹³⁷ Thus customary IHL generally prohibits 'attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population'.¹³⁸ A list of such objects is to be found in Protocols I and II and includes foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works.¹³⁹ In spelling out the concept of 'objects indispensable to the survival of the civilian population', the use of the words 'such as' introducing that list shows that it is non-exhaustive and can thus include dual-use facilities that support drinking water installations, such as electric power stations. The challenge in situations of asymmetric urban warfare is that the dual-use function of such objects (i.e. that while serving civilian purposes they are also being used 'in direct support of military action') may be cited as justification for attacks upon them.¹⁴⁰ Regardless of claims that the attack was carried out for a specific purpose other than denying sustenance to the civilian population, where attacks on dual-use infrastructure 'may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement',¹⁴¹ they will not be permissible.

By recognizing that 'starvation' does not only mean death due to deprivation of water and food but also due to malnutrition, sickness, and disease resulting from deprivation of essential foodstuffs, medicines, and commodities, the Preparatory Commission for the International Criminal Court made it clear that the scope of this customary rule is not as narrow as it would otherwise first appear.¹⁴² In any case, when it comes to targeting decisions in asymmetric urban armed conflict, greater military capabilities and capacities will lead to higher standards of reasonableness vis-à-vis the obligation to choose military objectives that may be expected to cause the least danger to civilian lives,¹⁴³ as well as the most proportionate means and methods of attacking those objectives. Indeed, for

137 *Ibid.*, Rule 7.

138 *Ibid.*, Rule 54.

139 Protocol I, above note 21, Art. 54 (2); Protocol II, above note 38, Art. 14.

140 Protocol I, above note 21, Art. 54(3)(b).

141 *Ibid.*

142 Knut Dörmann, 'Preparatory Commission for the International Criminal Court: the elements of war crimes – part II: other serious violations of the laws and customs applicable in international and non-international armed conflicts', in *International Review of the Red Cross*, Vol. 83, No. 842, 2001, pp. 475–476.

143 *Customary IHL Study*, above note 57, Rule 21.

many modern armed forces that have the wherewithal to be discriminating, precautionary, and proportionate in achieving their military objectives at operational and theatre levels, it must be considered unreasonable to have recourse to forms of wholesale destruction that are unacceptably detrimental to food security and public health.¹⁴⁴ As the effects of a widespread and systematic destruction of objects indispensable to the survival of a civilian population are likely to be multiplied where humanitarian aid is unreasonably denied or delayed,¹⁴⁵ such acts strongly indicate a policy of collective punishment of that population.

Conclusion

The ‘progress of civilization’ compels an adaptive interplay between the changing character of conflict and parties to it, advancing technologies and progressive ‘usages established among civilized peoples’, ‘laws of humanity’ and ‘dictates of the public conscience’.¹⁴⁶ Emerging from this dialectical process are higher standards of reasonableness. This ought to foster a greater coincidence of military and humanitarian interests, which in turn ought to lead to a population-centric approach to the modern scourge of asymmetric urban warfare prevalent in all categories of armed conflict. A defining feature of this form of war is that only where their weaker opponent fights on their terms are conventional armed forces most likely to prevail, through their superior capabilities, at the operational and theatre levels. This can be seen from the empirical survey by Arreguín-Toft of 202 asymmetric conflicts that took place between 1816 and 2003. It shows that where asymmetric adversaries use diametrically opposed military strategies – for instance, where a weaker side adopts the means and methods of guerrilla warfare as a counter-strategy to a militarily superior side’s conventional offensive – the weaker side is almost three times more likely to prevail over the stronger side than if it were to fight using the same means and methods of warfare as the stronger opponent.¹⁴⁷ The survey also shows that, in the period 1950–1999, militarily strong adversaries were defeated in 51.2% of all asymmetric conflicts.¹⁴⁸ Arreguín-Toft’s findings suggest that weaker adversaries generally prevail in asymmetric conflicts because they adopt unconventional counter-strategies that transform the hostilities into protracted wars of attrition, which become politically costly and unsustainable for the stronger side. In such situations, a stronger side may attempt to employ similarly unconventional and indirect strategies to defeat its weaker opponent. However, the historical case studies analysed by Arreguín-Toft, such as the Battle of Algiers in 1957 and Operation Rolling Thunder during the 1965–1973 Vietnam

144 UNHRC, above note 78, paras. 1324–1325.

145 *Ibid.*

146 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Preamble.

147 I. Arreguín-Toft, above note 6, p. 205.

148 *Ibid.*, p. 4.

War, indicate that ‘barbarism’ is a self-defeating strategy, especially if the long-term goals are to achieve a political outcome such as peace and security or regime change, because it serves to increase political and military resistance.¹⁴⁹ Moreover, as argued by Walzer, the strategic pitfall for militarily stronger sides is that asymmetric conflicts have a tendency to escalate into wars not only among but also against entire civilian populations – in this sense, there is a danger that ‘barbarism’ may become an inevitable outcome of asymmetric urban armed conflict.¹⁵⁰ International and internal asymmetric urban armed conflicts are ‘a mere continuation of policy by other means’,¹⁵¹ and for this reason, until the frameworks of international humanitarian and human rights law are further developed or reformed to ensure the universal application of satisfactory humanitarian protections, it is a strategic imperative that customary IHL be integrated into basic military doctrine and practice, which must in turn become part of a broader political and economic strategy towards achieving legitimate aims. What the Lieber Code, the first modern codification of the laws of war, told the armies of the United States of 1863 was as wise praxis then as it is now: ‘Military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult’.¹⁵² Thus, as been outlined above, a failure to be reasonable does not create the conditions in which the use of superior force can be beneficial at the strategic level, namely to facilitate peace, justice, and security; on the contrary, it may create and intensify internal and internationalized armed conflicts as adversaries are forced into adopting more and more unconventional means and methods of warfare in order to counter conventional military superiority. If there is anything to be learned from the hostilities in cities, towns, and villages in Vietnam, Chechnya, Lebanon, Iraq, Afghanistan, the West Bank, and Gaza, it is that asymmetric urban warfare is seldom decisive, and furthermore that failure to adopt a population-centric approach to urban warfare can undermine the utility of force by making the return to peace unnecessarily difficult. The application of customary IHL can but serve to increase the utility of force in modern conflicts when viewed from a strategic perspective, in that, aside from ideological differences, all parties to any armed conflict have a fundamental interest in peace, justice, and security and that unbridled military force alone cannot achieve these ends.¹⁵³

149 *Ibid.*, pp. 211–213, 220–227.

150 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn, Basic Books, New York, p. 187.

151 C. von Clausewitz, above note 12, Book 1, ch. 1, para. 24.

152 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 16.

153 R. Smith, above note 43, part III.