

Protecting civilians in urban areas: A military perspective on the application of international humanitarian law

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Abstract

Implementing the principles of international humanitarian law (IHL) represents a real challenge if the protection of civilians in today's urban armed conflicts remains a priority for armed forces. The application of the principle of distinction comes up against the difficulties of obtaining intelligence, in particular in the absence of troops on the ground. The minimalization of collateral damage requires putting in place very precise targeting procedures, and even the adoption of tactics designed to draw out traditional combat from cities. In terms of precautionary measures in attack or against the effects of an attack, these must be adapted to the context of urban combat. Nevertheless, IHL remains an essential instrument that must be analyzed and translated into action in a practical manner in order to conduct military operations that are at the same time effective and legally permissible.

Keywords: international humanitarian law, protection of civilians, cities, urban areas, targeting, distinction, proportionality, collateral damage, precaution, French armed forces, intelligence, troops on the ground.

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Introduction

It would be unrealistic and naive to imagine a “clean” war¹ with no civilian casualties. Just the opposite is commonly observed in the types of conflict prevalent today, often non-international in nature, involving organized armed groups disinclined to respect the customs of war and taking place, in some cases, in the territory of a failed State. It is in these types of situation that civilians suffer the most as a result of the fighting and are sometimes even deliberately targeted, particularly in urban environments, as is the case now in Syria, Gaza, Yemen and eastern Ukraine.

In this context, it is tempting to point to the inadequacy of the rules of international humanitarian law (IHL), which do not *a priori* take into account the new types of “combatants” and their asymmetric forms of warfare or consider the consequences of the use of new technologies. In my view, however, two preliminary observations need to be made before making such a judgement. First, IHL is a rich body of law, open to interpretation, and we would do well to explore all its possibilities before disparaging it. Second, it should not be forgotten that the failure of a party to a conflict to respect IHL does not release the other from its obligations in this respect, and this tends to reinforce a virtuous circle of practical IHL implementation.

As a legal practitioner for the French armed forces, I would like to share some reflections on the practical difficulties of implementing the principles of IHL (especially distinction, proportionality and precaution) in today’s conflicts, particularly in urban areas, and the solutions that would allow the parties to act according to these principles and in keeping with the spirit of IHL.

Difficulty of applying the principle of distinction in urban areas

The very nature of cities makes it complicated for armed forces to apply the principle of distinction in respect of objects.² Cities are, by definition, made up of countless civilian objects (dwellings, shops, schools, hospitals, etc.). Objects that are, by nature, military objectives (barracks, air bases, headquarters, etc.) are sometimes interwoven in the fabric of the city, whether as a result of urban extension or by design. In non-international armed conflicts (NIACs) in which

- 1 In the wake of the shock of defeat in Vietnam, the idea of “clean” or “zero-casualty” warfare spread and gained wide currency in the first Gulf War. See François-Bernard Huyghe, “The Impurity of War”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009. See also Guylain Chevrier, “Guerre du Golfe et télévision: Un mariage stratégique”, *Cahiers d’Histoire: Revue d’Histoire Critique*, No. 86, 2002.
- 2 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Article 52(2): “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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.”

regular State armed forces fight organized armed groups (OAGs), the military infrastructures of the latter tend to be very difficult to identify, because they are often pragmatically located in originally civilian buildings. The first difficulty for armed forces deployed in a conflict in which the adversary is operating in a city is therefore to pinpoint, based on various forms of intelligence, the exact location of enemy military facilities and the objects that, by their nature, could be considered essentially military objectives.

Armed forces are immediately confronted with the problem of dual-use facilities,³ particularly so in urban warfare. These are facilities that are civilian by nature but are used for both military and civilian purposes and can therefore be regarded as military objectives. There are many and varied examples, including bridges, roads, power stations and electricity distribution and transmission networks. The challenge for the armed forces, in terms of the intelligence function, is to gather as much information as possible on what use is being made of the facilities and try to determine, as accurately as possible, how this use is shared between the enemy forces and the civilian population. In the case of an oil refinery, for example, it would be necessary to establish the amount of fuel being directly supplied to enemy troops and the precise impact the destruction of the plant would have on the conduct of the enemy's operations. The share of the output destined for civilian use, to provide fuel for vehicles, heating, etc., must then also be calculated. The analysis reveals whether the facility is indispensable to the survival of the population; if so, it is entitled to special protection under IHL.⁴ The analysis also determines the direct and indirect risks that the loss of these resources would have on civilians. Furthermore, the findings of the analysis would be taken into account in determining proportionality, as will be seen below.

Some questions arise in respect of the definition of objects indispensable to the survival of the civilian population provided in Article 54 of Additional Protocol I to the Geneva Conventions (AP I). Article 54 is primarily concerned with food supplies, and its main purpose is to prohibit the use of starvation as a method of warfare. The scope of application of this rule of customary law⁵ is, however, broader than might first be supposed. The Preparatory Committee for the establishment of a permanent international criminal court recognized that the

3 See Henry Shue and David Wippman, "Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions", *Cornell International Law Journal*, Vol. 35, No. 3, 2002. See also Michael John-Hopkins, "Regulating the Conduct of Urban Warfare: Lessons from Contemporary Asymmetric Armed Conflicts", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, available at: www.icrc.org/en/international-review/article/regulating-conduct-urban-warfare-lessons-contemporary-asymmetric-armed (all internet references were accessed in December 2016).

4 See AP I, Article 54(2): "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

5 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 53, pp. 186–188.

term “starvation” did not just mean killing by depriving of nourishment and water, but also covered malnutrition, illness and disease caused by a lack of food, medicines and other essential commodities.⁶ Moreover, the list of protected objects given in Article 54(2) of AP I is not exhaustive, as it is preceded by the term “such as”. In the case of conflicts taking place in cities, Article 54(2) must therefore be considered to have a broad meaning and to cover food storage and distribution areas and the water supply system. However, the survival of the population can also depend on other systems, such as the electricity network, which is required to heat homes and power hospitals, for example, but can also make a direct contribution to the adversary’s capabilities (communications in particular). The challenge for armed forces is to assess the extent to which the civilian population depends on these dual-use facilities. In order to do this, systemic analyses carried out for intelligence purposes must be precise and fact-based, so that the direct and indirect impact of the planned destruction can be accurately measured.

In the case of conflicts in urban areas, there are two examples that clearly illustrate the practical difficulties currently facing armed forces. The issue of targeting communication systems is particularly complex. In the conduct of combat operations, the transmission of information through chains of command and control (abbreviated as C2) is vital. The destruction or neutralization of C2 systems therefore provides a real and precise military advantage. However, such networks, whether electrical, electromagnetic or digital, are most commonly dual-use facilities. It must therefore first be determined whether they can be considered indispensable to the population, taking into account that they are required, among other things, for the operation of the emergency response chain. Destroying or disabling phone towers used by the adversary, for example, is often a complicated matter. The issue of cyber-targeting in order to neutralize C2 systems is even more complex, as the effects are difficult to measure and control.⁷

The second example concerns schools, which are, by nature, civilian objects and of crucial importance to the civilian population in the short and long term, and for the country’s development. The use of school premises for military purposes by regular armed forces or organized armed groups, which is becoming increasingly frequent, can turn them into military objectives, because they do not enjoy the special protection granted to certain sites, such as places of worship and cultural property.⁸ Parties to a conflict often use schools deliberately, seeking to shield themselves in a civilian facility and also as a means of discrediting the adversary in the eyes of public opinion, when it is driven to attack a school. Sometimes,

6 See 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”, *International Review of the Red Cross*, Vol. 83, No. 842, 2001, pp. 475–476.

7 On the subject of cyber-warfare, see Herbert Lin, “Cyber Conflict and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 896, 2012, available at: <https://app.icrc.org/e-briefing/new-tech-modern-battlefield/media/documents/29.-Cyber-conflict-and-international-humanitarian-law.pdf>.

8 See the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956).

however, armed forces are compelled to use schools to temporarily store weapons and equipment or to provide shelter for their soldiers. This solution is clearly only conceivable when the premises are not being used for educational purposes. Many humanitarian organizations are justifiably concerned about the use of schools and other places of education for military purposes. One of them is the Global Coalition to Protect Education from Attack (GCPEA),⁹ which in 2013 drew up the Draft Lucens Guidelines.¹⁰ The purpose of the guidelines was to have States incorporate, first in their domestic legislation and eventually in the Geneva Conventions and their Additional Protocols, a specific ban on the use of educational establishments for military purposes. This initiative, however laudable, focuses on requirements that are not easy to reconcile: on the one hand, the protection of objects that are especially exposed and fragile, particularly in urban warfare, and whose destruction would damage prospects for future development; and, on the other, the leeway required by armed forces conducting modern operations against adversaries who have no qualms about taking advantage of the fact that the other party complies with the rules of IHL. Adding new rules to the existing body of IHL would undoubtedly be overly restrictive, as it would often be difficult to comply with them for reasons of operational effectiveness.

The specific characteristics of urban areas could also lead to a rekindling of the debate about cities as targets in themselves and the lawfulness of siege warfare.¹¹ Cities have always been an important factor in the power game, and in an armed conflict the taking or destruction of them can become a symbol or an end in itself. This can result in the parties ignoring basic principles of IHL, in particular the obligation to distinguish between military objectives and civilian objects. In the ongoing conflict in the Levant,¹² it is clear that efforts to take and maintain control over cities (Mosul, Raqqa, Ramadi, Palmyra, etc.) are driven by a combination of military, strategic, political and symbolic aims. This is particularly true in the case of Daesh, with its ideology of State-like territorial domination, but also for the States involved, which are seeking to restore their sovereignty. In this drive to take cities, sometimes involving prolonged sieges, the parties often overlook their obligation to take into account the provisions of the Geneva

9 The GCPEA was established in 2010 by organizations from the fields of education in emergencies and conflict-affected fragile States, higher education, protection, international human rights law and IHL, which were concerned about continuous attacks on educational establishments and their students and staff in countries affected by conflict and insecurity.

10 GCPEA, *Draft Lucens Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, version of 22 October 2014, available at: http://protectingeducation.org/sites/default/files/documents/draft_lucens_guidelines.pdf.

11 Siege warfare issues are particularly salient in the ongoing Syrian conflict. See, for example, UNSC Res. 2139, 22 February 2014.

12 For further information on this subject, see French National Assembly, *Rapport de la mission d'information française sur les moyens de Daech*, Report No. 3964, 13 July 2016, available at: www.assemblee-nationale.fr/static/14/daech/rapport-daech-tome1.pdf.

Conventions,¹³ which provide for agreements to be made to arrange for the evacuation and exchange of the sick and wounded and to facilitate the passage of humanitarian aid.

Distinguishing between individuals is more complicated in urban areas

While the nature of cities complicates the practical application of the principle of distinction in respect of objects, the difficulties are no fewer when it comes to distinguishing between individuals and identifying the adversary, particularly in NIAC situations. As the notion of “combatant” does not exist in the rules applicable to NIACs, the solution lies solely in determining the direct participation of individuals in hostilities.¹⁴ The notion of direct participation in hostilities is not properly defined in the Additional Protocols, but the consequences are clear: civilians lose the protection accorded to them for the duration of their direct participation in hostilities. The International Committee of the Red Cross (ICRC) provides some insight into this notion of direct participation in hostilities in the Interpretive Guidance published in 2009,¹⁵ which explains that it refers to specific acts meeting three cumulative criteria: a threshold of harm, a direct causal link between the act and the harm likely to result from it,¹⁶ and the belligerent nexus (the act must be carried out in support of a party to the conflict and to the detriment of another).

In spite of these clarifications, however, the definition of direct participation in hostilities remains unsatisfactory. It is, for example, a complicated matter to draw a clear line between direct and indirect participation, particularly in conflicts in urban areas, where the precise characterization of activities can be complex. According to the Interpretive Guidance, supplying weapons to organized armed groups is not an act amounting to direct participation in hostilities, unless they are directly delivered to the zone where armed operations are taking place.¹⁷ In urban warfare, it can be difficult to establish the facts and determine what can be considered the indirect provision of weapons and what

13 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 15; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 18; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 17.

14 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 13(3): “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”

15 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (Interpretive Guidance).

16 It should be noted that in the Commentary on the Additional Protocols, a direct causal link is not required, just a “sufficient causal relationship”. See 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 and Martinus Nijhoff, Geneva, 1987, para. 4787.

17 Interpretive Guidance, above note 15, pp. 51–52.

amounts to delivery for immediate combat purposes, given the blurred and changing boundaries of combat zones and their location in the midst of civilian objects and facilities. There is therefore a danger that all transportation of weapons and munitions could be considered direct participation in hostilities, making direct attack permissible.

It is important for armed forces not to target civilians who are taking an indirect part in hostilities, by supporting the “war effort”, for example. Economic and financial aid, political support, demonstrations, etc. do not amount to acts of direct participation in hostilities, and those who engage in such activities must not be targeted.¹⁸

It should also be noted that the general protection granted to civilians in NIACs does not cover people fighting as part of an organized armed group – that is, a group with a certain level of organization that uses armed warfare, amongst other methods, to fight against one or more parties to the conflict. Armed forces must therefore make every effort to gather intelligence on membership of such groups, obtaining up-to-date information on participation in armed operations or meetings with influential members of the armed group, roles in the chain of command and control, the recruitment and training of fighters, etc.

In the case of the conflict against Daesh in the Levant, for example, the structure of the group means that the principle of distinction must be strictly respected, as Daesh is seeking to turn itself into a State and therefore endeavouring to acquire all the attributes of one, in particular by administrating large swathes of Iraqi territory.¹⁹ It is therefore necessary to ensure the protection of civilians, even if they work, maybe under duress and against their will, in the administrations established by Daesh (banks, courts, law enforcement, etc.). In this context, direct participation in hostilities is not as clear-cut as in other conflicts, and attention should be paid primarily to distinguishing between the political wing and the armed wing of the non-State party to the conflict.

The situation is further complicated when, in today’s so-called “asymmetric” conflicts, organized armed groups and even regular State forces seek tactical advantages in complex urban environments, using, for example, human shields, voluntary or otherwise. Human shields can be used to protect high-value targets (command centres), convoys and even whole cities when they become the last refuge of armed forces²⁰ or are placed under siege in the course of a conflict. Evidently, in such cases, the challenge is to respect the traditional principles governing the conduct of hostilities, which allow a military objective to be attacked, provided that the attacker fulfils its obligation to take all feasible precautions and respect the principle of proportionality in order to avoid, or at

18 *Ibid.*, p. 56.

19 See French National Assembly, above note 12.

20 For example, during the Libyan conflict in 2011, events in September resulted in the considerably weakened loyalist forces taking refuge in certain places, such as Bani Walid, keeping the inhabitants prisoner and using them as a shield to protect them from the attacks of National Transitional Council and NATO forces.

least minimize, incidental losses. In the case of voluntary human shielding,²¹ where civilians deliberately and voluntarily position themselves to protect a military objective by their presence, it could be argued that these civilians are abusing their status as protected persons. If it turned out that they had voluntarily chosen to act in this way, they could be considered, according to some sources, to be taking a direct part in hostilities for such time as their action lasted, and could therefore be deemed a legitimate target.²² However, this view is not upheld in part of the doctrine,²³ particularly when the physical obstacle created by these individuals fails to reach the threshold of harm required for the act to qualify as direct participation in hostilities.²⁴

Practical difficulties common to both facets of the principle of distinction

There are considerably greater difficulties when the attacking State does not have troops on the ground to distinguish civilians from fighters directly participating in hostilities or to confirm or refute intelligence collected for that purpose. For reasons generally based on political considerations, States are reluctant to deploy troops on the ground.²⁵

In this context, one of the possible solutions, as I see it, would be to move conventional warfare out of cities, for example by limiting air strikes in urban areas and putting a very high-precision targeting system in place for cases in which it is decided that a strike must be carried out in a city.²⁶ This would involve planning air strikes on support “upstream” of enemy military operations, respecting the principles governing the conduct of hostilities, and wiping out the leadership of armed groups, using very precise intelligence and, in many cases, special forces to ensure highly targeted operations. In cities, the use of non-lethal means could

21 On the question of voluntary human shields, see, for example, Antoine P. Kabore, “Do Voluntary Human Shields Participate Directly in Hostilities? An Analysis Based on the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, thesis for master’s in advanced studies, Geneva, December 2010, available at: <http://archives.geneva-academy.ch/docs/award-dunant/ADH-MAS-Memoire-Kabore-2009-2010.pdf>.

22 See Michael N. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary*, San Remo International Institute of Humanitarian Law, San Remo, 2006, reproduced in *Israel Yearbook on Human Rights*, Vol. 36, 2006, p. 44: “Should civilians voluntarily elect to shield a military objective or obstruct military operations, they would in almost all circumstances be taking an active (direct) part in hostilities, and, for the purpose of this Manual, could be treated as fighters.”

23 See, for example, Marco Sassòli, “Human Shields and International Humanitarian Law”, in Andreas Fischer-Lescano, Hans-Peter Gaser, Thilo Marauhn and Natalino Ronzitti (eds), *Peace in Liberty, Nomos and Dike*, Baden-Baden and Zurich, 2008, pp. 7–10.

24 Interpretive Guidance, above note 15, p. 57.

25 In the case of Operation Unified Protector (Libya, 2011) and Operation Inherent Resolve (Iraq/Syria, 2014), the political choice was made to confine action to air strikes and indirect support for the armed opposition groups.

26 Operation Inherent Resolve in Iraq/Syria has drawn on the lessons learned from decades of military engagement in Iraq and Afghanistan. Consequently, air strikes are few and far between, and the “no-strike lists” have been considerably extended, with the main aim of achieving zero civilian casualties.

also be promoted (psychological operations and perception-changing and cyber-activities), ensuring that the principle of distinction is fulfilled at all times.

Challenges of minimizing collateral damage in urban areas

The principle of proportionality calls for collateral damage to be minimized

The principle of proportionality is defined in paragraph 2(a)(iii) of Article 57 of AP I.²⁷ For the protection of civilians and civilian objects to be effective, it is necessary to ensure that all precautions are taken to reduce any incidental damage that could be caused by combat actions. Collateral damage is not prohibited by IHL, but it must be minimized. This is not only a legal requirement but also a strategic one, because a military force that causes civilian casualties could discredit the entire operation and undermine the legitimacy of the action taken.

In order to define what is meant by collateral damage, a semantic distinction must first be made, based on the degree of intentionality. Three categories can be identified, which are unforeseen, incidental and deliberate civilian harm.²⁸ The latter category does not fall within the definition of collateral damage, as it is always caused knowingly. In addition, as will be seen below, the implementation of a targeting oversight process, aimed specifically at reducing the risk of collateral damage, is in itself a guarantee that deliberate harm will not be done.²⁹ I will not therefore address the issue of deliberate harm, which results from the failure to take into account the principle of proportionality in the conduct of operations and to respect IHL in a broader sense.

Unforeseen harm can be caused, for example, by human errors or technical failures.³⁰ In this respect, the analysis of the US air strike carried out on 3 October 2015 on the Médecins Sans Frontières (MSF) hospital in Kunduz, Afghanistan, is particularly telling,³¹ revealing an accumulation of human errors and technical failures: an AC-130 aircraft, diverted to provide air support to US and Afghan troops on the ground that had come under enemy fire, failed to implement standard “no-strike designation” procedures; the aircraft’s communication system

27 AP I, Art. 57(2)(a)(iii): “refrain from deciding to launch any 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”.

28 See Camilla Waszink, *Protection of Civilians under International Humanitarian Law: Trends and Challenges*, Norwegian Peacebuilding Resource Centre Report, August 2011, pp. 30–32.

29 See *ibid.*, p. 31. Possible causes of deliberate civilian harm include “ideologies of genocide/ethnic cleansing, response to attacks on civilians by the other party, strategy to displace civilian populations from an area, spread fear or control the civilian population, strategy to undermine civilian support for the war effort and end civilian resistance, civilians perceived as ‘soft targets’ by the weaker party in asymmetrical conflicts”.

30 See *ibid.*, p. 31. Possible causes of unforeseen civilian harm include “accidents, e.g. due to technical failures or human errors, inaccurate intelligence, civilians targeted by mistake, e.g. because they were believed to be participating directly in hostilities”.

31 See USFOR-A Public Affairs, statement on the Kunduz MSF hospital investigation, 2015-11-25-US-01, Kabul, 25 November 2015.

malfunctioned, preventing information exchanges with headquarters; the onboard electronic systems were degraded as the result of an alert, which forced the AC-130 to effect an emergency change of course; there was no visual target acquisition prior to the strike; the decision to carry out the strike was approved by a non-competent authority at headquarters; and the real coordinates of the site were not verified prior to the strike. In view of all these factors, the analysis concluded that the strike had caused unforeseen civilian harm.³² In order to reduce this type of harm, armed forces must focus on improving their internal procedures and training.

Incidental civilian harm best illustrates the meaning of the military jargon term “collateral damage”, and it is with the aim of reducing this type of harm that armed forces put in place oversight processes. The risk of incidental harm is particularly high in urban areas, owing to the very nature of cities and the distinction difficulties described above. Incidental harm is, however, a foreseeable risk, and efforts to ensure the continuous improvement of targeting procedures, including the choice of weapons employed, should focus on strengthening studies that combine the gathering and use of intelligence, systemic analyses and technical studies on essential functions and infrastructure, particularly in urban areas (organization and weaknesses in water and electricity networks, organization of emergency services to deal with indirect incidental damage, etc.).

Indirect collateral damage is another issue to be considered. It is not always easy to determine the cause of such damage with scientific accuracy, particularly if the strike has a delayed or cascading effect. Here too, the question of the foreseeability of damage arises.

Processes adopted to minimize collateral damage

The practical implementation of the principle of proportionality by the armed forces is therefore based mainly on the adoption of strict standard targeting procedures, particularly for planned strikes. According to French doctrine, targeting is a rational, integrated process that involves identifying and then choosing the targets to be attacked, using a range of capabilities to achieve the desired outcome. The legal constraints established by IHL are fully integrated into every stage of the process. In assessing the legitimacy of the target, the principle of distinction is applied.³³

32 *Ibid.*, p. 2: “The report determined that the US strike upon the MSF Trauma Center in Kunduz City, Afghanistan, was the direct result of human error, compounded by systems and procedural failures. *The US forces directly involved in this incident did not know the targeted compound was the MSF Trauma Center.* The medical facility was misidentified as a target by US personnel who believed they were striking a different building several hundred meters away where there were reports of combatants. The report also determined that the personnel who requested the strike, and those who executed it from the air, did not undertake appropriate measures to verify that the facility was a legitimate military target” (emphasis added).

33 In the targeting cycle, the first stage in the analysis of the target dossiers involves ensuring that all the criteria relating to the “military objective”, within the meaning of AP I Article 52(2), are met. The relevance of the intelligence and its temporal validity are assessed for the target in question and also in the broader context of an overall assessment of the adversary’s capabilities.

The next step, the collateral damage estimate (CDE), ensures that the principle of proportionality is respected.³⁴ This method, resembling a scientific risk analysis, takes into account the effects that weapons can reasonably be expected to have, and a level of responsibility is assigned to each level of risk.³⁵

This analysis is based on knowledge of the sites to be attacked. I will not return here to the question of establishing the certainty that the object is a legitimate military target, but once this has been determined, the structure of the site must be studied (type of construction, potential weaknesses, etc.) with a view to assessing the effects of the weapons to be used, as must its surroundings (protection of nearby objects, type of buildings and infrastructure in the area around the target, state of communication, water and electricity networks, actual use of all these objects and resources, etc.).

In the case of unplanned attacks (dynamic targeting or on-the-spot combat actions), armed forces take into account the principle of proportionality in two ways. First, the rules of engagement (ROE) require combatants to implement the principle of proportionality, indicating what means are authorized in different cases.³⁶ Second, providing military personnel with IHL training, however general, prior to or during deployment, is a means of ensuring that IHL principles and their implementation are properly understood and fully incorporated into the conduct of operations.

Practical limitations of implementation in urban areas

The limitations inherent in the targeting process have been outlined above in relation to indirect effects. It can be argued that in the “fog of war”, military planners and decision-makers cannot reasonably be expected to assess cascading effects, as the information needed to do so is never fully available in the required time.³⁷ This is particularly true in an inevitably complex, dense and changing urban setting. The complexity of the situation is further compounded by the deliberate use of civilian objects and human shields, often not readily visible at

34 Once it has been established that the target is a legitimate military objective and that the foreseeable collateral damage has been minimized, the principle of precaution is implemented, determining the specific conditions of the strike (for example, the timing of the strike and advance warnings). See the sections on “Establishment of Specific Procedures and Precautions” and “The Complex Question of Giving Advance Warning”, below.

35 For example, the engagement of a target with a CDE level of 5 would be decided by a hierarchically higher military authority than in the case of a target with a CDE level of 1.

36 On ROE, see French Joint Doctrine (Doctrine Interarmées), version 5.2, 25 July 2006 (currently undergoing consolidation), on the use of force in military operations conducted outside national territory, p. 19.

37 US doctrine on targeting, for example, states that military commanders are not required to take into account risks that are too far removed to be assessed at a given point in time. However, the repercussions that a strike can reasonably be expected to have should be included in the calculation of collateral damage and incidental casualties. See Joint Chiefs of Staff, *Joint Doctrine for Targeting*, Joint Publication 3-60, 17 January 2002, p. I-7, available at: www.bits.de/NRANEU/others/jp-doctrine/jp3_60%2802%29.pdf.

first sight, with a view to discrediting the attacker and “pushing” it into causing collateral damage.

Another issue to be addressed is whether proportionality should be assessed for a single strike or for a series of strikes,³⁸ or even the entire military campaign. Military decision-makers are more inclined to consider the effects of attacks as part of an overall plan, designed to achieve a final outcome, which is to defeat the adversary. There is therefore a natural tendency to put the focus on the principle of necessity and to weigh up potential collateral damage against an overall military advantage. The role of the legal adviser is crucial here in reconciling the different operational and legal requirements.

Modern types of conflict (with the use of means of asymmetric warfare in urban areas, including improvised explosive devices and human shields, as mentioned above) and the frequently adopted “no boots on the ground” approach make it difficult to apply the principle of proportionality in targeting processes in urban settings. Even when armed forces have deployed soldiers in the territory where the conflict is taking place, the extent to which military commanders are obligated to expose their own forces to danger in order to limit collateral damage is a question open to debate. Arguably, limiting the risks to which combatants are exposed can in itself provide a concrete military advantage.³⁹ This assertion is, however, only valid if the technological resources available to these same armed forces (tracking radars, drones, etc.) do not provide them with sufficient protection from the risks posed.⁴⁰

Repeated tragedies involving civilians in urban conflict areas have prompted calls for changes to the law and practice, with a view to perhaps prohibiting collateral damage even when it is not unlawful or at least urging

- 38 Article 49 of AP I defines attacks as “acts of violence against the adversary, whether in offence or in defence”. This definition is, however, interpreted and applied in different ways in terms of the number and type of acts of violence that amount to an attack. For example, in its judgment in the *Galić* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) observed: “When seeking to establish whether the proportionality principle is violated, the Prosecution urges the Trial Chamber to analyze the ‘concrete and direct military advantage’ at the level of each sniping and shelling incident, and to consider whether the precautionary provisions contained in Article 57 of Additional Protocol I were complied with.” ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para 37. Conversely, when ratifying the Additional Protocols, the United Kingdom made the following reservation: “In the view of the United Kingdom, the military advantage anticipated from an 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.” See: <https://ihl-databases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.
- 39 On the debate concerning the importance of force protection, see, for example, Noam Neuman, “Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality”, *Yearbook of International Humanitarian Law*, Vol. 7, December 2004, available at: <http://thirdworld.nl/applying-the-rule-of-proportionality-force-protection-and-cumulative-assessment-in-international-law-and-morality>. See also David Luban, “Risk Taking and Force Protection”, *Georgetown Law Faculty Publications and Other Works*, Paper 654, 2011, available at: <http://scholarship.law.georgetown.edu/facpub/654/>.
- 40 See ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, reprinted in *International Legal Materials*, Vol. 39, No. 5, 2000, paras 48–50.

States to go “beyond what is required by IHL”.⁴¹ This understandable humanitarian concern is amplified by the media, which often provides greater coverage of conflicts in urban settings, partly for practical reasons of access, but also because of the impact of such events on public opinion. This extensive media coverage sometimes masks the efforts of armed forces to reduce collateral damage and to implement protective measures.

Precautions in attack

The general rule on precautions in attack is found in Article 57 of AP I, which provides in general terms, in paragraph 1, that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”.⁴² In addition to the principle of proportionality established in paragraph 2(a)(iii), as explained above, Article 57 contains rules concerning verification that the target is a military objective, the choice of means and methods of attack, the possibility of interrupting an attack, choosing between objectives, and advance warning.

Importance of intelligence gathering

Paragraph 2(a)(i) of Article 57 indicates that it is necessary to “do everything feasible” to verify that the target is a military objective,⁴³ which entails gathering complete and accurate intelligence. This can take various forms: imagery (aerial, satellite), radio, electromagnetic, human, and so on. As far as possible, information should be gathered from several different sources (for example, images corroborated by human intelligence) and should be recent (satellite images no more than several days old, communications recently intercepted, etc.). Generally, military intelligence services use standard codes to “track” the accuracy of intelligence. There are, however, some practical difficulties in terms of intelligence, which is the cornerstone of a precise targeting process that respects the applicable rules.

The gathering of relevant intelligence requires well-developed, reliable and even redundant technical resources. Not all States, for example, are able to acquire high-quality satellite images, and military satellite capabilities vary significantly

41 See C. Waszink, above note 28, p. 37: “[I]t may be time to start discussing how much civilian harm is acceptable even when it is not in itself unlawful and whether more can be done by parties to armed conflicts to minimise civilian harm. The measures taken by, for example, ISAF forces in Afghanistan demonstrate that there may be considerable scope for doing so even beyond what is required by IHL in a very strict sense, and that this may indeed be beneficial on both humanitarian and military grounds.”

42 Article 57(4) of AP I also provides: “In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”

43 Article 57(2)(a)(i) of AP I states that those planning or deciding upon an attack shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them”.

from one State to another (in terms of image resolution, in particular). The quality of intelligence is enhanced by the physical presence of human gatherers (conventional or special forces) in the theatre of operations. In the case of “no boots on the ground” operations, this human intelligence is lacking, and it is unrealistic to think that technology alone can resolve this deficiency. When the intelligence comes from “local” sources (allied forces, rebel fighters, etc.), the party involved must be able to verify the accuracy and objectivity of the information before taking responsibility for a strike based on the information received.

In a coalition military operation, it must be possible to share intelligence and for the intelligence provided by the coalition or States belonging to it to be “questioned” and controlled by national means of verification. Difficulties exist on two levels: on a technical level (means of verification at least equivalent to those of allied forces) and in terms of classification (information exchange agreements in order to access all target documentation).

The importance of today’s open sources for obtaining intelligence should not be underestimated: the Internet (Google Maps), NGOs operating on the ground, think-tank reports, journalists, etc. While such sources should be fully taken into account, closer monitoring of their accuracy is nonetheless required, and this is a limitation that today’s armed forces must be aware of.

Issues relating to choice of weapon in urban areas

Paragraph 2(a)(ii) of Article 57 of AP I is concerned with the choice of means and methods of warfare,⁴⁴ which must be made with a view to limiting collateral damage. Even before the targeting process, armed forces are limited in their choice of weapons by the provisions of international law. For States party to the conventions concerned, the use of certain weapons⁴⁵ is regulated or, in some cases, banned. For example, a State such as France could not include the use of cluster bombs in a deliberate targeting process, because it has ratified the Oslo Convention.⁴⁶

Two precautions are generally taken when it comes to choosing permitted or regulated weapons. First, the most precise weapon should be chosen.⁴⁷ This not only ensures the application of the principle of proportionality, but is also a guarantee of technical, operational and even financial effectiveness. Second, with a view to minimizing potential collateral damage, all the effects of the weapon

44 Article 57(2)(a)(ii) of AP I states that those planning or deciding upon an attack shall “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”.

45 Examples include chemical and biological weapons, incendiary weapons, mines and cluster munitions.

46 Convention on Cluster Munitions, 2688 UNTS 39, 3 December 2008 (entered into force 1 August 2010), available at: www.clusterconvention.org/the-convention/convention-text/.

47 This has long been the case for bombs dropped by aircraft (laser- and GPS-guided). More recently, in France, the development of the *Caesar* self-propelled howitzer and the guided unitary multiple launch rocket system, as well as the work carried out on GPS-guided shells and rockets, demonstrates that precision is at the centre of military developments. See Rudolph Stamminger, “Peut-on encore faire la guerre sans armes de précisions?”, *Le Monde*, 13 September 2012.

must be taken into account: the effects of the actual impact and also the blast and fragment effects caused by the impact. These effects are the subject of very precise scientific studies, using input from the evaluation of damage caused by past strikes (known as battle damage assessment), which ensure that predictive calculations are as accurate as possible.

Lastly, I would like to comment on the current trend, undeniably commendable in its intention to increase protection for civilians, towards seeking to impose more constraints on armed forces which they would find difficult to implement for operational reasons and which would be applied indistinctly to all armed forces, without taking sufficient account of efforts made to respect the relevant provisions of IHL. A telling example is the current mobilization against the use of explosive weapons in urban areas. While there is no question about the destructive effects of explosive weapons in densely populated areas, such effects are largely due to a lack of proper oversight in the use of these weapons or to too broad an interpretation of the principles of distinction and proportionality. In truth, strict application of the principle of precaution will, in the vast majority of cases, rule out the use of this type of weapon in populated areas.

Establishment of specific procedures and precautions

Article 57 also requires procedures to be put in place for suspending or cancelling an attack⁴⁸ and for choosing between several targets.⁴⁹ The fact that there are highly standardized targeting procedures and that target dossiers are studied before choices are made by decision-making authorities is an implicit acknowledgement of the possibility of choosing between targets and also allows for the implementation of decision-making processes taking into account the level of risk involved. In addition, the use of video footage from drones, for example, makes it possible to follow a strike live, which means that it is now easier to suspend a strike when a change in the environment is detected (for example, the presence of civilians).

In the process of approving a target pack, other precautions can also be taken, whether technical (aircraft angle of attack, use of weapons with a delay fuse) or of a more general nature (night strikes, for example). The timing of the attack is an essential factor in the application of the principle of precaution. With a view to choosing the right time, accurate data must be collected about the situation on the ground, in particular information about the way of life and customs of the civilians at risk.

48 AP I, Art. 57(2)(b): “[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.”

49 AP I, Article 57(3): “When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”

Current doctrinal developments focus on what is referred to as “full-spectrum targeting”, including both kinetic and non-kinetic (cyber, influence, etc.) operations, whether carried out separately, sequentially or concurrently. Different means are ultimately chosen and employed, taking into account the risk of collateral damage and fulfilment of the principle of precaution, with a view to achieving the same desired end-state while minimizing the risks.

The complex question of giving advance warning

In accordance with the principle of precaution, the attacker can also urge civilians to leave the combat or strike area by issuing an advance warning, as provided for in paragraph 2(c) of Article 57 of AP I.⁵⁰ However, for these warnings to be effective, they must meet numerous criteria:⁵¹ a range of means of communication must be used (television and radio broadcasts, telephone calls, leaflets, etc.) to ensure that those at risk from attacks are reached; the warnings must indicate the time and place of the attack as clearly as possible; they must give sufficient time to react; they must contain precise instructions on how to avoid the attack (where to go, evacuation measures, etc.); and the messages must be credible. Given these constraints, in my view, the level of effectiveness of such warnings is very low, particularly in certain circumstances when the territory is small and there is intense fighting everywhere.⁵² It should not be forgotten either that a party to a conflict has an obligation to give advance warning “unless circumstances do not permit” – that is, provided that the warning does not put the party’s own forces in danger and/or spoil the element of surprise.

In modern asymmetric conflicts, however, the element of surprise is not always such a decisive factor. It would be easier for armed forces with advanced technological resources to fulfil the obligation to give advance warning, even when they do not exercise effective control over a territory. This was a conclusion that emerged from a United Nations (UN) document published in 2006 on the situation in the occupied territories, in which the Secretary-General suggested that the greater the resources the attacker has at its disposal (communication and surveillance systems, in particular), the greater its obligation to ensure that the

50 AP I, Art. 57(2)(c): “[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”

51 See Report of the United Nations Fact Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009.

52 It is interesting to note that during Operation Cast Lead, 2.5 million leaflets were dropped and around 16,500 phone calls were made by the Israeli armed forces. The leaflets contained both generic warnings (urging the people of Gaza to move away from combat zones) and local warnings (indicating the time of the evacuation and designating specific routes to safe areas). More specific warnings were then given by telephone. In spite of these efforts, the Fact Finding Mission considered these actions to be insufficient, citing “the lack of specificity and thus credibility of many pre-recorded phone messages and leaflets. The credibility of instructions to move to city centres for safety was also diminished by the fact that the city centres themselves had been the subject of intense attacks during the air phase of the military operations.” See *ibid.*, para. 37.

principle of precaution is fulfilled by giving advance warning, particularly in conflicts taking place in urban areas.⁵³

Precautions against the effects of attacks

The general rule concerning protection against the effects of attacks is provided in Article 58 of AP I.⁵⁴ This article is not about regulating the behaviour of combatants in attacks, but rather encompasses all the measures that all powers should take in their own territory or territory that they control in order to protect the people there. They are therefore preventive measures aimed at ensuring effective protection for civilians. The requirement to take precautions against the effects of attacks is a rule to be taken into account in peacetime, but also takes on particular significance in the planning of attacks and in the conduct of operations. It is not, however, an absolute rule, as Article 58 starts by providing that the parties to the conflict should implement it “to the maximum extent feasible” and specifies that it refers to territories and populations “under their control”. As indicated in the ICRC’s study on customary international humanitarian law, the rule concerning protection from the effects of attacks can be divided into two sub-rules, specifically the need to locate military objectives away from civilians⁵⁵ and the need to remove civilians from the vicinity of military objectives.⁵⁶

Locating military objectives away from civilians

The principle stated in paragraph (b) of Article 58 of AP I involves taking preventive or protective measures in peacetime. It is therefore necessary for the party that can be referred to as the “defender” to ensure that certain types of building intended for military use (barracks, ammunition depots, etc.) are not erected in certain places (specifically in towns or cities), to avoid locating military objectives in certain areas and to keep dangerous points away from civilians. This obligation is, however, limited to what is feasible. Many States interpret this notion of “to the maximum extent feasible” as meaning that they have to take the precautions that are materially or practically possible, taking into account the prevailing

53 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 Vite, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 83–85.

54 AP I, Art. 58: “The Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”

55 See ICRC Customary Law Study, above note 5, Rule 23, pp. 71–74.

56 *Ibid.*, Rule 24, pp. 74–76.

circumstances, including military considerations (no questioning of the overall defence strategy, for example) and humanitarian considerations (the measures should not create too much hardship for civilians). It should be noted that demographic changes and the extension of urban areas can prove an obstacle to locating military facilities outside towns and cities in the long term. The principle does not apply to civilian objects that can also be used for military purposes (stations, airports, etc.).

It is worth noting that this obligation to take precautions is harder to fulfil in NIAC situations, particularly by organized armed groups, which may be of recent or spontaneous creation and have no pre-existing military facilities. Such groups are therefore limited in the choice of where to locate their military facilities and may have limited resources, making them unable to implement preventive measures.

It is easier to implement the principle of separation in the case of fixed objectives than in the case of mobile ones (troops, vehicles, etc.) because, for the latter, precautions must be taken while operations are in progress. The challenge for parties to a conflict is clearly identifying their military forces without compromising the safety of those forces. Precautions could therefore include decisions to limit the passage of convoys through cities (bypassing them, where possible), setting up camps and positions outside cities, ensuring zones are clearly marked, restricting access, training military personnel so that they can inform civilians, etc. Evidently, the main risk of such identification measures is that the party is giving the adversary a clear indication of the location of its military objectives. The solution is to carry out a case-by-case analysis in order to weigh up the military expediency of locating troops in a specific, clearly identified place and the threat that this poses to those forces if the location is too visible.

Looking at this issue from the perspective of the party that can be referred to as the “attacker”, it is important to remember, first of all, that it is not unlawful to target military objectives if the defender fails to take the necessary precautions or if it deliberately uses civilians to shield its military operations. In such cases, the attacker must take precautions in attack and respect the principle of proportionality, even if the defender does not comply with the rules of IHL.⁵⁷

One solution that can be adopted by the attacker with a view to implementing the principle of precaution against the effects of attacks is to drive the adversary towards isolated areas. This was, in some respects, what France sought to do in Operation Serval, conducted in Mali from January 2013 onwards at the request of the Malian State.⁵⁸ Faced with an adversary intent on taking control of the country’s cities, including the capital Bamako, the French armed forces sought to repel the enemy by engaging in minimal urban combat, limiting

57 On this subject of the non-reciprocity of IHL, see, for example, ICRC Customary Law Study, above note 5, Rule 140, pp. 498–500.

58 On the subject of French military intervention in Mali, see, for example, Jean-Christophe Notin, *La guerre de la France au Mali*, Tallandier, Paris, 2014.

the scope and number of operations through the deployment of special forces.⁵⁹ Local forces were given the responsibility of retaking the cities, while the special forces focused their efforts on pursuing the armed groups, monitoring and controlling supply points to prevent the enemy from replenishing supplies in the cities and maintaining a show of force in urban areas while at the same time continuing to fight the enemy in isolated areas. This strategy does, however, have its limitations, particularly when conflicts extend over a long period, as it can result in all of the fighting taking place outside urban areas, turning the cities into a safe haven for the enemy.

As it is so difficult, if not impossible, for defenders and attackers to separate military objectives from civilians, they might find it preferable to move civilians away from military objectives.

Moving civilians away from military objectives

Compliance with paragraph (a) of Article 58 also requires, in the case of the defender, the implementation of preparatory measures such as the construction of dedicated infrastructure for civilians (shelters, buildings, camps, food depots, etc.), the involvement of civil society (regular training for civil defence services) and the regular dissemination of information and warnings. Once again, these measures are easier for States to implement than armed groups, particularly when the latter's structures are weak.

The attacker can also contribute indirectly to moving civilians away from the fighting by establishing air and maritime exclusion zones, which involves delimiting areas that the enemy is not permitted to enter and where civilians are relatively safe, although violations of such zones can lead to fighting that will have repercussions for civilians. In any event, the establishment of exclusion zones raises the question of access to humanitarian aid, which the attacker must also deal with, in addition to complying with overflight/passage prohibitions. The difficulties involved in managing such zones should not be underestimated, and it should be taken into account that they require significant resources for distinction and information activities. This difficulty is compounded when humanitarian organizations or States delivering aid do so without first notifying the authorities responsible for managing the zone, a problem NATO forces had occasion to observe during operations in Libya in 2011.

Another precaution is evacuation operations that can be carried out directly by the attacker, particularly if it controls the conflict area. Evacuation of the nationals of a particular State⁶⁰ not only raises issues with regard to *jus ad*

59 On this subject, see the work of the French Commission on Foreign Affairs, Defence and the Armed Forces on the French special forces, available at: www.senat.fr/les_actus_en_detail/article/forces-speciales-francaises.html.

60 Known as RESEVAC operations in French military doctrine.

bellum,⁶¹ but also poses problems of discrimination. Is it legitimate, or even lawful, for a party to evacuate only its own nationals⁶² and do nothing for foreign nationals suffering abuse, for example? There is, however, no positive obligation in law to evacuate civilians from a country affected by conflict. If civilians had to be evacuated by an attacker in a conflict area, the operation would have to meet the same criteria as those outlined above for defenders, although to a lesser extent, and its implementation would therefore present the same practical difficulties.

The evacuation of civilians by the defender raises numerous questions. First, does the obligation extend to all civilians or just some categories of people entitled to special protection (women, children, the sick, the disabled, etc.)? Apart from the fact that it is very difficult for a party to a conflict to distinguish between people in this way, it should also be noted that the legitimate desire to protect the weaker sectors of the population may conflict with the principle of respecting family unity, which is to be found in numerous provisions of IHL and human rights law.

If it is assumed that civilians in the immediate vicinity of the fighting should be evacuated, the question also arises of how to precisely delimit the boundaries of the combat zone and what to do when the territory is very small. A number of questions arise in relation to the place that civilians are evacuated to, normally a place that they are familiar with and that poses no danger to them. Should civilians be informed in advance of the place they are being evacuated to, so that they can make an informed choice about whether or not to go? How can safety zones be maintained without putting too great a strain on already stretched military resources? And, once again, is this feasible in a small, conflict-ridden territory?

Lastly, with regard to the timing of the evacuation, here again caution is paramount. Evacuating civilians during the fighting can be dangerous, particularly in urban areas, but waiting until the fighting is over can prove disastrous. In any event, parties to a conflict are only required to do what is “feasible”, and the precautions to be taken in evacuating civilians should not go beyond the point where their lives are made difficult or even impossible.

It is important to note that there are provisions prohibiting the forced movement of civilians, which are applicable both in international armed conflicts (IACs) and NIACs.⁶³ In both types of conflict, forced displacement is prohibited unless the security of the civilians involved or imperative military reasons require them to be moved.⁶⁴ Even when permitted, the movement of civilians is limited, in the case of IACs, to displacement within the occupied territory, unless

61 For instance, whether the use of force in the evacuation of nationals for humanitarian reasons can be considered an exception recognized in customary law to the prohibition on recourse to force between States, or whether it is simply permitted, in certain circumstances, because such an intervention is not deemed to constitute the use of force between States.

62 French nationals or members of the European Union in the case of France.

63 In IACs, deportations and forcible transfers are prohibited (GC IV, Art. 49), and in NIACs, the forced movement of civilians is prohibited (AP II, Art. 17).

64 See ICRC Customary Law Study, above note 5, Rule 129, pp. 457–462.

materially impossible, and in the case of NIACs, within the national territory. Clearly, the imperative military reasons that permit an exception to this rule do not include the movement of civilians as a means of persecution. The most sensitive issue here, however, is evaluating the safety of civilians to determine whether it is necessary to evacuate them. Who should make this assessment, and what criteria should be used?

Indirect contribution to the protection of civilians

With a view to ensuring the protection of civilians, IHL provides for the possibility of establishing protected areas for the purpose of moving the inhabitants of cities away from the fighting.⁶⁵ There are three types of protected area: “hospital zones” for wounded and sick members of the armed forces (Article 23 of the First Geneva Convention), “hospital and safety zones and localities” for civilians entitled to particular protection (Article 14 of the Fourth Geneva Convention) and “neutralized zones” for people *hors de combat* (Article 15 of the Fourth Geneva Convention). Parties to a conflict also have the possibility of declaring a place a “non-defended locality” (Article 59 of AP I) and establishing agreements to demilitarize certain zones (Article 60 of AP I). Although there is no provision for such zones in the law applicable to NIACs, it is clear that an area which contains only wounded and sick people, medical and religious personnel, humanitarian relief personnel and civilians may not be attacked, because there are specific rules applicable in NIACs protecting these categories of people.⁶⁶

These provisions list the rights and obligations of the parties in great detail, with a clear distribution of responsibilities for the protection of the people gathered in such zones. However, the *sine qua non* condition for their effectiveness is that they are established with the full knowledge and express consent of all the actors.

The advantages of establishing protected zones are patently evident: they allow a clear distinction to be made between military objectives, on the one hand, and civilians and civilian objects, on the other, and facilitate the arrangement and delivery of humanitarian assistance. However, there are also numerous risks, as they concentrate large numbers of defenceless civilians in one place. In addition, if the agreement between the parties is deficient or flawed in some way or there are insufficient resources to protect the zones, the consequences could be tragic. There is no forgetting the case of the Srebrenica enclave, a “safe zone” established unilaterally by Resolution 819 of April 1993,⁶⁷ because the UN Security Council refused to engage in talks with the Republika Srpska. The fact that there were not

65 Neutralized zones had already been established in the past – for example, in Madrid in 1936, in Shanghai in 1937 (Jacquinot safe zone) and in Jerusalem in 1948 (agreement between Va’ad Leumi, the Jewish armed organization, and the Arab League, allowing the ICRC to create a safe zone in order to provide shelter to civilians). It was this latter initiative that inspired the provisions on this subject included in the Geneva Conventions of 1949.

66 See ICRC Customary Law Study, above note 5, Rule 35, p. 119–120.

67 The concept was subsequently extended to other cities: Tuzla, Zepa, Bihac, Gorazde and Sarajevo in May 1993.

enough UN troops (600 Blue Helmets) to protect it and the many other shortcomings revealed since resulted in the infamous massacres of July 1995.⁶⁸

In the context of the Syrian conflict, there have been renewed calls for the establishment of “free zones”⁶⁹ on the Turkish border in the north and/or on the Jordanian border in the south, as sanctuaries for refugees. The intention is commendable, and such an initiative would allow certain principles of IHL to be fulfilled. There are, however, many unresolved issues: how can an agreement be secured between the belligerents, and between which parties would it be established (there are several NIACs taking place simultaneously in Syria⁷⁰)? What can be done to prevent such zones from being misused, for example, as safe havens by rebel groups? How can the implementation of these humanitarian principles be achieved in a conflict in which the *modus operandi* of the different parties involves deliberately targeting civilians?

Protection of civilians by armed forces can also be included in the conduct of operations as a general guideline and not solely in the implementation of the principle of precaution against the effects of attacks. This would involve a comprehensive approach, including support and protection measures, to ensure that civilians do not suffer unduly from the consequences of the fighting. It would include so-called civil-military activities, aimed at rehabilitating infrastructure, improving access to health-care services and directly providing medical care to civilians through military facilities (hospitals and medical personnel). This comprehensive vision, with a long-term focus on rebuilding a State and restoring its institutions, must also be accompanied by measures aimed at protecting civilians from violations and ensuring that perpetrators do not enjoy impunity. The military must be permitted to use force and intervene in order to prevent and end human rights violations and capture those responsible, while at the same time respecting the sovereign prerogatives of the State in whose territory it is intervening.

Conclusion

The conduct of military operations in urban areas today presents a daunting challenge. Efforts to implement the principle of distinction effectively and reduce collateral damage must be radically increased. This is particularly complicated when there are no troops on the ground, and realistically, technology alone cannot be expected to overcome all the difficulties posed. Must this reasoning then be taken to its logical conclusion, which would be that the effective implementation of the principles of IHL requires a physical presence on the

68 See, for example, Pierre Salignon, “Le massacre de Srebrenica”, *Revue Humanitaire*, Autumn/Winter 2008. See also NIOD Institute for War, Holocaust and Genocide Studies, *Srebrenica Report*, 10 April 2002, available at: www.niod.knaw.nl/en/srebrenica-report/report.

69 See the testimony given by General Keane at the US Senate hearing held early in October 2015.

70 See RULAC (Rule of Law in Armed Conflicts), “Country Profile: Syria”, Geneva Academy, October 2015, available at: www.rulac.org/countries/syria.

ground and therefore the deployment of armed forces in massive numbers to the territories where conflicts are taking place, just the opposite of today's prevailing "no boots on the ground" approach? This would, in fact, also be a sound application of the principle of military necessity.

The difficulties encountered in implementing preventive and protective precautionary measures often arise from the collapse of State structures, whether the cause of the conflict or one of its consequences. A comprehensive vision with a long-term and not exclusively military focus should therefore prevail in this type of situation, with a view to rebuilding institutions and securing the future. This reflection is in keeping with the current line of thinking that has emerged in the updating of urban warfare doctrines.⁷¹

French doctrine on urban operations,⁷² which has undergone significant developments since 2010, emphasizes the fact that a city is a space replete with restrictions and risks. The "Three Block War" concept⁷³ reflected in this doctrine highlights the fact that, in cities, military units have to engage successively or simultaneously in enforcement, peacekeeping and humanitarian operations, compressed in the same time and space. The implications are threefold. First, integration and cooperation with civilian actors is necessary, particularly with regard to protection. Second, it is vital to maintain essential services and structures indispensable to restoring governance, as part of a comprehensive approach. Lastly, the strategy must include the means to isolate the adversary from civilians, particularly the urban population, by limiting its resources, undermining its freedom of action and conducting information and influence operations.

The implementation of such principles can then contribute to ensuring protection for civilians in urban areas and application of the rules of IHL concerning precautions against the effects of attacks.

71 It is worth noting that counter-insurgency tactics in urban environments are nothing new (the Battle of Algiers and the strategy implemented by General Petraeus in Afghanistan, for example). All have shown that conflicts are not won with the systematic destruction of urban areas, but with a combination of actions, including human intelligence, targeted neutralization designed to preserve the lives of civilians, and a comprehensive approach ("winning hearts and minds") focused on not losing the support of the inhabitants and securing the future.

72 See the French Joint Doctrine, No. 234/DEF/CICDE/NP, 30 September 2010, amended on 8 May 2012, available at: <http://portail-cicde.intradef.gouv.fr/RDIA-2010-005-Les-operations-urbaines-OPURB>.

73 The "Three Block War" concept was coined in the late 1990s by US Marine General Charles Krulak to illustrate the challenges facing US Marines in operations such as the one carried out in Somalia in 1993. The main thrust of the theory is that military personnel must be trained to operate simultaneously in all three types of environment encountered today: full-scale military action, peacekeeping operations and humanitarian aid.

