

# Protection of civilians under international humanitarian law: trends and challenges<sup>1</sup>

Camilla Waszink

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## Executive Summary

This paper examines challenges faced in ensuring the adequate protection of civilians during armed conflict in accordance with international humanitarian law (IHL).

While IHL establishes a comprehensive legal framework to protect civilians from the effects of military operations, this stands in stark contrast to the situation that civilians in conflict-affected areas face on the ground. Civilians account for a high proportion of the victims in most contemporary armed conflicts, whether as an unintended result of the fighting or because they are deliberately targeted by belligerents. Even in situations where the parties are seemingly committed to implementing their obligations under IHL, military operations often result in high numbers of civilian casualties and widespread destruction of civilian property.

Several current conflict trends are associated with increased civilian suffering, including the prevalence of internal armed conflicts, often involving a range of armed actors with varying degrees of capacity and will to implement IHL. The frequently asymmetric nature of such conflicts may lead belligerents to resort to unlawful means and methods of warfare, for

example by deliberately operating from civilian areas, feigning civilian status in order to attack their adversary or directly attacking civilians. Military operations also increasingly take place in urban and other densely-populated areas, exposing civilians to particular risks. In conflicts with more political goals, maintaining legitimacy and support among the civilian population is often essential to achieving both the military and political objectives. The civilian population thus finds itself at the centre of the conflict in many contemporary wars.

**Camilla Waszink** is senior advisor at the Norwegian Peacebuilding Resource Centre (NOREF). Before joining NOREF, she was a policy adviser in the Arms Unit of the International Committee of the Red Cross in Geneva from 2002 through 2009, where she worked on a range of weapons and international humanitarian law issues, including international regulation of arms transfers, small arms availability and landmines. She has also worked as a researcher and consultant, including for the Small Arms Survey and the Centre for Humanitarian Dialogue in Geneva, the Bonn International Center for Conversion, and the Program on Security and Development at the Monterey Institute of International Studies. She has published extensively on arms control and international humanitarian law, armed violence, post-conflict disarmament, and weapons management in peace processes. She holds an MA in international policy from the Monterey Institute of International Studies and a BA in political science and law from the University of Oslo.

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This paper focuses on how parties to armed conflicts – both states and non-state armed groups – implement their obligations under IHL, in particular the rules on distinction, proportionality and precautions that are fundamental to protecting civilians during hostilities. Based on experiences from recent conflicts, it identifies a range of protection challenges that arise in contemporary warfare.

In particular, it examines the difficulties of protecting civilians in urban and asymmetrical warfare situations, as well as more general concerns related to the choice of weapons and targeting decisions. It also looks at some of the ways in which IHL is regularly violated, with civilians being directly targeted in different ways, and what might motivate and cause such abuses to take place. The challenges

identified confirm the widely-held view that the main obstacles to achieving adequate civilian protection relate not to the inadequacy of the rules themselves, but to the way in which these rules are applied during actual military operations and to deliberate non-compliance with the rules.

The paper concludes by suggesting civilian harm in armed conflict can be broadly divided into three categories – unforeseen, incidental and deliberate civilian harm – and that concrete and practical measures to reduce and minimise such harm can be identified in each category. Finally, it calls for a more vigorous discussion involving both states and civil society of how to reduce the significant gap that exists between the theory and actual practice of protecting civilians under IHL.

### Abbreviations and acronyms

AP I	Additional Protocol I
AP II	Additional Protocol II
CAR	Central African Republic
CCM	Convention on Cluster Munitions
CCW	Convention on Certain Conventional Weapons
DRC	Democratic Republic of the Congo
GC IV	Fourth Geneva Convention
ICRC	International Committee of the Red Cross
ICRC CLS	ICRC Study of Customary International Humanitarian Law
ICTY	International Tribunal for the former Yugoslavia
ISAF	International Security Assistance Force
IHL	International humanitarian law
UN	United Nations
US	United States

## Introduction

Civilian suffering in war is not a new phenomenon. Throughout history, civilians have been targeted by belligerents, who often have made no distinction between combatants and civilians when fighting their enemies. Massacres, rape, torture, starvation, enslavement, forced conscription and displacement have all been common features of war at different times and in different places. Sometimes civilian suffering has been an unintended result of the fighting, and at other times it has been inflicted as a deliberate military strategy.

Civilians are affected in many ways by war, whether as the direct victims of death, injury, rape and forcible displacement or as indirect victims through conflict-induced increases in disease, hunger and malnutrition. The impact and experience of war will not be the same for all civilians, but can vary enormously among the members of different groups, e.g. depending on whether they are men or women, young or old, or living in an urban or a rural area. Not least, it will depend on the conduct of the combatants and the extent to which they endeavour to target or protect civilians during hostilities.

While wars have invariably been accompanied by suffering for civilians and soldiers alike, there have almost always been certain limits on warfare – i.e. norms establishing the types of actions that are acceptable or unacceptable in war – including notions of who should and should not be targeted. Even if these norms have varied greatly, when certain groups have been spared from attack, they have often included those considered to be particularly “innocent”, “vulnerable” or “weak”, such as children, women and the elderly. As the idea of “limited war” and non-combatant immunity developed, in particular in medieval Europe, notions of civilian protection gradually became more sophisticated. However, it was only after the genocide and widespread atrocities against civilians committed during the Second World War and the armed conflicts in the 1950s to the 1970s that a specific legal framework was established for the protection of civilians.

Today, all parties to armed conflicts are bound by the rules of international humanitarian law (IHL) – also known as the law of armed conflict – to take a broad range of measures to protect civilians from the effects

of military operations. The 1949 Geneva Conventions and the 1977 Additional Protocols constitute the core of the legal framework regulating behaviour in war, including for the protection of civilians and other persons that do not take part in hostilities (e.g. wounded, sick and captured combatants). Although significantly less detailed than the rules applicable to international armed conflicts, Common Article 3 to the Geneva Conventions and Additional Protocol II<sup>2</sup> establish rules for non-international – i.e. internal – armed conflicts, imposing obligations on states and non-state armed groups alike. Moreover, most of the fundamental rules pertaining to the protection of civilians are considered to be customary humanitarian law in both international and internal armed conflicts, and binding on all states, whether signatories or not to the relevant treaty, as well as non-state armed groups.

IHL has proven to be an adaptable legal framework with additional rules being adopted in response to new developments. A case in point is the adoption of the first two Additional Protocols in 1977, partly in response to the humanitarian concerns arising from internal armed conflicts and wars of national liberation. The treaties prohibiting anti-personnel mines and cluster munitions are more recent examples.

As the nature of warfare continues to evolve, new protection needs may arise. A recent International Committee of the Red Cross (ICRC) study identified several specific gaps or weaknesses in the existing legal framework, particularly as regards non-international armed conflicts, which is the dominant form of conflict today.<sup>3</sup> Due to the current prevalence of internal armed conflicts, the interaction between IHL and international human rights law is also becoming a matter of increased importance and debate.<sup>4</sup> The latter protects the individual in all situations, although governments may derogate from some provisions in public emergencies, including during an armed conflict.

2 The threshold for application of Protocol II is higher than that for Common Article 3, and it only applies to internal armed conflicts that meet specific criteria.

3 Dr Jakob Kellenberger, ICRC president, “Strengthening legal protection for victims of armed conflict”, official statement, 21 September 2010, <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm>, accessed 18 May 2011.

4 See, for example, Cordula Droege, “The interplay between international humanitarian law and international human rights law in situations of armed conflict”, *Israel Law Review*, vol 40, no. 2, 2007, pp 310–355.

The need for further regulation and clarification of the rules should be continuously assessed in light of emerging humanitarian concerns. However, it is widely acknowledged that if only the rules of IHL that aim to protect civilians were fully implemented, the situation of civilians during armed conflicts would vastly improve. In 2010, while identifying certain areas in which IHL should be strengthened, the ICRC's president reiterated that "what is required in most cases ... is greater compliance with the existing legal framework, not the adoption of new rules".<sup>5</sup> This confirms the widely-accepted view that the main obstacles to better protection of civilians relate primarily to the way in which the existing rules of IHL are implemented or to a lack of respect for the rules by parties to armed conflicts.

### Scope and structure

The purpose of this paper is to examine key challenges faced in ensuring the adequate protection of civilians during contemporary armed conflicts in accordance with IHL. Over the last 60 years, IHL has established a comprehensive legal framework with rules that in theory afford civilians significant protection from the effects of military operations, yet the situation of civilians in conflict-affected countries speaks to a different reality on the ground. While reliable figures are scarce, it is clear that civilians have accounted for a high proportion of the victims in most armed conflicts during this period. The tremendous human suffering that is inflicted on the civilian population in wars across the globe calls for a thorough examination of the current international norms protecting civilians and in particular of the way in which such norms are implemented.

The focus in this paper is on how parties to armed conflicts – i.e. states and non-state armed groups – are fulfilling their obligations under IHL. Although of crucial importance, measures pursued by third parties to protect civilians are not addressed here, e.g. by the United Nations (UN), the African Union or other regional organisations in the context of peacekeeping operations, or by humanitarian organisations with protection mandates.

The paper is divided into three main parts. The first section briefly outlines some prevalent features of contemporary armed conflicts that can have implications for the protection of civilians and implementation of IHL. This is followed by two longer sections addressing related, but still distinct areas of concern:

- the protection of civilians during the conduct of hostilities and in particular key challenges that have been identified when it comes to implementing the fundamental IHL rules on distinction, proportionality and precautions in current armed conflicts; and
- the lack of compliance with IHL, including the deliberate targeting of civilians by states or non-state armed groups that seem to operate in obvious disregard of the law. As parties to armed conflicts commonly violate a range of IHL rules pertaining to the protection of civilians, the focus of this section is not limited to the rules governing the conduct of hostilities.

The conclusion summarises key challenges identified that merit further discussion and consideration in order to strengthen the future implementation of IHL and the protection of civilians.

This background paper does not purport to address the full range of concerns that arise in relation to the protection of civilians in contemporary warfare, nor does it attempt to undertake a legal analysis of the current state of IHL. Rather, it aims to provide a synthesis of key challenges that – based on evidence from recent conflicts – have been identified by the UN, the ICRC and other humanitarian organisations; military and legal experts; and NGOs such as Human Rights Watch. While examples are used to illustrate key points, these are in no way meant to provide an exhaustive overview of cases where these protection concerns have arisen.

### Features of contemporary armed conflicts with implications for the protection of civilians

Since the end of the Second World War, **internal armed conflicts have become more prevalent than inter-state conflicts**. Between the Second World War and 1992, there was a steady increase in the number of armed conflicts due primarily to armed struggles

<sup>5</sup> Kellenberger, "Strengthening legal protection for victims of armed conflict", 2010.



against colonialism and proxy wars in the global South sponsored by the United States and the Soviet Union. The majority of new wars during this period were conflicts within rather than between states, with most occurring in the developing world. According to the *Human Security Report 2005*, 95% of all armed conflicts in the preceding decade were internal.<sup>6</sup>

After the end of the cold war, there was a marked drop in the number of armed conflicts overall,<sup>7</sup> although this downward trend has stalled since 2006. A dominant feature of armed conflicts in the post-cold war era has been low-intensity internal conflicts involving non-state armed groups. **While the overall number of battle deaths has been typically lower than in large-scale conventional wars between states, the direct targeting of and abuses against civilians have been common.** Another feature of many of these conflicts, particularly when one or several armed groups are involved, is their tendency to end temporarily through the signing of a cease-fire or a peace agreement, only to resume again months or years later. It is also common for the violence, including that directed at civilians, to be limited to certain parts of a state or region, while other areas are relatively unaffected.<sup>8</sup>

An increasing number of conflicts could be described as so-called **“asymmetrical conflicts” involving parties that are highly unequal in military strength and technological capacity**, typically where the state is fighting an insurgent armed group or where a coalition of states is involved in an armed conflict against another state or non-state armed groups. The consequences for civilians are often devastating, as the weaker party seeks to compensate for its military inferiority by resorting to tactics prohibited by IHL, in turn leading the militarily-superior party to respond by relaxing its own implementation of the rules.

Rupert Smith has coined the term “war amongst the people” to describe contemporary conflicts that are not fought on a distinct battlefield, but in which hostilities take place anywhere, including in civilian areas. Smith argues that this constitutes a

fundamental paradigm shift in the nature of warfare, to which the label “asymmetrical” is inappropriate, as these conflicts cannot be won merely through conventional military power.<sup>9</sup> Beyond military victory, these **wars often have political objectives such as establishing, peace, stability and security in a country or region, or even protecting civilians.** This places the civilian population at the centre of the conflict – in terms of being at increased risk when military operations take place in or near civilian areas – but also as a prize to be won and, conversely, as a potential target. Gaining and maintaining support and legitimacy among civilians are often essential to achieving the political and thus also the military objectives of contemporary armed conflict.

Many current conflicts **do not fit neatly into the traditional categories of international and non-international armed conflict.** These include situations of internationalised internal armed conflicts (i.e. internal conflicts with foreign intervention) and so-called “transnational armed conflicts” where a conflict involving a non-state armed group takes place in several states.<sup>10</sup> Since the 9/11 terrorist attacks, the categorisation of the “war on terror” and the question of whether the confrontation between one or several states and a non-state entity with transnational operations can be considered an armed conflict under IHL have been the sources of much debate. The ICRC has argued for a case-by-case approach, in which the nature and scale of violence in a particular setting would determine whether it reaches the threshold of armed conflict under IHL.<sup>11</sup>

**The legal classification of conflicts can be difficult and is often contested, including by the parties to the conflicts in question.** For example, a state will often be reluctant to admit to losing the monopoly of power within its territory and may deny the existence of an armed conflict. States that participate in peacekeeping or other UN-mandated

6 Human Security Centre, University of British Columbia, *Human Security Report 2005: War and Peace in the 21<sup>st</sup> Century*, New York and Oxford, Oxford University Press, 2005, p 18.

7 Ibid, p 23.

8 Dan Smith, “Trends and causes of armed conflict”, Berghof Research Centre for Constructive Conflict Management, August 2004.

9 Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Harmondsworth, Penguin, 2006, pp 3–4.

10 Sylvain Vité, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, *International Review of the Red Cross*, vol 91, no. 873, March 2009, p 83.

11 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, October 2007.

operations may for domestic political reasons not wish to be perceived as a party to the conflict in which they are intervening, even when their mandate allows them to use force beyond self-defence and take part in hostilities. In other cases, it may be in the interests of a state to characterise internal disturbances as an armed conflict, since it can provide a justification for using military force or detaining people in circumstances that would not be permitted in a law enforcement framework governed by international human rights law. In low-intensity conflicts, it is also not uncommon for a situation to oscillate between one of internal disturbances and one that reaches the threshold of internal armed conflict. The political implications inherent in the legal classification of conflicts can make it difficult to determine and agree on the legal framework that applies in a given situation, and this can also have profound implications for the protection of civilians.

One of the defining features of many current conflicts is **the involvement of a wide range of different armed actors, with varying degrees of organisation, command structures, equipment, training and knowledge of IHL**. In addition to government forces and opposition armed groups, such conflicts often involve a range of other armed actors such as paramilitary groups, civil defence forces and militias, which may be aligned to any of the parties involved. There is also an unclear line between or a combination of political and criminal violence in numerous settings, where armed actors with mostly-criminal motivations are contributing to insecurity and attacks against civilians.<sup>12</sup> The activities of groups that engage in suicide attacks and other acts of terrorism that directly target civilians have also increased both in armed conflicts and in other situations. The proliferation of conventional weapons – in particular small arms and light weapons that are cheap, highly portable and easy to handle with minimal training – is seen as having contributed to the multiplication of armed actors and groups. While small arms such as assault rifles can be

used in a highly-discriminating manner, they are often used in deliberate attacks on civilians and are therefore associated with high levels of civilian suffering.

In response to the downsizing of defence budgets after the end of the cold war, there has also been a rapid growth in the **outsourcing of military services to private military companies**. These corporations typically perform a variety of support functions, such as logistics, training and advice, but in some cases they also take part in hostilities. While the involvement of private companies and citizens in warfare is not a new phenomenon, the extent of their involvement in modern conflicts has implications for the protection of civilians. These concern both the responsibilities of such companies in terms of compliance with IHL and the potential difficulties of determining their status as either combatants or civilians under IHL.

**Several of the conflict trends mentioned above have contributed to blurring the distinction between civilians and combatants**, one of the core premises on which IHL is based. As civilian participation in hostilities has increased, in particular in the context of internal armed conflicts, the determination of civilian versus combatant status has become far more complex. This is particularly the case when it comes to civilians who – even if they are not members of an armed group taking part in the conflict and thus can be considered combatants – nevertheless engage in acts that may temporarily suspend their protection against direct attack.<sup>13</sup> Other serious concerns in this regard are the failure by some armed groups to adequately distinguish themselves from the civilian population and even that of combatants deliberately intermingling with the civilian population, operating from within civilian areas or feigning civilian status to attack their adversary.

### **Current challenges in protecting civilians against the effects of hostilities**

In a number of recent and current conflicts, the parties have stressed that they go to great lengths to operate in accordance with IHL. Such claims are mostly made

<sup>12</sup> However, it is important to distinguish between armed conflict situations in which IHL applies and other situations of violence that would be governed by other bodies of law, including international human rights law. In addition, even in a situation of armed conflict, an armed gang or organised criminal group would likely not be considered a party to the conflict, and its actions and the state's response to them would thus be governed by other legal frameworks, including human rights law and domestic criminal law.

<sup>13</sup> Article 51(3) of Additional Protocol I (AP I) and Article 13(3) of Additional Protocol II (AP II) entitle civilians to protection against the dangers arising from military operations and prohibit direct attacks on civilians “unless and for such time as they take a direct part in hostilities”.

by states, although certain armed groups have also emphasised their adherence to IHL, sometimes through unilateral declarations, special agreements or similar express commitments. Nevertheless, even in situations where the belligerent parties are seemingly committed to implementing their obligations under IHL as regards civilian protection, military operations frequently result in high numbers of civilian casualties and the widespread destruction of civilian property. This is also the case in situations involving highly-disciplined and trained armed forces. This section explores some of the factors that can jeopardise or challenge the protection of civilians in current conflicts and that can contribute to a situation where the protection that IHL seeks to provide to civilians may differ significantly from the real dangers and vulnerabilities that civilians are exposed to on the ground.

Central to this analysis are the IHL rules on distinction, proportionality and precautions, which are fundamental to the protection of civilians during hostilities. **Distinction requires that the parties to a conflict at all times distinguish between civilians and combatants and between civilian objects (buildings, infrastructure, etc) and military objectives**, and that they direct their attacks only against military objectives.<sup>14</sup> The rule of distinction finds two expressions in treaty and customary IHL, in terms of the prohibition on indiscriminate attacks and the precautions required in attack. Indiscriminate attacks fall into three categories: those that are not directed at a specific military objective; those that employ means and methods that cannot be directed at specific military objectives; and those where the effects of such use cannot be limited as IHL requires.<sup>15</sup> Specific examples of attacks defined as indiscriminate and thus prohibited, according to Additional Protocol I, would be the bombardment of an area where there are concentrations of civilians or civilian objects “by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives”,<sup>16</sup> as well as attacks that would violate the proportionality rule.<sup>17</sup>

14 AP I, Article 48. As to the customary nature of this article in international and non-international armed conflicts, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005 (commonly known as the ICRC Customary Law Study – ICRC CLS), rule 7, pp 25-29.

15 AP I, Article 51(4); ICRC CLS, rule 12, pp 40-43.

16 AP I, Article 51(5)(a); ICRC CLS, rule 13, pp 43-45.

17 AP I, Article 51(5)(b); ICRC CLS, rule 14, pp 46-50.

**The proportionality rule requires parties to refrain from any attack where the expected civilian losses that may result are excessive in relation to any direct and concrete military advantage that is anticipated.**<sup>18</sup> Incidental civilian harm resulting from an attack – often euphemistically referred to as “collateral damage” – is therefore not unlawful as long as it is not considered excessive in accordance with this rule. To make this determination, the rule requires that in the context of each attack, an assessment must be made as to the exposure to injury and the level of injury that civilians may suffer as a result of the attack and that this be weighed against the military gain anticipated. This includes consideration of the target itself, its vicinity and the type of weaponry used in the attack. Temporally, the proportionality assessment follows that of distinction, as it presupposes that a distinction between combatants (or military targets) and civilians has been made in order to assess the extent of incidental loss to those civilians.

Related to both distinction and proportionality are the rules on precautions.<sup>19</sup> Both parties – whether attacking or being attacked – must take measures to avoid or minimise the effects of their actions on civilians. The rules on precautions in attack require military planners, among others, to select the methods and means of attack with a view to avoiding or minimising loss or damage to the civilian population or civilian objects, to refrain from attacks that would violate the rule of proportionality, to verify the military nature of the target, and to provide effective advance warning of the attack to civilians. The rules on precautions against the effects of attacks require parties “to the maximum extent feasible” to remove civilians and civilian objects from the vicinity of military objectives and avoid placing military objectives within or near densely-populated areas. The parties are also required to take other necessary precautionary measures to protect civilians and civilian objects under their control, and although not specified, examples could include establishing warning and evacuation systems for civilians, constructing bomb shelters, and marking dangerous

18 AP I, Article 57(2)(a)(iii); ICRC CLS, rule 14, pp 46-50.

19 AP I, Articles 57 and 58; ICRC CLS, rules 15-24, pp 51-76.

areas.<sup>20</sup> It is expressly prohibited to use civilians or civilian objects to shield military objectives or operations.<sup>21</sup>

This section starts by examining in some detail two increasingly-common “conflict environments” – urban and asymmetrical warfare – that are seen to pose particular challenges for the protection of civilians and the implementation of the above-mentioned rules. Issues of more general importance for the protection of civilians during hostilities are then discussed, i.e. the choice of weapons and new developments in weapons technology that can have implications for civilian protection; and some of the difficulties that arise when applying the rules on distinction, proportionality and precautions in practice, in particular in the context of targeting decisions. Since all of these subjects are closely related, there is some overlap between the sub-sections: the choice of weapons is, for example, important for the protection of civilians during hostilities in urban areas, while the difficulties of applying the rules are relevant to most situations. However, challenges related to these three issues – environment, weapons and targeting – all contribute to the gap that exists between the theory and the actual practice of protecting civilians under IHL.

### **Conduct of hostilities in urban and other populated areas**

Wars have always entailed particular difficulties and risk for civilians in urban areas. For example, it was in large cities that some of the most deadly and destructive violence in the Second World War took place, with devastating consequences for civilians on all sides, including those in Stalingrad, London, Warsaw, Dresden, Berlin, Hiroshima and Nagasaki.

In response to the many horrors of the Second World War, the Fourth Geneva Convention of 1949 included some general rules for the protection of civilians in war. However, it was not until the adoption of Additional Protocol I in 1977 that detailed rules for the protection of the civilian population against the effects of hostilities were established. Part of the background for this was the rapid expansion of air

warfare capabilities, which since the Second World War had continued to be used with devastating effects on civilians. Additional Protocol I explicitly prohibits area bombardment, which it qualifies as an indiscriminate attack.<sup>22</sup>

Despite a significant strengthening of the legal framework aimed at protecting civilians from the effects of hostilities, civilians have nevertheless continued to suffer during sieges, bombardments and ground operations in cities as diverse as Sarajevo, Mogadishu, Grozny and Baghdad. Capital cities often bear the brunt of such hostilities, being both in practical and symbolic terms the central hubs of communication, economic activity, national administration and power.

The conduct of hostilities in cities and other population centres puts civilians at particular risk due to their high concentration, often in close proximity to combatants and military objectives. In addition, cities and towns are by definition filled with objects for civilian use, whether homes, shops, schools or hospitals, which become highly exposed to the effects of hostilities. Fighting in urban areas also poses significant dangers to soldiers, and the risk of getting caught up in protracted and inconclusive engagements have often deterred militaries from sending ground troops into cities, leading them instead to rely on air strikes and the use of artillery. These can have devastating effects on the civilian population, as cities and other populated areas are inherently challenging and difficult environments in which to conduct military operations, including in terms of defining and identifying military objectives, making proportionality assessments, and taking adequate precautionary measures to protect civilians.

For the same reason, cities can be particularly attractive for local armed forces or armed groups who can capitalise on both the civilian nature of the urban environment and their knowledge of the area, creating a very difficult and dangerous setting for their opponent. While guerrilla warfare has traditionally been fought from rural areas, armed groups are now increasingly operating in urban areas. This is probably due to several factors,

20 Jean-François Quéguiner, “Precautions under the law governing the conduct of hostilities”, *International Review of the Red Cross*, vol 88, no. 864, December 2008, p 819.

21 AP I, Article 51(7); ICRC CLS, rule 97, pp 337-340.


22 Article 51(5).





including the tactical advantages that they can gain in a complex urban environment against a militarily-superior adversary and the fact that the civilian “constituents” whose support they rely on increasingly live in urban areas, as do the members of armed groups themselves.

In numerous recent and ongoing conflicts, such as in Iraq and Afghanistan, the risks to civilians in urban areas have been significantly exacerbated by combatants deliberately intermingling with civilians and using objects such as civilian homes or infrastructure for military purposes, thus making them potential targets. Because this makes the already-difficult urban environment even more unpredictable, the adversary is more likely to cause civilian harm, both unintentionally and by lowering its own standards of compliance with the law.



The choice of weapons is a crucial consideration when applying the rules of distinction and proportionality in an urban environment. Certain weapons will be inherently difficult to use in accordance with these rules in populated areas like cities and towns. Of particular concern is the use of high explosive munitions, such as artillery, or weapons with an area effect, such as cluster munitions or incendiary weapons.

The UN secretary-general, in his 2009 report on the protection of civilians in armed conflict, expressed growing concern over the use of explosive weapons in densely-populated areas, which “inevitably has an indiscriminate and severe humanitarian impact. First, in terms of the risk to civilians caught in the blast radius or killed or injured by damaged and collapsed buildings. Secondly, in terms of damage to infrastructure vital to the well-being of the civilian population, such as water and sanitation systems.”<sup>23</sup>

23 UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 29 May 2009, S/2009/277, para 36. IHL specifically prohibits for any motive attacks on, the destruction of, and the removal or rendering useless of objects that are indispensable to the survival of the civilian population, such as foodstuffs and drinking water installations (AP I, Article 54(2); AP II, Article 14; ICRC CLS, rule 54, pp 189-193). While it is acknowledged that this prohibition permits some exceptions, these are very limited and intended to permit attacks that only affect the members of the armed forces of an adversary and do not leave the civilian populations with such inadequate food or water as to cause their starvation or force their movement (Article 54(3)).

He reiterated this concern in 2010, calling for more systematic data collection and analysis of the human costs of explosive weapons, and for UN member states to issue policy statements outlining “the conditions under which explosive weapons might be used in populated areas”.<sup>24</sup> In a study conducted in 2006, the organisations Landmine Action and Medact analysed media reports of violent incidents involving explosive weapons over a six-month period. The data showed that the average number of persons reported killed in attacks with explosive weapons in populated areas was almost twice as high and the number of injured three times as high as in unpopulated areas. The vast majority of the reported victims of attacks in populated areas were civilians.<sup>25</sup> Although data from media reports is not comprehensive and is subject to different types of biases, the study does indicate that explosive weapons used in populated areas place the civilian population at high risk. In addition to the immediate harm that they can cause, explosive weapons also create unexploded ordnance, which poses a continuous threat to civilians until it is removed. Growing concern about the use of explosive weapons in populated areas is evidenced by various new initiatives, such as a project at the UN Institute for Disarmament Research that aims to contribute to greater understanding of the humanitarian effects caused by explosive weapons<sup>26</sup> and, most recently, the launch of the International Network on Explosive Weapons in August 2011.<sup>27</sup>

A related problem is that of improvised or “homemade” explosive devices, often assembled using “off-the-shelf” materials such as fertilisers, gasoline, and mobile phones, and components gathered from unexploded and abandoned munitions. Such devices are causing much civilian death and injury in ongoing conflicts, including in Iraq, Afghanistan,

24 UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 11 November 2010, S/2010/579, paras 48–51.

25 Richard Moyes, “Explosive violence: the problem of explosive weapons”, *Landmine Action*, 2009, p 24.

26 UN Institute for Disarmament Research, “Discourse on explosive weapons”, project note, [http://www.unidir.org/bdd/fiche-activite.php?ref\\_activite=499](http://www.unidir.org/bdd/fiche-activite.php?ref_activite=499), accessed 28 April 2011; see also <http://www.ExplosiveWeapons.info>.

27 Save the Children UK and Action on Armed Violence, “NGOs demand new efforts to stop bombing of civilians”, Geneva, 30 August 2011, <http://www.landmineaction.org/resources/Press%20release%20AOAV%20+%20Save%20the%20Children%2030%20March%202011.pdf>, accessed 28 April 2011.

Pakistan and Somalia. This is primarily due to the way in which these weapons are used, which often amounts to indiscriminate attacks on or the direct targeting of civilians. The effects of such attacks have been particularly devastating when large amounts of explosives have been detonated in locations with high concentrations of civilians, such as in markets, at religious ceremonies and in schools.

The use of munitions containing white phosphorous has caused controversy in some recent conflicts. Among others, such munitions have been used by US forces in Iraq and by Israeli forces in Gaza.<sup>28</sup> The United States and NATO have also documented the use by Afghan militants of white phosphorous in improvised explosive devices, including in civilian areas.<sup>29</sup> White phosphorous will burn fiercely until depleted or deprived of oxygen, causing extensive, painful and lethal burns that are particularly difficult for medical personnel to treat due to the risk of their own exposure to the white phosphorous. Protocol III to the 1980 Convention on Certain Conventional Weapons (CCW), which has been ratified by 109 states to date, prohibits the use of incendiary weapons against military targets located in populated areas, unless they are clearly separated from civilians and civilian objects and all feasible precautions have been taken to limit the incendiary effect to the military objective and minimise civilian harm. The use of air-dropped incendiary weapons is completely prohibited in populated areas.<sup>30</sup> However, munitions with “incidental incendiary effects” such as “illuminants, tracers, smoke or signaling systems” are not considered incendiary weapons under the protocol and are thus not prohibited.<sup>31</sup> The

use of white phosphorous munitions to, for example, screen troops, mark targets and illuminate dark areas is therefore allowed, although they would still have to be used in accordance with the general rules of IHL. Due to the acute hazard such munitions pose to any civilians coming into contact with them, their use in populated areas can raise concerns under the rules of distinction, proportionality and precautions in attack unless extreme care is exercised.

During warfare in urban and other populated areas, risks to civilians may be decreased through the increased use of “precision attacks”. Military experts highlight that achieving greater precision in attack does not only depend on the accuracy of the weapons, but also on the capacity to reliably locate and track the target, select the correct system of attack, accurately assess the effect of the attack, and re-engage if needed, while avoiding or minimising harm to civilians or civilian objects.<sup>32</sup> By improving the quality of targeting, precision attacks can make it easier to protect civilians from the effects of hostilities, particularly in densely-populated areas.

While precision technologies can make it easier to avoid or minimise civilian harm, their use also raises some potential concerns. For example, it may encourage the targeting of military objectives located in close proximity to civilians that would otherwise have been considered off limits, due to the possibility of limiting – though not necessarily avoiding – civilian harm. Also, different states’ militaries still vary significantly in their capacities for conducting precision attacks, while non-state armed groups have as yet limited access to such technologies. If the precision capabilities of the parties are highly unequal, it may encourage the weaker party to engage in unlawful tactics that put civilians at increased risk.<sup>33</sup>

Cities and towns will often contain infrastructure that serve both civilian and military functions, such as electricity and telecommunications installations, industrial facilities, and transportation networks. The possibility of conducting precision attacks that reduce the risk of harm may facilitate the targeting

28 Program on Humanitarian Policy and Conflict Research, *IHL and White Phosphorus Munitions*, IHL Primer, no. 5, <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2105>, accessed 21 June 2010.

29 Combined Joint Task Force – 101, “Reported insurgent white phosphorous attacks and caches”, press release 20090511–002, declassified for public release on 11 May 2009, <http://www.cent-com.mil/press-releases/reported-insurgent-white-phosphorus-attacks-and-caches>, accessed 21 June 2010.

30 States that are not party to Protocol III to the CCW must respect the general rules of IHL when using incendiary weapons, including the principles of distinction and proportionality. In addition, customary law requires that particular care be taken to avoid civilian harm when using incendiary weapons (see ICRC CLS, rule 84).

31 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Article 1(1)(b)(i), Geneva, 10 October 1980.

32 Joints Chiefs of Staff, “Joint Vision 2020”, June 2000; referred to in Michael Schmitt, “Precision attack and international humanitarian law”, *International Review of the Red Cross*, vol 87, no. 859, September 2005, p 446.

33 Ibid, pp 453-463.

of such “dual-use”<sup>34</sup> infrastructure, particularly through aerial attacks. Militaries may attack dual-use facilities purely to eliminate their military function, but such attacks can also form part of a strategy to demoralise the enemy and in particular undermine popular support for the war effort. Attacks on dual-use targets may be allowed under IHL if they fulfil the definition of a military objective.<sup>35</sup> However, both ethical and legal concerns arise if they are motivated primarily by their impact – albeit psychological – on the civilian population.<sup>36</sup> It has been argued that new approaches to targeting, such as effects-based targeting<sup>37</sup> adopted by the United States and NATO, may contribute to broadening the notion of military objectives in this direction.<sup>38</sup>

The destruction of dual-use facilities can have severe humanitarian consequences for the civilian population. In addition to the immediate threat of death and injury at the time of the attack, the indirect effects are often severe. The destruction of roads and bridges can hinder transport of the sick and wounded or prevent civilians from using roads to flee from the fighting. The loss of electricity can hamper the operation of medical services; incapacitate water and sanitation systems; or make it difficult for civilians to refrigerate food, cook or stay warm.

34 This term is not found in IHL, but it is often used to refer to objects that serve both military and civilian purposes.

35 AP I, Article 52(2) defines military objectives 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”. As to the customary nature of this rule in international and non-international armed conflicts, see ICRC CLS, vol 1, pp 29-32.

36 It is prohibited to attack objects indispensable to the survival of the civilian population (see note 23) and to cause widespread, long-term and severe damage to the natural environment and thus prejudice the health or survival of the civilian population (AP I, Article 55; ICRC CLS, rules 43-45, pp 143-158). However, the latter prohibition is not included in AP II and the applicability of the customary rule to non-international armed conflicts is still unclear. The ICRC has identified this as an area of IHL requiring further development.

37 In which the selection of targets and the force to be applied to them are focused on achieving the specific effects (rather than necessarily their destruction) that will most effectively contribute to the overall objectives of the mission.

38 Alexandra Boivin, “The legal regime applicable to targeting military objectives in the context of contemporary warfare”, University Centre for International Humanitarian Law Research Paper Series, no. 2, 2006, p 25. However, the potential of effects-based targeting in reducing civilian harm has also been emphasised, among others by Schmitt, “Precision attack and international humanitarian law”, 2005, p 453.

Significant proportions of urban populations in the developing world live in poor areas and slums. This can exacerbate their vulnerability to the effects of hostilities due to such factors as poor building quality, inadequate access to medical assistance and lack of resources to flee from fighting. While this is not unique to urban settings, it is often those that are already vulnerable that are likely to be the worst affected by the conflict. With more than half of the world’s population already living in urban areas – a figure that is likely to increase significantly due to rapid population growth and urbanisation – protecting civilians during warfare in urban areas is likely to be a mounting concern in the years to come.

### Asymmetrical warfare

Asymmetry in terms of unequal military capacity is not a new phenomenon. Warring parties have always possessed different military strengths that they have attempted to use to their advantage. However, **as wars between states have become increasingly rare, disparity between the parties – in particular in terms of technology – have become a defining characteristic of many current conflicts.** This is particularly evident in wars involving one of the great powers, as they hold both the largest quantities of weapons and the most advanced weaponry. It is also the case where a coalition of states fights a common enemy, such as the US-led coalition in Iraq or the NATO-led International Security Assistance Force (ISAF) in Afghanistan. Internal armed conflicts in which the government is fighting one or several armed groups are also typically asymmetrical.



Increasing asymmetry between the parties has been associated with greater use of perfidious attacks and the deliberate targeting of civilians by the weaker party, as well as with the use of various unlawful tactics by the militarily-stronger party, including indiscriminate attacks and illegal detention and interrogation practices. In 2009, the UN secretary-general highlighted the risks posed to civilians by the increasingly-asymmetrical nature of conflict in situations such as Afghanistan, Iraq, Pakistan and Somalia.<sup>39</sup>

39 UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 2009, para 24.



In fighting an opponent of superior military strength, the weaker party might seek to compensate for its disadvantage by resorting to means and methods of warfare that are prohibited by IHL and that undermine the protection of civilians. Direct attacks on “soft targets” such as civilians and civilian objects constitute the most evident threat to civilians in many asymmetrical conflicts. Humanitarian organisations are also increasingly targeted in these contexts. For the weaker party, such attacks are likely to be easier and cause fewer losses than attacks on military personnel or installations. In addition to their devastating immediate consequences, attacks on civilians can have powerful political and psychological effects by instilling fear among the entire civilian population. In addition, they are likely to generate considerable media attention and thus have important “multiplier” effects by affecting perceptions of the war effort.<sup>40</sup> For similar reasons, hostage taking – including the capture of journalists and other media personnel – is becoming more frequent.

For some groups, unlawful tactics may also form part of a preferred military strategy to exploit the enemy’s weak points. Intermingling with the civilian population, locating military objectives in civilian areas, or using civilians as human shields are tactics that take advantage of the principle of distinction by making it very difficult for the other party to attack without causing harm to civilians. Because it could be both difficult and dangerous for the militarily-weaker party to get close enough to the adversary to attack, a way of doing so is to feign protected status, for example by wearing civilian clothing, or to misuse protected objects or emblems for military purposes. While wearing civilian clothing is not prohibited as such – although it does entail a loss of lawful combatant status – it violates the prohibition of perfidy if it is done deliberately as a means of killing, injuring or capturing the adversary.<sup>41</sup> It also increases the likelihood of incidental harm to civilians, or to civilians being attacked by mistake. Of particular concern in this regard is the use in recent conflicts of groups that benefit from special protection under IHL and that are less likely to arouse suspicion, such as children and even in some cases children with disabilities, including to carry out suicide attacks.

Civilians are protected against direct attacks “unless and for such time as they take a direct part in hostilities”.<sup>42</sup> Determining if and when a civilian is participating in hostilities has become an increasingly-important question in recent years,<sup>43</sup> in particular due to the prevalence of non-international armed conflicts in which civilians take part in different ways. It is a particularly-acute concern in asymmetrical conflicts where combatants deliberately seek to confuse the adversary as to their status. The potential risk this tactic poses to civilians is further exacerbated when hostilities take place in urban and other densely-populated areas.

Military commanders will seek to avoid exposing their soldiers to unnecessary risks in order to keep the number of military casualties to a minimum. For the militarily-superior party, this can, for example, be achieved by employing missiles or air strikes from high altitudes. This may, however, increase the risk of civilian harm, whether directly as a result of targeting problems or indirectly by creating incentives for the opponent to resort to unlawful tactics such as discarding uniforms and moving troops and weapons into civilian areas. Civilians and civilian objects may also be at greater risk of being deliberately attacked as long as lawful military objectives, such as the superior party’s military forces and equipment, remain “out of reach” to the opponent. When coalitions of international forces have launched military interventions, such as in the former Yugoslavia, Iraq, Afghanistan and most recently Libya, the protection of troops has often been of paramount concern, particularly to maintain public support for these operations among troop-contributing countries.

A notable development in this regard is the evolution of US counter-insurgency (COIN) doctrine. Based on lessons learned from asymmetrical conflicts in Iraq and Afghanistan, a new US Army/Marine Corps *Counterinsurgency Field Manual* was published in 2007, in which preserving non-combatant lives and dignity is identified as central to mission accomplishment. The new COIN doctrine and a growing recognition of how civilian casualties have undermined the military and political goals being pursued have contributed to a shift in strategy in both

40 Robin Geiß, “Asymmetric conflict structures”, *International Review of the Red Cross*, vol 88, no. 864, December 2006.

41 AP I, Article 37; ICRC, CLS, rule 65, pp 221-226.

42 AP I, Article 51(3); AP II, Article 13(3); ICRC CLS, rule 10, pp 34-36.

43 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, ICRC, May 2009.



Iraq and Afghanistan. For example, during 2010, a series of new tactical directives, standard operating procedures and guidelines were issued to ISAF forces in Afghanistan. The new orders emphasise the need to minimise civilian casualties and contain, among others, more-detailed guidelines for aerial bombardment, the use of artillery and night raids. These efforts seem to have positively affected the balance between “force protection” and civilian protection. According to the UN Assistance Mission in Afghanistan, despite a surge in the number of international and Afghan pro-government forces and in military operations in 2010, civilian casualties caused by these forces decreased by 21% compared to 2009.<sup>44</sup> The UN has underlined that concerns persist when it comes to achieving the full implementation of these guidelines and that accountability for civilian casualties remains inadequate. Nonetheless, these measures demonstrate that even in highly-asymmetrical and difficult contexts, reducing civilian harm during hostilities is possible and can be beneficial on both humanitarian and military grounds.

Alarmingly, and in spite of these positive developments, the human toll of the armed conflict in Afghanistan has continued to grow. Although the Taliban issued an update of its own code of conduct in May 2010, in which in order to win the support of the local population it urged combatants to avoid harming civilians, attacks by anti-government groups are in practice killing a growing number of civilians and constituted 75% of total civilian deaths and injuries in 2010.<sup>45</sup> The main reason for this increase is the use of more powerful and sophisticated improvised explosive devices. Targeted killings, abductions, and the intimidation of both civilians and international aid workers are also common tactics among anti-government elements.<sup>46</sup>

Systematic violations of IHL by one side are over time likely to affect the adversary’s behaviour. It may lead the opponent to adapt its own interpretation and application of the rules, for example by adopting a broader definition of military objectives or a more narrow interpretation of the precautions considered feasible.<sup>47</sup> The result could be a vicious circle of

gradually-weaker implementation of and respect for IHL, with the likely effect that civilians would be increasingly exposed to the effects of hostilities. Another risk in such scenarios is that the crucial separation between *jus ad bellum* (law on the use of force, i.e. whether the decision to go to war is just) and *jus in bello* (law in war, i.e. whether the war is conducted in accordance with the law of armed conflict) becomes blurred. If one side perceives it is fighting a “just war” against an enemy using “terrorist tactics”, it may be tempting to argue that the normal rules of war no longer apply or that they will need to be adapted to the circumstances.<sup>48</sup>

While the importance of reciprocity as a principle in IHL is a matter of scholarly debate, in practical terms it clearly provides a powerful incentive for compliance with IHL. If warring parties are fundamentally unequal in power and status, this is likely to affect their expectations of reciprocity. Asymmetrical conflict dynamics thus challenge part of the foundation on which IHL is based and can pose a major threat to civilian protection in war. Although the notion of reciprocity may affect the behaviour of belligerents on the ground, it is important to underline that it does not affect their legal obligations under IHL.<sup>49</sup> If one party fails to take adequate precautions to protect civilians against the effects of attacks or even goes as far as deliberately using civilians to shield military objectives, this does not in any way relieve the other party of its obligations to consider the presence of civilians in assessing the proportionality of an attack and to take all feasible precautions to avoid or minimise civilian harm.<sup>50</sup>

48 Avishai Margalit and Michael Walzer, “Israel: civilians & combatants”, *New York Review of Books*, 14 May 2009, <http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/>, accessed 20 April 2011.

49 The International Criminal Tribunal for the Former Yugoslavia (ICTY) has categorically rejected reciprocity as a justification for violations of IHL, affirming that “[t]he defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants” (ICTY *Kupreškić* judgement, 14 January 2000, para 511).

50 While the use of human shields is prohibited, the question of whether and under what circumstances civilians that act as “voluntary human shields” can be considered to be taking direct part in hostilities and thus lose their protection as civilians is still contested. The ICRC provides examples of situations in which – in its view – civilians that attempt to shield military objectives by their presence could be considered as taking direct part in hostilities and others in which they would not; see Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009, pp 56-57.

44 UN Assistance Mission in Afghanistan/Afghanistan Independent Human Rights Commission, *Afghanistan Annual Report 2010 on Protection of Civilians in Armed Conflict*, August 2011, p iv.

45 Ibid, p i.

46 Ibid, pp iii-iv.

47 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2007, pp 13-14.

## Choice of weapons

It is a fundamental principle of IHL that the choice of means and methods of warfare – i.e. weapons and tactics – is not unlimited.<sup>51</sup> For the purpose of protecting civilians, IHL prohibits weapons that are by nature indiscriminate, such as biological weapons. Indiscriminate weapons are those that cannot be directed at a specific military objective or whose effects cannot be limited as required by IHL and thus are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>52</sup> The rules on precautions require that all feasible precautions in the choice of means and methods of warfare be taken to avoid – or in any event minimise – incidental loss of life or injury to civilians and damage to civilian objects.<sup>53</sup> Weapons that cause unnecessary suffering or widespread, long-term and severe damage to the natural environment are also prohibited.<sup>54</sup> In addition to the general rules on weapons, a number of treaties prohibit specific weapons (e.g. biological, chemical and blinding laser weapons) or restrict their use due to their potential to have indiscriminate effects in some circumstances (e.g. the use of incendiary weapons in populated areas).

In fact, humanitarian concerns related to certain weapons have led to important developments in IHL in recent years. The 1997 Convention on the Prohibition of Anti-Personnel Mines was a major achievement for the protection of civilians. When the treaty was adopted, anti-personnel mines were causing tens of thousands of civilian deaths and injuries each year, with the latter often resulting in permanent and severe disabilities for their victims. Today, 156 states have joined the treaty, more than 45 million stockpiled mines have been destroyed, and vast areas of contaminated land have been cleared. As a result of an initiative started in 2000 to encourage non-state armed groups to comply with the anti-personnel mine ban, more than 40 armed groups have so far committed to a total ban on these weapons by signing a deed of commitment developed by the Swiss organisation Geneva Call. Only a few states and non-state armed groups continue to use anti-personnel mines. Nevertheless, anti-personnel mines from previous and ongoing

conflicts still cause large numbers of new deaths or injuries each year, including in Afghanistan, Cambodia, Colombia, Myanmar and Pakistan, and mine clearance is still projected to take many years to complete in most mine-affected countries.<sup>55</sup>

Another category of weapons that has recently been banned due to their humanitarian consequences is cluster munitions. In areas where these weapons have been used on a significant scale – such as in Afghanistan, Iraq, Kosovo, Laos and Lebanon – their use has resulted in high numbers of civilian casualties. Advocacy efforts by civil society and humanitarian organisations have been instrumental in bringing about both these prohibitions, as has the involvement of those who have been directly affected by these weapons, including survivors of landmine and cluster munition injuries.

Adopted in 2008, the Convention on Cluster Munitions (CCM) prohibits the use, production, stockpiling and transfer of cluster munitions.<sup>56</sup> Signed by 108 states and ratified by 57 as of May 2011, the treaty entered into force in August 2010. It places obligations on States Parties to clear affected areas, assist victims and destroy their stockpiles, thus providing a comprehensive solution to prevent future civilian harm from these weapons.

However, this achievement risks being undermined by the ongoing efforts to develop a second legally-binding instrument on cluster munitions, this time within the framework of the CCW. While this discussion involves all the major military powers, including the United States, the Russian Federation and China, which have not signed the CCM, NGOs have warned that the draft protocol being considered would allow continued use of several cluster munition types that have been shown to cause significant civilian harm.<sup>57</sup> Of broader concern is the precedent that it would set if states

51 AP I, Article 35(1).

52 AP I, Article 51(4)(b) and (c); ICRC CLS, rule 71, pp 244-250.

53 AP I Article 57(2)(a)(ii); ICRC CLS, rule 17, pp 56-58.

54 AP I, Article 35(2) and (3); ICRC CLS, rule 70, pp 237-244.

55 International Campaign to Ban Landmines, *Landmine Monitor Report 2010*, 2010, <http://www.the-monitor.org/index.php/publications/display?url=lm/2010/>, accessed 15 May 2011.

56 Defined as “a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions” (Convention on Cluster Munitions, Article 2(2)).

57 See, for example, Human Rights Watch, “Statement made at the meeting of the CCW Group of Governmental Experts, Geneva”, 28 August 2011, <http://www.hrw.org/en/news/2011/03/28/bonnie-docherty-delivers-statement-ccw-cluster-munitions-protocol>, accessed 15 May 2011.

(including many of the states that are already party to the CCM) agree to weaker standards for civilian protection than those established in an existing agreement.

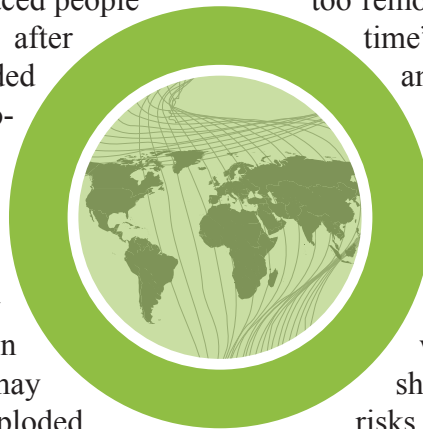
One of the main concerns raised in relation to the use of cluster munitions, as well as other explosive weapons, is the long-term hazard they create in terms of unexploded ordnance. Unexploded munitions, whether cluster submunitions, artillery shells, mortars, bombs or rockets, can pose a serious hazard to civilians for years or even decades after their use. The most obvious and direct risks are those of death and injury. Groups that do not fully understand or are unaware of the danger can be particularly vulnerable, such as children or displaced people who are returning to their homes after a conflict. In addition, unexploded ordnance can have severe socio-economic consequences for war-affected communities, preventing the resumption of agricultural activity and the reconstruction of infrastructure, homes and community resources, such as water and sanitation systems and schools. Because it may take years or even decades for unexploded ordnance to be removed, people are often compelled to enter dangerous areas in the interim, for example to collect water and firewood or to cultivate crops and build houses.

This raises the question of whether, in assessing whether an attack complies with the proportionality rule, it is sufficient to consider only the expected immediate impact of an attack or whether longer-term consequences need to be taken into account, such as those that may result from explosive weapons that fail to explode as intended. In a survey conducted among states party to the CCW, proportionality was considered the most relevant IHL principle (listed by 97% of respondent states) when using weapons that could result in explosive remnants of war, i.e. abandoned and unexploded ordnance.<sup>58</sup> In a paper examining this question in more detail, the same legal experts who analysed

states' responses to the survey argue that experience from previous conflicts can help determine the likely effects of an attack and should be used to inform proportionality assessments.<sup>59</sup> Thus, in light of the wealth of information now available from credible sources documenting the significant humanitarian consequences of explosive remnants of war, it would be difficult to argue in future cases that such effects are unexpected and not foreseeable.

The extent to which the effects of an attack beyond its immediate and direct impact should factor into proportionality assessments remains a matter of some discussion. Obviously, one cannot demand that military commanders take into account risks that are "too remote to be capable of assessment at that time".<sup>60</sup> However, it would seem both logical and realistic to require that "reasonably foreseeable ... reverberating effects must be included in the calculation of collateral damage and incidental injury".<sup>61</sup> This is also the approach taken by the US Joint Chiefs of Staff in their *Joint Doctrine for Targeting*, which states that "[s]ound planning should allow for consideration of the risks of unintended second- and third-order consequences".<sup>62</sup> The derivative and longer-term effects of an attack on the civilian population are becoming an increasingly-important consideration, both in light of experiences from past conflicts (e.g. when using explosive weapons or attacking dual-use objects such as electrical installations) and modern technologies of warfare (e.g. computer network attacks).

Developments in weapons technology are currently taking place at an unprecedented pace, with existing weapons being continuously enhanced and new ones developed. As has been the case throughout history,



58 Timothy L.H. McCormack, Paramdeep B. Mtharu & Sarah Finnin, *Report on States Parties' Responses to the Questionnaire: International Humanitarian Law and Explosive Remnants of War*, Melbourne, Asia Pacific Centre for Military Law/University of Melbourne Law School, March 2006, p 17.

59 Timothy L.H. McCormack and Paramdeep B. Mtharu, *Expected Civilian Damage & the Proportionality Equation: International Humanitarian Law & Explosive Remnants of War*, Melbourne, Asia Pacific Centre for Military Law/University of Melbourne Law School, November 2006, p 11.

60 Christopher Greenwood, quoted in *ibid*, p 6.

61 Michael Schmitt, "The impact of high and low-tech warfare on the principle of distinction", Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, p 9.

62 Joint Chiefs of Staff, *Joint Doctrine for Targeting*, Joint Publication 3-60, 17 January 2002, pp 1-7, [http://www.bits.de/NRA-NEU/others/jp-doctrine/jp3\\_60%2802%29.pdf](http://www.bits.de/NRA-NEU/others/jp-doctrine/jp3_60%2802%29.pdf).



advances being made in other areas of science and technology are quickly taken advantage of to develop new means of warfare. Some of these new weapons and weapons systems raise legal concerns under IHL, among others due to the implications they may have for the protection of civilians.

The use of remotely-controlled weapons is rapidly expanding, the best-known example being the use of unmanned aerial vehicles or so-called “drones”. While such drones can be used merely for reconnaissance and surveillance, drones equipped with missiles have been increasingly used by the United States to attack targets in Iraq, Somalia, Afghanistan and Pakistan. They have also been used by Israel, among others during Operation Cast Lead in Gaza. A growing number of states and even armed groups are reported to be acquiring these weapons.<sup>63</sup> Drones have in particular been used to attack the locations of suspected militants. Drones offer many military advantages, most notably that they can be operated from remote distances without placing pilots at risk. Unrestricted by human limitations, they are also able to fly for extended periods of time to remote, difficult and dangerous areas. Reliable figures are still scarce, but it is clear that the use of drones has been responsible for significant numbers of unintended civilian deaths. Pakistani sources have indicated that for every targeted militant killed in drone strikes in north-western Pakistan, there have been about 50 unintended victims,<sup>64</sup> while US officials assert that most of the unintended victims have in fact been lower-level militants.<sup>65</sup> According to a study of US drone strikes in Pakistan between 2004 and 2010 based on accounts from “reliable media sources”, about two-thirds of those killed were described as militants, putting the civilian death rate at 32%.<sup>66</sup>

Key factors that have been identified as contributing to the high number of unintended victims from drone attacks include technological challenges in target identification combined with the lack of reliable, on-the-ground intelligence to accurately verify the target.<sup>67</sup> While drones can strike their targets with great accuracy, Human Rights Watch has compared them to sniper rifles in that they “are only as good at sparing civilians as the care taken by the people who operate them”.<sup>68</sup> In addition, the individuals targeted are often located in civilian settings such as in their homes or villages, where they are likely to be surrounded by civilians not participating in hostilities, including their spouses and children.<sup>69</sup>

In the case of US drone strikes in Pakistan, drone operations are carried out by intelligence personnel and not by the military. This has raised concerns about the rigour of targeting procedures. In addition, the involvement of both military and civilian personnel in drone attacks and the fact that many drone operators are located far from the armed conflict raise difficult questions about the legal status of drone operators and further blur the distinction between civilians and combatants. A related issue is whether the physical and “emotional” distance between drone operators and their targets might influence targeting decisions, because drone operators feel more detached from their victims than soldiers on the ground. A recent survey of drone operators in the US military (the survey did not include CIA operators) raises some doubts about this argument, as they indicate a higher incidence of post-traumatic stress disorder than among their colleagues in combat zones, although several factors have likely contributed to the stress experienced by this group.<sup>70</sup> In light of the increased use of drones and the proliferation of drone technology, the potential concerns that these weapons raise under IHL, particularly as regards distinction, proportionality and precautions in attack, should be carefully considered.

63 Mary Ellen O’Connell, “Unlawful killing with combat drones: a case study of Pakistan, 2004-2009”, Notre Dame Law School Legal Studies Research Paper no. 09-43, 2009, p 5.

64 David Kilcullen and Andrew McDonald Exum, “Death from above, outrage from below”, *New York Times*, 17 May 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html>, accessed 2 April 2011.

65 Reuters, “Drones kill low-level militants, few civilians: U.S.”, 3 May 2010. <http://www.reuters.com/article/idUSTRE6424WI20100503>, accessed 2 April 2011.

66 Peter Bergen and Katherine Tiedemann, “The year of the drone: an analysis of U.S. drone strikes in Pakistan, 2004-2010”, New America Foundation, 24 February 2010.

67 O’Connell, “Unlawful killing with combat drones”, 2009, p 7.

68 Human Rights Watch, “Precisely wrong: Gaza civilians killed by Israeli drone-launched missiles”, *Human Rights Watch*, 2009, p 3.

69 Ibid, pp 8-11.

70 Maryann Cusimano Love, “A troubling disconnection”, 15 March 2010, [http://www.americamagazine.org/content/article.cfm?article\\_id=12180](http://www.americamagazine.org/content/article.cfm?article_id=12180), accessed 2 April 2011.



The rapidly-expanding use of high-tech weapons that rely on “beyond-visual-range and over-the-horizon” technology could increase the risk of civilian harm by reducing human control over the decision-making process.<sup>71</sup> The risks that may ensue from taking humans “out of the loop” concern a whole range of autonomous and semi-autonomous weapons systems being developed.<sup>72</sup> In what is being described as a revolution in military robotics, pre-programmed weapons capable of functioning independently of human intervention are increasingly being tested and deployed on the ground, for example in Iraq and Afghanistan. An early example was the sentry gun, which is automatically aimed and fired at targets that are detected by sensors. For example, the Phalanx CIWS sentry gun, which is a component of the Aegis computer system, is used on naval ships to defend against attacks by planes and missiles. This system was involved when a US Navy ship shot down an Iranian civilian passenger jet over the Persian Gulf in 1988, killing 290 passengers and crew, including 66 children. The plane had been mistakenly identified as an Iranian military aircraft by the computer system, and despite physical evidence to the contrary, crew members relied on the computer’s judgement more than their own. This incident illustrates some of the key questions being posed with regard to unmanned weapons, such as the extent of human control retained over these systems and the risk of humans deferring to a computer’s “superior” intelligence in targeting decisions.<sup>73</sup>

These would be even greater concerns if truly autonomous weapons systems, with independent capacities of decision-making and learning, were to be successfully developed. Such systems could significantly alter the battlefields of the future, with potentially-serious implications for IHL. With regard to the protection of civilians, one of the fundamental questions would be whether and how such weapons would distinguish between combatants and civilians, in particular in current scenarios where combatants and civilians are

increasingly intermingled. Furthermore, how would proportionality assessments be undertaken and precautions in attack ensured?<sup>74</sup>

Another rapidly-expanding category of weapons are so-called “non-lethal” or “less-lethal” weapons, which employ a wide range of technology including kinetic, acoustic, optical, electro-magnetic, biological and chemical technologies. The aim of non-lethal weapons is to “neutralise” an adversary’s troops or equipment without causing death or permanent injury. These technologies are being pursued for both military and law enforcement purposes, in particular in relation to the increasing number of low-intensity and asymmetrical conflict scenarios where civilians and civilian objects are intermingled with military objectives. While the objective of minimising harm to civilians (and combatants) must be welcomed, the deployment of non-lethal weapons also raises several concerns.<sup>75</sup> Among others, the term “non-lethal weapon” is itself highly controversial. All weapons will be potentially lethal, depending on how they are used, and there is limited empirical data on the health effects of many of these new technologies.<sup>76</sup> In addition, due to their “non-lethal” label, such weapons are more likely to be used in situations where civilians are mixed with combatants, with implications for the principle of distinction and the prohibition of indiscriminate attacks. Some of the “non-lethal” technologies being pursued may also challenge the absolute prohibitions on biological and chemical weapons.<sup>77</sup>

71 Schmitt, “The impact of high and low-tech warfare on the principle of distinction”, 2003, p 8.

72 Peter Singer, “In the loop? Armed robots and the future of war”, Brookings Institution, 30 May 2010. [http://www.brookings.edu/opinions/2009/0828\\_robots\\_singer.aspx?rssid=revolution+in+military+affairs](http://www.brookings.edu/opinions/2009/0828_robots_singer.aspx?rssid=revolution+in+military+affairs), accessed 1 June 2010.

73 Ibid.

74 Swiss Federal Department of Foreign Affairs and ICRC, *60 Years of the Geneva Conventions and the Decades Ahead*, report on a conference held in November 2009, published 2010, pp 30-33, [http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/60JahreIKRK\\_Konferenzpapier\\_FR-EN.pdf](http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/60JahreIKRK_Konferenzpapier_FR-EN.pdf), accessed 25 April 2011.

75 Some of these concerns fall outside the scope of this paper, such as those relating to the protection of combatants from superfluous injury and unnecessary suffering.

76 Existing empirical data does not necessarily favour use of the term “non-lethal”. The opiate fentanyl that was used as a chemical incapacitant by Russian Federation security forces during the Moscow theatre siege in 2002 had a fatality rate of 16%, more than twice that of chemical weapons used on the battlefield in the First World War; see David P. Fidler, “The meaning of-Moscow: ‘non-lethal’ weapons and international law in the 21<sup>st</sup> century”, *International Review of the Red Cross*, vol 87, no. 859, September 2005, p 532.

77 Swiss Federal Department of Foreign Affairs and ICRC, *60 Years of the Geneva Conventions and the Decades Ahead*, 2010, p 31.

With regard to all of the above-mentioned weapons systems and technologies, it is important to recall that Article 36 of Additional Protocol I requires each State Party to assess whether the use of a new weapon, means or method of warfare would violate the rules of international law in some or all circumstances. In view of the rapid development of weapons technology, this rule is of particular importance today.

### Practical application of the rules

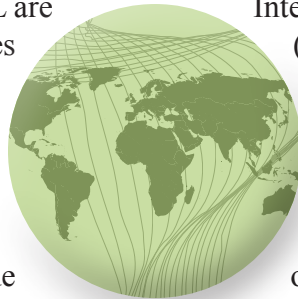
As stated in the introduction to this paper, one of the main obstacles to achieving adequate protection of civilians in war is – aside from the challenge of deliberate non-compliance – how the rules are interpreted and applied on the ground during actual military operations. While the rules of IHL are specifically designed for the particularities of armed conflicts, thus balancing military and humanitarian considerations, this does not mean that the implementation of the rules is a simple or straightforward undertaking. The challenges involved are highlighted by the ICRC in a guide developed to assist militaries in integrating IHL during their operations: “law is ... sometimes too general to serve as a guide for practical behavior in combat .... It is therefore necessary to interpret it, analyze its operational implications and identify consequences at all levels.”<sup>78</sup>

The first challenge relates to the interpretation of the rules. The key rules for the protection of civilians from the effects of hostilities contain terms that are not adequately or precisely defined, or the definition leaves considerable room for interpretation, such as “civilian objects”, “military objectives”, “concrete and direct military advantage”, and “all feasible precautions”. What does it take for civilian losses to be considered “excessive” as compared to the “concrete and direct military advantage anticipated” from an attack? Were these losses “expected” or merely an unfortunate result of unforeseen circumstances? And did the object targeted qualify as a military objective in that it made “an effective contribution to military action” and the attack offered a “definite military advantage”?

78 ICRC, *Integrating the Law*, Geneva, ICRC, May 2007, p 17.

The ambiguity inherent in the rules can result in differences in their practical application and gives significant discretion to those in charge of making targeting decisions. It also assumes that parties will implement the rules in absolute good faith. As stated in the commentary to Additional Protocol I in relation to the principle of proportionality: “Even if this system is based to some extent on a subjective evaluation, the interpretation must above all be a question of common sense and good faith for military commanders.”<sup>79</sup>

In practice, however, a number of difficulties arise when it comes to the interpretation and application of these rules. For example, with regard to the crucial task of conducting proportionality assessments, the



International Tribunal for the former Yugoslavia (ICTY) Ad Hoc Committee established to review allegations of IHL violations during the NATO bombing campaign against the Federal Republic of Yugoslavia stated that “[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied”.<sup>80</sup> The committee identified

some of the questions that remain unresolved in this regard, including how to measure and compare the different “values” of military advantage and incidental civilian harm, and the extent to which a commander is required to expose his/her own forces to danger in order to limit civilian harm.<sup>81</sup> Other challenges to consistent application of the proportionality principle relate to the fact that assessments are likely to be highly contextualised, depending on by whom, where and when they are made. For example, the relative values assigned to the anticipated military advantage versus expected civilian losses would likely be judged differently by a military commander and an IHL lawyer or even by different military commanders, depending on their experience and background.<sup>82</sup> There are also different views as to whether the proportionality test must be applied to each element of an attack

79 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/ Martinus Nijhoff, 1987, pp 683-684.

80 ICTY Ad Hoc Committee, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, para 49.

81 Ibid, para 49.

82 Ibid, para 50.

or only to the attack as a whole.<sup>83</sup> As previously mentioned, the question of how to take into account effects that are further removed in space or time, but nevertheless foreseeable, is also of increasing relevance in contemporary armed conflicts.

It was in response to similar unresolved questions surrounding the notion “direct participation in hostilities” that the ICRC, together with the TMC Asser Institute, initiated an expert process involving legal experts from military, governmental and academic circles during the period 2003-2008. The principle of distinction requires civilians to be protected from attack, “unless and for such time as they take a direct part in hostilities”.<sup>84</sup> Informed by these discussions, as well its own research, the ICRC developed and published a document providing recommendations on the interpretation and practical application of this concept in light of the increasing difficulties faced in distinguishing between combatants and civilians in contemporary warfare.<sup>85</sup> While it is hoped that this document will assist militaries in determining when civilians may or may not be considered to take a direct part in hostilities, similar guidance does not yet exist with regard to several other key concepts relating to the conduct of hostilities. Also, there is still no consensus or uniform practice among states on how these rules are to be interpreted and applied.

This leaves a considerable grey area between what can be considered “unfortunate” and “unlawful”

civilian harm.<sup>86</sup> Consequently, it is difficult to question decisions made by commanders in particular cases and to assess whether they have done everything feasible to minimise incidental civilian harm. The fact that targeting decisions are informed by military intelligence, which parties are often unwilling to disclose, makes them even more difficult to judge. As a result, third parties investigating allegations of misconduct in war – such as humanitarian or human rights organisations and fact-finding missions from the UN or other international bodies – have to base their conclusions on the often limited or conflicting information available to them from publicly-available reports, testimonies by victims and witnesses, interviews with other local actors, etc. The parties, on the other hand, tend to make general assertions denying any wrongdoing without presenting specific evidence to back up their claims. As Richard Goldstone, who led the UN fact-finding mission investigating allegations of war crimes committed by Israel and Hamas in the Gaza war of 2008-2009, recently commented: “The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion ... Israel’s lack of cooperation with our investigation meant that we were not able to corroborate how many Gazans killed were civilians and how many were combatants.”<sup>87</sup>

Regardless of the veracity of such allegations in specific situations, it is clear that the current dynamic of claims and counter-claims, often based on inadequate information, makes it difficult to reach firm conclusions about the reasons for harm inflicted on civilians. Also, it is not always advantageous for the parties concerned, as it not only makes it more difficult to prove, but also to refute claims that violations have occurred. In some cases, political considerations may influence or be perceived to have influenced the legal analysis, putting its credibility in question and making it prone to attack from the other side. These factors can limit the effectiveness

83 AP I, Article 49 defines attacks as “acts of violence against the adversary either in offence or in defence”. However, this definition is interpreted and applied in different ways when it comes to the number and types of acts of violence that make up an attack. For example, in its *Galić* trial judgement (para 37), the ICTY Trial Chamber noted: “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 incident and shelling incident and to consider whether the precautionary provisions in Article 57 of Additional Protocol I were complied with”. On the other hand, the declaration of the UK upon ratification of the Additional Protocols states: “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.” ([http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note00.Par.0018.File.tmp/mt\\_070321\\_gennotif980528\\_e.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note00.Par.0018.File.tmp/mt_070321_gennotif980528_e.pdf)).

84 AP I, Article 51(3); AP II, Article 13(3).

85 Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009.

86 Charli Carpenter, “Collateral damage control”, 11 August 2010, <http://www.nytimes.com/2010/08/12/opinion/12iht-edcarpenter.html>, accessed 18 April 2011.

87 Richard Goldstone, “Reconsidering the Goldstone Report on Israel and war crimes”, 1 April 2011, [http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html), accessed 18 April 2011.

of fact-finding missions and similar efforts in terms of ascertaining facts on the ground and contributing to the improved protection of civilians.

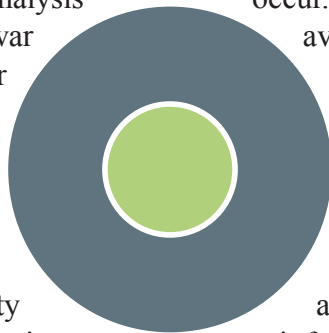
Perhaps it would be possible to agree on ways to minimise civilian harm in contemporary armed conflict through discussions that, rather than being linked to a specific context, are based on patterns of civilian harm identified in a variety of conflicts. A recent initiative that might contribute to this goal is the call by an increasing number of civil society organisations for parties to armed conflicts systematically to record and report on civilian casualties resulting from military operations.<sup>88</sup> Proposals for an independent monitoring agency that would collect data and report on all situations of armed conflicts have also been put forward.<sup>89</sup> Enhanced documentation, analysis and monitoring of civilian casualties in war would not only promote accountability for possible violations, but could also help identify measures that both the parties themselves and other actors can take to prevent and reduce future civilian harm. At the same time, there is a need to shift the burden of proof from civil society and other third parties to the warring parties themselves to demonstrate that they are doing what they can during military operations to minimise the effects on the civilian population. A crucial question that should be discussed in this regard is the level of incidental civilian harm considered acceptable even when such harm would not be deemed unlawful.

The challenges inherent in interpreting and applying many of the legal provisions relating to the protection of civilians underscore the importance of translating the rules into military doctrine in the form of policies, manuals, procedures, codes of conduct, rules of engagement, and other directives that establish a common vocabulary and set of principles to guide military conduct. Equally important is their integration into training at all levels. The dissemination of IHL to armed forces is a legal obligation for both states and armed groups.<sup>90</sup> To avoid instruction in IHL becoming

an “academic exercise” and little more, it is important that training is adapted to the responsibilities and tasks of different personnel, focuses on actual scenarios likely to be faced on the ground, and addresses controversial and complex issues. As stated by one legal expert with regard to military manuals: “if the law itself is unintelligible, contradictory, or incapable of practical application in armed conflict, there is a considerable danger that it will be ignored.”<sup>91</sup>

There is also an obligation on states to have legal advisers available to provide advice to commanders on the application of IHL. There is no similar requirement for armed groups, although the ICRC Customary Law Study emphasises that this can never be invoked as an excuse for violations that occur.<sup>92</sup> In reality, of course, the legal expertise available to different militaries will vary a great deal, affecting the implementation of IHL on the ground.

For planners and commanders involved in targeting decisions, a crucial element in the decision-making process is the availability, quality and accuracy of information on which decisions are made. Reliable intelligence is vital to the identification of legitimate military objectives and in assessing civilian harm. As mentioned earlier, the lack of reliable on-the-ground intelligence has been highlighted as one of the reasons for the high number of civilian casualties caused by drones in Afghanistan and Pakistan. Several well-known incidents have also illustrated how improvements in weapons precision make little difference when intelligence fails, such as the NATO attack on the Chinese Embassy in Belgrade in 1999 in which three Chinese citizens were killed and 15 injured and the bombing of the Al Firdos bunker in Baghdad in 1991 that killed hundreds of civilians who had sought shelter there. As one expert stresses, “weapon precision is, at best, only as good as the information that supports it”.<sup>93</sup> Attacks



88 See Oxford Research Group, “Recording Casualties of Armed Conflict project”, <http://www.oxfordresearchgroup.org.uk/rcac/>, accessed 19 April 2011.

89 Charli Carpenter, “War crimes reporting after Goldstone”, *Foreign Affairs*, 9 May 2011.

90 Fourth Geneva Convention (GC IV), Article 144; AP I, Articles 80, 83 and 87; AP II, Article 19; ICRC CLS, rule 142, pp 501-505.

91 William Boothby, “Addressing the realities, development and controversies regarding the conduct of hostilities”, Nobuo Hayashi, ed, *National Military Manuals on the Law of Armed Conflict*, Forum for International Criminal and Humanitarian Law Publication Series, Oslo, PRIO, 2008, p 127.

92 ICRC CLS, rule 141, pp 500-501.

93 Matthew Waxman, *International Law and the Politics of Urban Air Operations*, RAND Monograph Report, Santa Monica, RAND Corporation, 2000, p 60.



based on flawed intelligence will inevitably raise questions as to whether adequate precautions were taken to prevent harm to civilians.<sup>94</sup>

Now that surveillance technology has become more sophisticated and the accuracy of weapons systems has increased, so has the possibility of accurately and reliably verifying, selecting, tracking and attacking targets, and of assessing likely civilian harm. Improvements in technology thus expand the scope of what can be considered “feasible” precautions. However, capacities are likely to vary considerably among different states and armed groups in terms of the technologies available to them. Consequently, the precaution requirements will differ depending on a party’s technological capacity. While this disparity is inherent in the rule itself,<sup>95</sup> it could be perceived by militaries as imposing an unfair burden on the technologically-superior party. Another risk that has been highlighted in this regard is the false expectation created – by the militaries themselves or more often by politicians – that civilian casualties can mostly be avoided by modern armed forces.<sup>96</sup>

Both from a legal and moral perspective, the technological capabilities available to a belligerent will undoubtedly influence the degree of care expected to be taken to avoid civilian harm. As can be seen in media and NGO reporting on recent conflicts, when civilian casualties are caused by military forces possessing high-tech weaponry capable of pinpoint targeting, there is commonly the perception that they either failed to take adequate precautions, or worse, that the harm was caused intentionally. With technologies that allow for greater precision in targeting becoming more widely available, tolerance of civilian casualties is likely to decrease even further. An interesting question raised in this regard is whether states with the financial means to acquire technologies

that allow for more precise targeting and thus may reduce the risk to civilians would be considered to be required to do so.<sup>97</sup>

Increasingly-sophisticated surveillance technologies will often enable military commanders to observe hostilities at a distance in “real time”. This could have both positive and negative implications for the implementation of IHL by individual soldiers on the ground. On the one hand, it may allow for greater control and possibilities of intervention to prevent violations of IHL from occurring. On the other hand, it may lead soldiers to excessively rely on such external guidance, thus reducing their individual sense of responsibility.<sup>98</sup>

Another critical factor in targeting decisions is time, both in terms of the time frame within which decisions are made and the actual time that elapses between the assessment and the attack, which will affect the likelihood of a change in circumstances. Again, technology may be helpful in this regard by providing the means to constantly track targets and monitor relevant changes in the environment. However, as evidenced by NATO’s numerous tragic targeting errors in Afghanistan, enhanced surveillance technology does not necessarily substitute for reliable on-the-ground intelligence. The analysis of data to achieve an actual understanding of what is observed is also critical, in particular in different socio-cultural contexts. The problem of mirror imaging – i.e. the assumption that the adversary’s behaviour is governed by the same values and motivations as one’s own – has been highlighted as a particular challenge in intelligence analysis in general and targeting decisions in particular.<sup>99</sup>

The environment in which an attack takes place will also significantly affect the decision-making process. In urban settings, where the environment is likely to be dangerous, confusing and rapidly evolving, targeting decisions will often have to be made very quickly by soldiers on the ground. Concern with protecting one’s own troops can easily prevail in chaotic circumstances. If the adversary is violating

94 While requirements as to the certainty of intelligence are not specifically articulated under IHL, AP I, Article 57(2)(a)(i) requires that those who plan and decide upon an attack shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects” nor subject to other protections under the protocol. IHL also requires that in cases of doubt the objective is to be presumed to be a civilian or civilian object and thus protected in accordance with IHL.

95 AP I, Article 57(2).

96 Michael N. Schmitt, “War, technology, and international humanitarian law”, HPCR Occasional Paper Series, Summer 2005, p 58.

97 Schmitt, “The impact of high and low-tech warfare on the principle of distinction”, 2003, p 10.

98 Ibid, p 11.

99 Paul Rexton Can, “What should we bomb? Axiological targeting and the abiding limits of airpower theory”, *Air & Space Power Journal*, Spring 2004.

IHL by locating military objectives in densely-populated areas or feigning civilian status, this will increase the difficulty of accurately distinguishing civilians from combatants.

Although by no means a comprehensive overview, this section has attempted to illustrate some of the difficulties that may arise when the rules of distinction, proportionality and precautions are implemented during actual military operations. To improve the protection of civilians during hostilities, addressing these difficulties requires far greater attention and discussion. This is all the more important due to the fact that several of the challenges identified have been exacerbated by trends in contemporary warfare, including the expansion of military operations in urban areas, the prevalence of asymmetrical conflicts, and the rapid development of new technologies and weapons.

Deliberate disregard for IHL presents perhaps the most visible and acute concern for civilian protection in many parts of the world, and the scope of this problem will be examined in the next section. At the same time, parties who supposedly execute their operations in accordance with IHL and command highly-disciplined forces equipped with sophisticated weaponry also regularly cause large numbers of civilian deaths and injuries and widespread destruction of civilian objects.

Even when attacks that result in significant civilian harm prove to be lawful and conducted in accordance with IHL, it is always relevant and necessary to question whether parties are doing their utmost to spare civilians from the effects of military operations and to constantly consider further measures that could be taken to strengthen the implementation of IHL in order to avoid or minimise civilian harm.

### **Deliberate violations of IHL**

It is unfortunately the case that much civilian death, injury and suffering during war are neither accidental nor the result of inadequate efforts to minimise incidental civilian harm during the conduct of hostilities. Civilians are killed or harmed intentionally, and for some parties this is a preferred method of warfare.

Deliberate violence against civilians has been a feature of armed conflict throughout history. This culminated in the large-scale atrocities and genocide committed during the Second World War, which spurred a new concern for the plight of civilians in war, as expressed in the Fourth Geneva Convention of 1949. Until then, humanitarian law had mainly been concerned with the situation of combatants, such as the protection of the wounded and the treatment of prisoners.

However, although 60 years have now passed since the adoption of the Geneva Conventions, deliberate attacks on and abuses against civilians during armed conflict are still widespread. In fact, such incidents are so commonly reported from conflict situations around the world that they seem almost an inevitable by-product of war. It is easy to draw the conclusion that this is simply the reality of war and that there is little scope for influencing and changing behaviour in such extreme circumstances.

Enhancing respect for humanitarian law among those who seem deliberately to flaunt the rules is undoubtedly a complex challenge for which no simple or permanent solutions are likely to be found. Instead, it will require continuous efforts to improve the situation for the countless men, women and children who are daily suffering the consequences of such practices and to protect those at risk of becoming the next victims. Improving compliance with the law will require a comprehensive approach that focuses on a combination of preventative and punitive responses by actors at all levels. Equally important will be the necessary commitment and political will to make this a far higher priority than it is at present.

This section starts with a brief summary of common types of IHL violations that affect civilians in contemporary conflicts. It is followed by an analysis of some of the factors that have been identified as contributing to the occurrence and prevalence of such violations, and which could provide entry points for developing more effective strategies to enhance compliance with IHL.

### **Common IHL violations in current conflicts**

In many recent and on-going conflicts, civilians have been directly targeted and subjected to indiscriminate attacks by parties to conflicts. Some

of the most egregious examples have been well documented due to the work of the International Tribunals for the former Yugoslavia and Rwanda and the Special Courts in Sierra Leone and Cambodia. At present, the International Criminal Court is investigating cases of alleged war crimes in Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Sudan (Darfur) and Libya. While violations of IHL are often associated with the conduct of non-state armed groups, state actors also resort to unlawful means and methods of warfare.

In his most recent reports on the protection of civilians in armed conflict, the UN secretary-general attributes many of the problems in this area to the prevalence and dynamics of non-international armed conflicts, which are often characterised by their asymmetrical nature and a proliferation of armed groups. In these contexts, armed groups routinely attack civilians and civilian objects or deliberately put civilians at risk by using them to shield military objectives. In response, the militarily-superior party, usually a country's government or a coalition of states, may employ means and methods of warfare that violate the rules of distinction and proportionality. The secretary-general has expressed deep concern about such conflict dynamics and their impact on civilians, including in Afghanistan, the DRC, Iraq, Pakistan, Somalia, Sudan and Yemen.<sup>100</sup>

The secretary-general has also highlighted several cases of recent and ongoing conflicts where the tactics of all parties have contributed to high numbers of civilian casualties, for example the fighting in the Vanni region of Sri Lanka that ended the war between the government and the Liberation Tigers of Tamil Eelam in 2009, the Israeli operation against Hamas in Gaza in the winter of 2008-2009, and the ongoing conflict in Afghanistan.<sup>101</sup> Of course, these are only a few of the most recent contexts in which hostilities have resulted in widespread civilian harm. In its press releases issued throughout 2009, the ICRC expressed its concern for the situation of civilians during

hostilities in a broad range of conflicts, including in Afghanistan, the CAR, Chad, Colombia, the DRC, Gaza, Guinea, Iraq, Pakistan, Somalia, Sri Lanka and Yemen.<sup>102</sup> Comprehensive reports documenting IHL violations in specific contexts are also regularly published by NGOs, including Human Rights Watch and Amnesty International.

In addition to the frequent lack of respect for the general protections afforded to civilians under IHL, several specific protection concerns have received particular political attention in recent years:

- Although rape and sexual violence have always been common features of armed conflicts, the systematic use of sexual violence as a method of warfare started to receive more attention in the 1990s when such practices were seen on a large scale during the genocide in Rwanda and the armed conflicts in the former Yugoslavia.<sup>103</sup> Sexual violence is used as a military strategy for various – often mutually supporting – purposes, including as a way of spreading fear among the civilian population, as retaliation for alleged abuses committed by the other party, to humiliate and degrade the adversary, and to displace population groups from certain areas or as part of a strategy of so-called “ethnic cleansing”.<sup>104</sup> It is difficult to determine with accuracy the extent of sexual violence in conflict, since many cases are never reported. Some of the reasons for this include the stigma often faced by the victims (while the perpetrators rarely experience similar consequences), the security risks involved in reporting the incident, inadequate support systems for victims, and the lack of comprehensive data collection and reporting mechanisms. The prohibition on sexual violence in IHL is absolute. However, there is no doubt that rape and other types of sexual violence are extremely

<sup>100</sup>UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 2009, p 5; UN Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, 2010, p 2.

<sup>101</sup>Ibid, p 7.

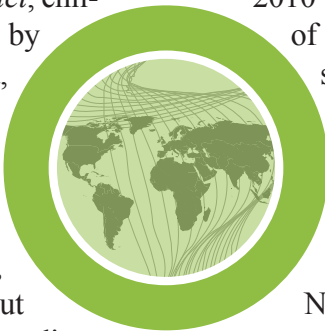
<sup>102</sup>ICRC press releases 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/News?OpenDocument>, accessed 10 June 2010.

<sup>103</sup>Women are subject to special protection under IHL and, among others, are protected particularly against rape, forced prostitution and any other form of indecent assault (GC IV, Article 27; API I, Article 76(1); ICRC CLS, rule 134, pp 475-478). The prohibition on sexual violence in IHL is absolute. Under the Rome Statute, rape and other types of sexual violence are war crimes in both international (Article 8(2)(b)(xxii)) and non-international (Article 8(2)(e)(vi)) armed conflicts.

<sup>104</sup>Suk Chun and Inger Skjelsbæk, “Sexual violence in armed conflicts”, Policy Brief 1/2010, PRIO, 2010.

widespread in many ongoing conflicts, including in the DRC, Sudan (in particular in Darfur), Uganda, Myanmar and Colombia. Frequently, sexual violence also remains a problem in the post-conflict period, as currently seen in Liberia and Sierra Leone. The majority of direct victims of sexual violence are women and girls, who in addition to the physical and psychological harm they are subjected to, also face a high risk of impregnation and HIV infection. However, boys and men are also vulnerable to sexual violence, both as the direct victims of such abuses or more indirectly, for example by being forced to watch as female family members are raped.

- The unlawful recruitment and use of children as soldiers is also a widespread problem.<sup>105</sup> While it is most prevalent in conflicts in Africa, the use of children as soldiers occurs in every region. According to the 2010 *Report of the UN Secretary-General on Children and Armed Conflict*, children are recruited and used as soldiers by parties in Afghanistan, the CAR, Chad, Colombia, the DRC, Iraq, Myanmar, Nepal, the Philippines, Somalia, Sri Lanka and Sudan (southern Sudan and Darfur) and Uganda.<sup>106</sup> Children are mostly recruited by armed groups, as opposed to government forces, but many of these groups are backed either directly or indirectly by governments. Child soldiers are also frequently the victims of other types of violence, such as sexual abuse. While girls might more often be recruited for sexual purposes, they also commonly participate in combat. Brutal techniques are often employed to indoctrinate and desensitise children and thus



make them obedient fighters, including by forcing them to kill family or community members, and by plying them with drugs and alcohol. Many children are forcibly recruited by being abducted from their homes, schools or refugee camps. However, voluntary enlistment is also common, motivated by such factors as the lack of employment and education opportunities; the loss of or separation from relatives; and the wish to join peers who are fighters, to revenge atrocities committed against their own families or communities, or to support the armed group's cause.<sup>107</sup> Regardless of whether recruitment is forced or voluntary, the enlistment and use of child soldiers in hostilities is prohibited, and is a war crime when children are under 15.<sup>108</sup>

- A further and growing concern related to the protection of children is **attacks against schools** and other educational facilities.<sup>109</sup> The UNESCO 2010 study *Education under Attack* – a survey of targeted attacks against educational institutions, students and staff worldwide – documented that such attacks had intensified dramatically or remained high in a number of recent or ongoing conflict situations, including in Afghanistan, Colombia, Gaza, Georgia, Iraq, Pakistan and Nepal.<sup>110</sup> The study also found that children were at significant risk of forced recruitment and sexual violence during attacks on school facilities, or when travelling to and from school.
- The **forced displacement of civilians** within or across borders is also used as a deliberate tactic

<sup>105</sup>IHL prohibits the recruitment or use of children under the age of 15 in hostilities in both international armed conflict (AP I, Article 77(2)) and non-international armed conflict (AP II, Article 4(3); ICRC CLS, rules 136 and 137, pp 482-488). The 2000 Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict also prohibits the compulsory recruitment of children under the age of 18 into the armed forces and requires states parties to take all feasible measures to ensure that such children do not participate in hostilities. The protocol also prohibits the recruitment and use in hostilities of children under the age of 18 by armed groups. In addition to their general protection as civilians, children are afforded special protection, with more than 25 articles in the Geneva Conventions and their Additional Protocols referring specifically to children.

<sup>106</sup>UN General Assembly and Security Council, *Report of the Secretary-General on Children in Armed Conflict*, A/64/742 and S/2010/181, 13 April 2010, pp 48-51.

<sup>107</sup>Rachel Brett, "Adolescents volunteering for armed forces and groups", *International Review of the Red Cross*, vol 85, no. 852, December 2003, pp 857-866, <http://www.icrc.org/eng/resources/documents/misc/5wnjfx.htm>, accessed 5 May 2011.

<sup>108</sup>The Rome Statute defines the conscription, enlistment or use in hostilities of children under the age of 15 as a war crime in both international and non-international armed conflict (Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii)).

<sup>109</sup>As a civilian object, a school is protected against direct attack. In AP I, Article 52(3), schools are also one of the examples given to illustrate the presumption principle, which states that in situations of doubt as to whether an object is making an effective contribution to military action, the presumption is always in favour of it retaining its protection from attack.

<sup>110</sup>UNESCO, *Education under Attack 2010*, 10 February 2010, <http://unesdoc.unesco.org/images/0018/001868/186809e.pdf>, accessed 5 May 2011.



by belligerents,<sup>111</sup> for example to obtain control over territory or natural resources, to weaken the adversary by targeting and destroying the livelihoods of the civilian population, or as a way of systematically removing a certain population group from an area. According to the UN High Commissioner for Refugees, while the number of refugees at the end of 2005 was at its lowest level in almost 25 years, that number has significantly increased since then. By the end of 2009, it reached a record high, with more than 43 million people forcibly displaced due to conflict and persecution. This included 15.2 million refugees and 27.1 million conflict-induced internally displaced people.<sup>112</sup> While not all of these people have been forced to flee as a result of deliberate attacks or violence, a significant reason for the current high figure is the outbreak or intensification of several armed conflicts in recent years, including in Afghanistan, Colombia, the DRC, Iraq, Pakistan, Somalia, Sudan, Sri Lanka and Yemen.

- When humanitarian agencies are attacked or otherwise prevented from delivering aid and carrying out protection activities, the situation of civilians is further aggravated. **Attacks on humanitarian workers**<sup>113</sup> have steadily in-

creased over the last decade, including large-scale attacks such as the bombing of the UN compound in Baghdad in August 2003 that killed 22 people and the murder of 17 staff – 16 of them Tamils – from the French NGO Action contre la Faim in Sri Lanka in 2006. According to a study published in 2008, reviewing 12 years of data on aid worker attacks from 1997 to 2008, the number of humanitarian workers killed, seriously injured or kidnapped in violent attacks reached a record 260 in 2008, although more than 60% of these incidents occurred in three high-risk contexts, i.e. Afghanistan, Somalia and Sudan (Darfur).<sup>114</sup> The increase in attacks against aid workers can therefore be attributed to a deterioration of security in a few contexts. Various factors have likely contributed to this situation, including the decreased acceptance in some politico-cultural contexts of humanitarian aid as neutral and independent – with international aid organisations being associated with Western political and military agendas – as well as inadequate security management and adaptation of practices to these highly-challenging environments.<sup>115</sup>

- Equally alarming is the widespread **lack of respect for the medical mission**<sup>116</sup> during armed conflict. Medical personnel, facilities, vehicles and patients are frequently attacked; the sick and wounded are prevented from accessing medical care or medical services are disrupted; and medical facilities and emblems are misused to carry out military operations. The authors of a recent review of such incidents in the period

111 IHL specifically prohibits the forced displacement of civilian populations unless their safety or imperative military reasons so demand in AP II, Article 17(1) and GC IV, Article 49 (in relation to occupying powers), and it is described as a grave breach in AP I, Article 85(4)(a). See also ICRC CLS, rule 129, pp 457-462. The Rome Statute defines as war crimes the deportation or transfer of populations within or outside of occupied territories by an occupying power during an international armed conflict (Article 8(2)(b)(viii)) and the ordering of the displacement of populations unless their safety or imperative military reasons so demand (Article 8(2)(e)(viii)).

112 UNHCR, *Statistical Yearbook 2009: Trends in Displacement, Protection and Solutions*, 2009, p 10 <http://www.unhcr.org/4ce530889.html>, accessed 19 April 2011. The 15.2 million refugees include 4.8 million Palestinian refugees under the responsibility of the UN Relief and Works Agency for Palestine Refugees in the Near East.

113 In addition to the protections humanitarian workers enjoy as civilians, various specific IHL provisions outline the obligations of parties to a conflict or an occupying power with respect to facilitating or not impeding the delivery of humanitarian assistance, as well as the obligation to respect and protect those delivering such assistance (see GC IV, Articles 23, 50 and 59; AP I, Articles 70 and 71; AP II, Article 18; ICRC CLS, rules 30, 31 and 32, pp 102-111). In addition to the war crimes of targeting civilians applicable in both international (Rome Statute, Article 8(2)(b)(i)) and non-international (Article 8(2)(e)(i)) armed conflict, the specific war crime covering medical, humanitarian and peace-keeping personnel would equally extend to both international (Article 8(2)(b)(iii)) and non-international (Article 8(2)(e)(iii)) armed conflicts.

114 Abby Stoddard, Adele Harmer and Victoria DiDomenico, “Providing aid in insecure environments: 2009 update: trends in violence against aid workers and the operational response”, Humanitarian Policy Group Policy Brief, no. 34, April 2009.

115 Ibid.

116 Respect for and the protection of those who provide medical assistance to the wounded and sick in armed conflict have been recognised since the very inception of modern IHL. The Geneva Convention of 1864 in its very first article affirmed the neutral nature of medical missions, calling for them to be protected and respected by the belligerents. In contemporary instruments, relevant rules are found in AP I, Articles 12, 15, and 16 on the protection of military medical units, civilian medical units and civilian medical personnel. The right of organisations such as national Red Cross/Red Crescent Societies to of their own initiative care for the sick and wounded is also recognised and protected in Article 17. As to the customary nature of these articles in particular and the protections afforded medical personnel and objects in general, see ICRC CLS, pp 79-86, 91-104 and 119-120.

1989-2008 emphasised the lack of systematic reporting and the absence of mechanisms to improve compliance with the law as major impediments to improving the protection of medical personnel and facilities in armed conflict. Although the data analysed was subject to a number of limitations, the authors identified three major trends during the period reviewed: “attacks on medical functions seem to be part of a broad assault on civilians; assaults on medical functions are used to achieve a military advantage; and combatants do not respect the ethical duty of health professionals to provide care to patients irrespective of affiliation.”<sup>117</sup> The need to protect health workers and health-care facilities during armed conflict has started to receive greater attention, including in a resolution launched in November 2010 by the International Health Protection Initiative calling for a range of measures to enhance the various aspects of health protection during armed conflict.<sup>118</sup>

- **Deliberate attacks against journalists**<sup>119</sup> working in conflict zones have also increased. While media personnel working in such situations must be prepared to face a certain level of risk, in a number of previous and ongoing conflicts, attacks on journalists, including murders and kidnappings, have been used as a deliberate tactic by the parties. According to the Committee to Protect Journalists, 859 journalists have been killed since 1992, with particularly-high numbers in most years between 2003 and 2010.<sup>120</sup> This figure includes deaths occurring in situations other than armed conflict, but a significant number took place in areas where hostilities were ongoing at the time, including in Afghanistan, Bosnia, Colombia, Iraq, Pakistan, Rwanda, Sierra Leone and Somalia.

## Causes of violations

In seeking to improve compliance with IHL, it is important to understand the reasons why violations occur so that intervention points can be identified. The motivations for deliberate violence against civilians are diverse and complex, even more so given the wide range of armed actors involved in contemporary armed conflicts.

It is also important to distinguish between different levels of intent. As one expert has suggested, military leaders may order soldiers to commit violations as a method of warfare; they may condone violations being committed by their fighters; or they may allow violations to occur.<sup>121</sup> A study conducted by the ICRC of the reasons why IHL is violated identified group conformity and instructions from superiors as among the most significant factors influencing the behaviour of combatants.<sup>122</sup> Abuses against civilians will often take place in situations where leaders tolerate or even encourage attacks on civilians and when such behaviour is widespread and accepted by one’s peers. Such dynamics likely play a key role, for example in the practice of rape and other types of sexual violence.

In addition, other political, military or even practical factors can contribute to the occurrence of IHL violations or increase the risk of civilian harm during the conduct of hostilities. Although the causes of violations and non-compliance with IHL will be many and multifaceted, a few broad categories are outlined below. In practice, some of these are closely linked and may overlap.

## Intentional military or political strategy

Violations of IHL, including attacks against civilians, can form part of a deliberate military or political strategy by one or several parties to a conflict.

In asymmetrical conflicts, for example, the weaker party might find it easier to attack the civilian population, and it could be perceived as the most effective strategy to weaken an enemy that is militarily superior. Ideologies of resistance or

117 Leonard S. Rubenstein and Melanie D. Bittle, “Responsibility for protection of medical workers and facilities in armed conflict”, *The Lancet*, vol 375, no. 9711, 23 January 2010, p 329.

118 International Health Protection Initiative, “A resolution on the need to ensure the protection of healthcare during armed conflict”, 30 November 2010, <http://ihpi.org/>, accessed 5 May 2011.

119 AP I, Article 79; ICRC CLS, rule 34, pp 115-118. The protection of journalists as civilians remains applicable, provided that “they take no action adversely affecting their status as civilians”. The prohibition in both international and non-international armed conflicts against the directing of attacks against civilians would of course extend to journalists as civilians.

120 Committee to Protect Journalists, <http://cpj.org/killed/>, accessed 19 April 2011.

121 Olivier Bangerter, “Talking to armed groups”, *Forced Migration Review*, no. 37, August 2011, <http://www.fmreview.org/non-state/>, accessed 20 April 2011.

122 Jean-Jacques Frésard, *The Roots of Behaviour in War: A Survey of the Literature*, Geneva, ICRC, October 2004, p 110.

liberation are often used to justify the deliberate targeting of civilians and to present it as the only option available to “level the playing field”. This may typically be the case in internal conflicts involving insurgent armed groups challenging the government, or in internationalised internal armed conflicts where an external power or a military coalition is involved in fighting non-state armed groups, such as in Iraq and Afghanistan.

When faced with such tactics, a militarily-superior adversary may in turn respond with less restraint, resulting in further civilian harm. In the dangerous and unpredictable environment created by combatants that feign civilian status to launch attacks, the risk of targeting civilians by mistake also increases. The notion that they are fighting for a “good cause” against an opponent that is breaking all the rules may also lead military forces to see the protection of their own forces as a greater imperative than protecting the civilian population of the opponent.<sup>123</sup>

Parties may also engage in deliberate attacks on civilians as a means of destabilising or controlling a territory, demonstrating military strength, or creating tensions between different groups. This can be a particularly-effective strategy where members of the civilian population belong to different religious, ethnic or tribal groups and where such differences can be accentuated through propaganda and by launching attacks with the aim of inciting inter-communal violence.

### **Military expediency**

Civilian suffering can also be induced to break the will of the adversary, to compel the opponent to surrender and to expedite the end of a conflict.<sup>124</sup> Although a deliberate military strategy, the targeting of civilians is in these cases a means to an end rather than an end in itself. This was the theory invoked when Germany launched the Blitz on London, when the Allies fire-bombed cities in Germany at the end of the Second World War, and in the most extreme circumstance when they dropped the nuclear bombs on Hiroshima and Nagasaki. In the latter case, a “humanitarian necessity” argument was employed in that by expediting the end of the war, more lives would be saved than the many that were lost in the

nuclear attacks.<sup>125</sup> In the words of the US secretary of war at the time, Henry Stimson, “this deliberate, premeditated destruction was our least abhorrent choice”.<sup>126</sup>

Strategies that seek to coerce an adversary into changing its actions (rather than achieving a traditional military victory), including by turning the civilian population against the political leadership and weakening civilian support for the war effort, have also been adopted in a number of more recent conflicts. Although not involving deliberate attacks on civilians, but rather on dual-use objects, this was the tactic used by NATO in its bombing campaign against Serbian targets, which was designed to compel Slobodan Milošević to stop Serbian attacks on Kosovar Albanians.<sup>127</sup> While such strategies do not necessarily involve violations of IHL, to the extent that they entail broadening the concept of military objectives, they could undermine the principle of distinction and increase the risk of civilian harm.<sup>128</sup>

### **Genocidal ideologies and “identity” conflicts**

Violence against civilians can also constitute a goal in itself and is sometimes the main objective of one or both sides in a conflict. Genocide and extermination are the most extreme manifestations of such ideologies. While Hitler’s systematic extermination of six million Jews, as well as various other groups that he perceived as “contaminating” Germany and the Aryan race, remains the most terrifying example of both genocidal thinking and its implementation, history is unfortunately replete with examples of attempts to purge states or regions of certain population groups. Recent examples include the so-called “ethnic cleansing” strategies pursued in Rwanda and the former Yugoslavia.

Conflicts with ethnic, tribal or religious dimensions can easily come to be perceived as wars between different groups rather than just between soldiers,

<sup>125</sup>Gabriella Blum, “The laws of war and the ‘lesser evil’”, *Yale Journal of International Law*, vol 35, no. 1, 2010.

<sup>126</sup>Henry Stimson, interview in *Harper’s Magazine*, February 1947, quoted in *ibid*, p 24.

<sup>127</sup>Schmitt, “The impact of high and low-tech warfare on the principle of distinction”, 2003, p 7.

<sup>128</sup>See, for example, Marci Sassòli, “Legitimate targets of attacks under international humanitarian law”, HPCR Policy Brief, January 2003, p 5.

<sup>123</sup>Margalit and Walzer, “Israel”, 2009.

<sup>124</sup>Frésard, *The Roots of Behaviour in War*, 2004, p 29.

where the aim is to destroy the other group rather than just to win the war, or conversely to defend and save the group from an aggressor by whatever means necessary. Murder, rape, torture and other brutal tactics are common in such conflicts, with atrocities by one side often leading to retaliation by the other, thus creating cycles of reciprocal abuse. Within the dynamic of such conflicts, all members of the enemy population may be perceived as legitimate targets, regardless of whether they would be considered combatants or civilians from a legal perspective. Civilians may themselves also take an active part in abuses, so that the blurring of the distinction between combatants and civilians is complete. In order to create a permissive environment for abuses, military and political leaders may present the conflict as a fight for survival, and propaganda is often utilised to demonise the other group or label them as something less than human and thus not deserving of protection.<sup>129</sup>

Research conducted by the ICRC has shown that most people, including populations in war-affected countries, accept the general principle that civilians should be protected in war. However, this norm frequently breaks down in concrete situations of armed conflicts, in particular when an entire society is mobilised in the war effort and people find it difficult to distinguish between civilians and combatants.<sup>130</sup> In his compelling study on the killing and abuse of civilians in war, Hugo Slim highlights the inherent ambiguity of both civilian and combatant identities.<sup>131</sup> While IHL is based on a strict division of populations into these two categories, with the former being entitled to extensive protection during warfare, the reality is far more complex, as civilians and combatants have a range of different identities, roles and relationships. For example, civilians often contribute in different ways to the war effort, such as through their economic activities, or by providing moral and political support to their soldiers and their political leadership.

Given the inherent ambiguity of civilian identity, it is crucial to emphasise that while the distinction drawn in IHL between combatants and non-combatants is

fundamental to limiting suffering in war, it does not rely on a simplistic notion of civilians as being automatically “innocent”. As Avishai Margalit and Michael Walzer underline in an editorial in the *New York Review of Books* in 2009: “The contrast between combatants and noncombatants is not a contrast between innocent civilians on the one hand and guilty soldiers on the other. Civilians are not necessarily innocent, in the sense of being free from the guilt of evil-doing. German civilians who were enthusiastic supporters of the Nazis were certainly not innocent in that sense. Innocence is a term of art: noncombatants are innocent because they do not participate directly in the war effort; they lack the capacity to injure, whereas combatants qua combatants acquire this capacity. And it is the capacity to injure that makes combatants legitimate targets in the context of war. Men and women without that capacity are not legitimate targets.”<sup>132</sup>

### **Denial of applicability and lack of ownership of the rules**

A particular challenge in terms of the conduct of armed groups is that they may not accept IHL as applicable or relevant to their actions. Although, legally speaking, the rules of IHL governing non-international armed conflicts also bind non-state armed groups, such groups may not accept this notion in practice. International treaties are, after all, negotiated among states, and armed groups might not consider that they are bound by rules that they did not participate in negotiating and that they often perceive as biased in favour of states’ interests. Another disincentive for armed groups to comply with the law in such cases is the fact that IHL does not grant them “combatant status” as it does with state armed forces. This means that members of armed groups can be prosecuted and punished for their participation in hostilities under domestic law, regardless of whether their conduct complies with IHL or not.<sup>133</sup>

Since 11 September 2001, a growing number of armed groups have been included on the terrorist lists of individual states or inter-governmental bodies and have thus become subject to a range of sanctions.

<sup>129</sup>Ibid, p 30.

<sup>130</sup>ICRC/Greenberg Research, *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, Geneva, ICRC, October 1999, pp ix-xiii.

<sup>131</sup>Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, London, Hurst, 2007, pp 181-211.

<sup>132</sup>Margalit and Walzer, “Israel”, 2009.

<sup>133</sup>Michelle L. Mack, “Compliance with humanitarian law by non-state actors in non-international armed conflicts”, Working Paper, International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, pp 2-3.



However, the criteria for such listings are not always clear and may in some cases be more politically motivated than based on hard evidence of terrorist activity. This practice can present additional challenges to encouraging compliance with IHL by making it difficult or even “criminal” for states and organisations to engage with such groups in order to promote compliance and by placing groups “beyond the law”, where they may perceive they have nothing to lose and little to gain from improving their conduct.<sup>134</sup>

At the same time, a number of armed groups have shown a willingness to make explicit commitments to implement their IHL obligations – including by making unilateral declarations or adopting codes of conduct – and to take on new commitments that go beyond existing legal obligations, for example by ending their use of anti-personnel mines. There are a variety of political, military and legal reasons why armed groups may decide that it is in their interests to do so. Of course, acceptance of such commitments does not guarantee that they will be respected in practice. This will, for example, depend on their dissemination and enforcement within the group and on whether the commitment has been made in good faith or for other reasons.

States sometimes also reject the applicability of IHL in a non-international armed conflict, as they do not wish to concede that the situation on their territory amounts to an armed conflict. There can be different reasons for this, including a wish to avoid being perceived as a weak state, the fear of providing legitimacy or status to the relevant armed group, and the desire to preserve the state’s ability to deal with the group as an internal matter governed by domestic law. If the state itself does not acknowledge that it is involved in an armed conflict governed by IHL, this provides little incentive for the armed group(s) it is fighting to feel bound by it. Armed groups may also defend their lack of compliance with IHL by arguing that states – in particular powerful states – routinely commit violations without being held accountable.

Despite the fact that the Geneva Conventions have been ratified and thus accepted by all states

as the basic rules applicable in armed conflict, there is still a lack of “local ownership” and even acceptance of IHL in some areas of the world or by certain groups. For example, the perception that IHL represents predominantly-Western values and norms has received growing attention in recent years. This view, which challenges the universality of IHL, has been exacerbated by the notion of a “clash of civilizations”, in particular between the West and the Muslim world,<sup>135</sup> and the emergence of some Islamist armed groups that use particular interpretations of Islamic law to justify deliberate attacks on civilians. However, the challenge of promoting IHL in other cultural contexts is not limited to its relationship with Islam. In many parts of the world, religious law or traditional cultural practices governing conduct in warfare may be better known and seem more relevant to local populations and combatants than the internationally-negotiated rules of IHL. To address this concern, a number of studies, conferences and other initiatives have been launched that focus on the relationship between IHL and other religious or traditional sources of law, and efforts are being made by organisations that work to promote civilian protection to embed their work not only in international law, but also in local norms and values.<sup>136</sup>

### Lack of capacity

While many violations of IHL are a result of deliberate and conscious decisions, whether by the political or military leadership or by the fighters themselves, a number of other factors can also result in violations occurring in less intentional ways. In some cases, violations happen due to a lack of knowledge of the law. Although this can never be an acceptable justification for widespread and deliberate attacks on civilians, it is critically

<sup>135</sup>James Cockayne, “Islam and international humanitarian law: from a clash to a conversation between civilizations”, *International Review of the Red Cross*, vol 84, no. 847, September 2002, p 1.

<sup>136</sup>See, for example, the special issue on religion of the *International Review of the Red Cross*, vol 87, no. 858, 2005, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section\\_review\\_2005\\_858](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_review_2005_858); a series of dialogue conferences and seminars organised by the ICRC with Islamic scholars in the period 2004-2006, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/islamic-law-ihl-feature-010606>; and the thematic workshop on Islamic law and protection of civilians organised by the International Association for Humanitarian Policy and Conflict Research and the Jordan Institute of Diplomacy in Amman, Jordan, February 2010, [http://www.hpccr.org/thematic\\_workshops\\_ihl.html](http://www.hpccr.org/thematic_workshops_ihl.html).

<sup>134</sup>Nicolas Florquin and Elisabeth Decrey Warner, “Engaging non-state armed groups or listing terrorists? Implications for the arms control community”, *Disarmament Forum: Engaging Non-State Armed Groups*, no. 1, 2008, pp 18-20.

important (as well as a legal obligation) for IHL to be disseminated to soldiers at all levels and for military training to include instruction in the implementation of IHL. As mentioned earlier, IHL must also be integrated into military doctrine, rules of engagement and orders, and effective sanctions must be put in place for failure to obey the rules.

In the case of armed groups, their varying levels of organisation and command structures can present a particular challenge to achieving compliance with IHL. Sometimes, there is no clear hierarchical structure or chain of command within the group, rules of engagement are not formalised, the group itself may be fragmented, and/or different parts of the organisation do not agree on the degree to which IHL should be respected.

The types of weapons and military equipment available to belligerents can also affect compliance with IHL and the protection afforded to civilians. Certain weapons are indiscriminate when used in all or some circumstances (and thus prohibited or restricted under IHL), or they may lend themselves to indiscriminate use unless particular care is taken to avoid civilian harm. These include some weapons commonly used in non-international armed conflicts, such as anti-personnel and anti-vehicle mines, and light artillery weapons such as mortars and grenade launchers. Limited competence in the use of weapons can further increase the risk of civilians being harmed.

## **Conclusion**

This paper has examined features of current armed conflicts and emerging trends that can have implications for the protection of civilians. In doing so, it has sought to identify some of the obstacles that are preventing the legal rules established to protect civilians in war from being fully implemented in practice. It has also looked at ways in which civilians are frequently and deliberately denied the protection that they are entitled to under IHL and possible factors that contribute to this situation.

Civilian harm in armed conflict can be divided into three broad categories representing different degrees of intentionality, i.e. unforeseen, incidental or deliberate civilian harm. Although often more complex and interrelated in practice, some of the

factors identified in this paper as contributing to civilian harm have been used to illustrate each category in table 1.

This categorisation can also be useful when considering how to improve the protection of civilians in armed conflict, as measures to reduce civilian harm may be identified in each category. For example, reducing accidental civilian harm could be pursued through improving internal procedures and training, revising rules of engagement, enhancing methods of intelligence gathering and analysis, improving surveillance and weapons technology, and reconsidering the choice of weapons.

Ways of addressing deliberate civilian harm could include measures to strengthen rules, orders and sanctions for violations within military structures; ensuring accountability by investigating and prosecuting serious violations of IHL; establishing remedial and reparative mechanisms for victims; and developing comprehensive strategies to enhance compliance with IHL by non-state armed groups, including actions ranging from engagement and positive incentives to punitive sanctions.

Perhaps the most challenging question is that of how to reduce incidental civilian harm – given that so-called “collateral damage” is neither accidental nor unlawful – provided that the attack has complied with the rules of IHL governing the conduct of hostilities. It may be too easy to accept or even condone civilian harm caused by the parties to a conflict as long as they assert that it was incidental. However, even when the civilian harm inflicted does not present a legal problem, it remains a humanitarian concern. As suggested earlier, it 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. Precisely because incidental civilian harm is expected and thus foreseeable, there is a need to constantly consider whether actions can be taken to further minimise the effects of hostilities on civilians.

Avenues that could be pursued include: issuing new orders; revising rules of engagement; and enhancing commanders' oversight of and the legal advice provided to soldiers, for example in difficult operational settings (e.g. urban areas, counter-insurgency situations) and concerning the use of certain weapons and tactics (e.g. drones, explosive weapons in populated areas, attacks on dual-use targets). Developing further guidance on the interpretation and operationalisation of the rules that aim to protect civilians during hostilities should also be considered to ensure that these rules are more consistently applied by the parties to armed conflicts. While the existing IHL rules are perceived to be generally adequate, this requires that they are fully respected and implemented. The legal framework must also be continuously assessed in light of any new circumstances or challenges that may arise. For example, the ICRC recently identified certain areas where further development could be beneficial, in particular as regards non-international armed conflicts. When considering whether there is a need for the further development of IHL, the overriding concern must be to ensure greater protection of civilians and not to risk an actual weakening of the existing rules.

In addition to the steps that parties to conflict can take themselves, there is an important role for third parties in improving the implementation of and compliance with IHL. States not parties to the conflict, the UN or other multilateral bodies, regional organisations, and humanitarian organisations – among others – have moral and in some cases legal responsibilities in this regard. A range of tools are at the disposal of different actors, depending on the latter's role and the situation on the ground, including, for example, the monitoring and documentation of IHL implementation, the initiation of political dialogue and the application of diplomatic pressure, the imposition of targeted sanctions, the denial of arms transfers, and the investigation and prosecution of serious violations of IHL. It has been beyond the scope of this paper to examine these measures in any detail. However, any comprehensive discussion on the protection of civilians under IHL must consider how third parties can more effectively utilise existing mechanisms or develop new ones to improve respect for and implementation of IHL during armed conflicts.

Now that the international community is in the midst of a so-called "humanitarian intervention" in Libya and there is significant confusion about

**Table 1: Possible causes of or factors that may contribute to civilian harm in armed conflict<sup>137</sup>**

Unforeseen civilian harm:	<ul style="list-style-type: none"> <li>• accidents, e.g. due to technical failures or human errors</li> <li>• inaccurate intelligence</li> <li>• civilians targeted by mistake, e.g. because they were believed to be</li> </ul>
Incidental civilian harm:	<ul style="list-style-type: none"> <li>• proximity of civilians/civilian objects and combatants/military objectives during hostilities in densely-populated areas</li> <li>• choice of weapons, e.g. the use of weapons that are difficult to employ in accordance with IHL in certain environments such as high explosive weapons in populated areas</li> <li>• attacks on dual-use objects, i.e. objects that serve both military and civilian purposes</li> <li>• different interpretations of the rules, e.g. of what constitutes a "military objective" or when civilian losses can be considered "excessive" as compared to the military advantage anticipated</li> <li>• quality and accuracy of intelligence</li> <li>• level of integration of IHL into military doctrine and training</li> <li>• access to and quality of operational legal advice</li> </ul>
Deliberate civilian harm:	<ul style="list-style-type: none"> <li>• ideologies of genocide/ethnic cleansing</li> <li>• response to attacks on civilians by the other party</li> <li>• strategy to displace civilian populations from an area, spread fear or control the civilian population</li> <li>• strategy to undermine civilian support for the war effort and end civilian resistance</li> <li>• civilians perceived as "soft targets" by the weaker party in asymmetrical conflicts</li> </ul>

<sup>137</sup>This categorisation is adapted and further developed from an unpublished concept paper written by Gro Nystuen and the author for the Norwegian Ministry of Foreign Affairs.

the relationship between the terms “protection of civilians” and “responsibility to protect” and the roles and responsibilities of different actors with regard to both, it is important to recall that the primary duty to protect civilians in armed conflict lies with the parties to that conflict. The situation of civilians in armed conflict will first and foremost be determined by the actions of the belligerents and the extent to which they respect and implement IHL. In the same way as parties to an armed conflict can

decide to target civilians, they can choose to make every effort to conduct their military operations in accordance with IHL in order to protect civilians from the effects of hostilities. Although the human cost of almost any war will be high both for soldiers and civilians, reducing that cost is feasible for most parties to armed conflicts with the requisite political will. It is time for a more vigorous discussion of how this can be achieved.

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