

# 40<sup>th</sup> Round Table on Current Issues of International Humanitarian Law

## “The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives”

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### A closer look at the prohibition of indiscriminate attacks and disproportionate attacks

On more than one occasion, the ICRC has stated that it believes current international instruments governing the conduct of hostilities are ‘as pertinent to “new” types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted’.<sup>1</sup> Better protection during armed conflict can therefore be achieved through better implementation of already existing legal principles.

However, a challenge arises where the law as it stands is too vague and indeterminate to offer a clear standard of what can be considered lawful or unlawful conduct. In this presentation, I would like to challenge the argument that the existing framework on the conduct of hostilities is adequate, particularly in the area of the prohibition of indiscriminate and disproportionate attacks. In addition to better implementation of the law, it is essential to clarify existing vague norms as well as develop the law in a manner that offers better protection to the civilian population, particularly in light of new technologies and evolving types of conflict.

This presentation will focus on two particular prohibitions within the law on the conduct of hostilities, namely indiscriminate attacks and disproportionate attacks and the relationship between them, highlighting the vagueness of these prohibitions

#### **1. Indiscriminate attacks**

Article 51(4) of Additional Protocol I prohibits ‘indiscriminate attacks’ in the following terms:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

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<sup>1</sup> ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross for the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent’, (2-6 December 2003), available at: <https://casebook.icrc.org/case-study/icrc-ihl-and-challenges-contemporary-armed-conflicts> (last accessed: 25 September 2017).

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

The definition of indiscriminate attacks is an implementation of, and a corollary to, the principle of distinction. Under article 51(4), there are three cases of indiscriminate attacks. First, attacks 'not directed at a specific military objective', an example of which is area bombardments according to article 51(5)(a). The second case involves attacks utilising means and methods of warfare which are incapable, by their very nature, of being targeted accurately. The third case involves attacks that employ a method or means of warfare whose effects cannot be contained in time and in space.<sup>2</sup>

With respect to paragraph (b), it is possible that particular means and methods of warfare are capable of being targeted accurately and have effects that can be controlled, but in the specific circumstances may be rendered indiscriminate, for example, due to the altitude from which a weapon is fired, prevailing weather conditions, or the time of day in which the attack is launched.<sup>3</sup>

Additional Protocol II does not contain a specific prohibition or definition of indiscriminate attacks. However, the ICRC study on customary international law notes that the prohibition on indiscriminate attacks is arguably included by inference under Article 13(2) (which prohibits making the civilian population the object of attack).<sup>4</sup>

## **2. Proportionality**

The principle of proportionality in attack is codified in article 51(5)(b) of Additional Protocol I (and repeated in article 57). According to article 51(5):

Among others, the following types of attacks are to be considered as indiscriminate:

- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

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<sup>2</sup> L. Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', (1997) *International Review of the Red Cross* no. 316, 35 at 38-44.

<sup>3</sup> J. Weiner, 'Discrimination, Indiscriminate Attacks, and the Use of Nuclear Weapons' (2011) *The Lawyers Committee on Nuclear Policy*, available at: [http://lcnp.org/pubs/Weiner\\_Discrimination-Indiscriminate-Attacks.pdf](http://lcnp.org/pubs/Weiner_Discrimination-Indiscriminate-Attacks.pdf) (last accessed 25 September 2017) at 19; Y. Dinstein, *The Conduct Of Hostilities Under The Law Of International Armed Conflict* (Cambridge University Press, 2004), p. 118.

<sup>4</sup> 'Rule 11. Indiscriminate Attacks', *ICRC Customary IHL Study*, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11) (last accessed 22 September 2017).

There is much confusion within doctrine (compounded by inconsistent State practice) with respect to the relationship between disproportionate and indiscriminate attacks. According to one view, disproportionate attacks are one type of indiscriminate attack. Even if an attack is not indiscriminate because it is accurately targeted, and the means and methods used and their effects are controllable, it could still be indiscriminate if it causes disproportionate civilian harm. By the same token, some attacks are inherently indiscriminate, without regard to proportionality.<sup>5</sup> The 1987 Commentary to AP I supports this interpretation.<sup>6</sup>

A second view in doctrine considers that an attack is never indiscriminate unless it is also disproportionate.<sup>7</sup>

Under article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court it is a war crime in international armed conflict to intentionally launch an attack ‘in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct *overall* military advantage anticipated’ (emphasis added).

Additional Protocol II does not contain an explicit reference to the principle of proportionality.<sup>8</sup>

### **3. Critique of the provisions governing disproportionate attacks:**

The text of article 51(5)(b) which defines disproportionate attacks is vague and indeterminate, and therefore subjective and open to abuse. Since proportionality is always context-dependent, article 51(5)(b) cannot provide a clear standard of lawful and unlawful conduct. Some of the main questions arising under article 51(5)(b) are:

*a) What is a ‘concrete and direct military advantage anticipated’?*

Some states argue that the phrase ‘military advantage’ refers to the *overall* advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack. This is a reflection of article 8(2)(b)(iv) of the Rome Statute.

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<sup>5</sup> J. Gardam, *Necessity, Proportionality, and the Use of Force by States* (Cambridge University Press, 2004), pp. 94-96; Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, p. 429; Weiner, 24-25.

<sup>6</sup> ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’, para. 1979, available at: <https://ihl-databases.icrc.org/ihl/COM/470-750065?OpenDocument> (last accessed 20 September 2017).

<sup>7</sup> Gardam, p. 96; Weiner, at 26.

<sup>8</sup> ‘Rule 14. Proportionality in Attack’, *ICRC Customary IHL Study*, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) (last accessed 20 September 2017).

This, however, cannot be considered a correct interpretation of article 51(5)(b), as first and foremost it does not accord with the plain meaning of the text, which includes the qualifiers 'concrete' and 'direct' before the term 'military advantage', while omitting 'overall'. Secondly, proportionality under *jus in bello* is measured by reference to the 'immediate aims' of each single military attack, rather than the 'ultimate goals' of the broader military action. Otherwise, there is a danger of conflating proportionality under *jus in bello* with proportionality under *jus ad bellum*, which are separate and distinct concepts.<sup>9</sup>

According to the San Remo Manual, a 'military advantage' may involve a broad range of issues relating to force protection. Since the advantage must be 'military', psychological, moral, economic and social advantages are excluded.<sup>10</sup>

Similarly, the terms 'concrete', 'direct' and 'anticipated' present numerous interpretative difficulties.

*b) What is the meaning of 'may be expected to cause incidental loss of civilian life...'?*

According to article 51(5)(b), the 'concrete and direct military advantage anticipated' is to be weighed against the expected and not actual incidental effects on civilians (defined as 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof'). There is, however, no clear definition of what counts as incidental effect on civilians. Is it just the immediate death and injury resulting from an attack, or does it also include indirect or reverberating effects such as death and injury resulting from the destruction of civilian infrastructure?

There is also no clear definition of the term 'excessive'. According to the San Remo manual, 'the fact that collateral damage and incidental injury are extensive does not necessarily mean that they are excessive'.<sup>11</sup> This is in direct contradiction to the 1987 Commentary which states that 'the Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive'.<sup>12</sup>

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<sup>9</sup> J. Moussa "Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law," 90 (2008) *International Review of the Red Cross* 963, at 976.

<sup>10</sup> M. Schmitt, C. Garraway, Y. Dinstein 'The San Remo Manual on the Law of Non-International Armed Conflict: With Commentary', available at: <http://www.humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf> (last accessed 20 September 2017), p. 7.

<sup>11</sup> Schmitt, Garraway and Dinstein, pp.24,25.

<sup>12</sup> 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949', para. 1980

The majority of doctrine does not consider unintended or incidental mental harm to civilians as part of the definition of ‘injury to civilians’, with the implication that mental and psychological harm is excluded from the proportionality analysis.

The vagueness of the prohibition of disproportionate attacks has meant that in practice it lends itself to abuse in order to justify conduct that would otherwise be clearly unlawful.

Two contemporary examples of the difficulties associated with implementing the prohibitions of indiscriminate and disproportionate attacks illustrate this:

(i) The use of non-nuclear explosive weapons

Important questions have arisen in the wake of the use of the Mother of All Bombs (the largest conventional weapon ever deployed) against an ISIS cave complex in Afghanistan in 2017. In a blog post, Professor Michael Schmitt and Lt. Cdr. Peter Barker argued that the Mother of All Bombs is a guided weapon and therefore does not run afoul of the prohibition of weapons that are by nature incapable of being directed at lawful military objectives. It therefore does not constitute an indiscriminate means of combat.<sup>13</sup>

With respect to the principle of proportionality, Schmitt and Barker state that the use of the Mother of All Bombs in remote areas where civilians and civilian objects are absent raises no proportionality concerns. On the other hand, they argue that ‘using a MOAB in a populated urban area, for instance, would generally violate the [proportionality] rule except in circumstances where the military advantage sought is enormous’.<sup>14</sup>

On the other hand, the ICRC has stated that even when they are aimed at lawful military targets, explosive weapons with a wide impact area have a significant likelihood of indiscriminate effects in densely populated areas. In urban areas, military objectives are often placed among persons and objects protected under IHL. In addition, such attacks are more likely to lead to the destruction of critical infrastructure, which can also have reverberating effects, including large-scale displacement. As such, the use of a MOAB in a densely populated area would violate the prohibition of indiscriminate attacks, and cannot be justified on the grounds of proportionality.

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<sup>13</sup> N. Schmitt and P. Barker, ‘The Mother of All Bombs’: Understanding the Massive Ordnance Air Blast Weapon’, available at: <https://www.justsecurity.org/40022/the-mother-bombs-understanding-massive-ordnance-air-blast-weapon/> (last accessed 20 September 2017).

<sup>14</sup> Ibid. According to the 1987 Commentary, ‘the idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with article 48 (Basic rule) and with paragraphs 1 and 2 of the present Article 51’, para. 1980.

(ii) The use of nuclear weapons

In its controversial *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the ICJ stated that ‘the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’. It then went on to state with a majority of seven votes in favour and seven against, and with the casting vote of the Court’s President that: ‘In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’.<sup>15</sup> This statement has been interpreted as meaning that international law does not prevent a State from violating IHL, where it is acting in an extreme circumstance of self-defence. In other words, this would mean that a State could invoke a *jus ad bellum* consideration to justify violations of IHL, harking back to just war doctrine.

In order to justify the Court’s approach Judge Higgins attempted in her dissenting opinion to explain the Court’s statement by reference to the proportionality principle. She argued that the suffering associated with nuclear weapons (a *jus in bello* consideration) could conceivably meet the test of proportionality when balanced against ‘extreme circumstances’ such as ‘defence against untold suffering or the obliteration of a State or peoples’. An attack is thus ‘proportionate’ if the ‘military advantage’ is one ‘related to the very survival of a State or the avoidance of infliction ...of vast and severe suffering on its own population’.<sup>16</sup>

However, such an application of the proportionality principle falls into the trap of conflating proportionality under *jus ad bellum* with proportionality under *jus in bello*. Ultimately, under *jus in bello*, the extent of suffering is to be measured against the ‘concrete and direct military advantage anticipated’ from an attack. No consideration should be given to the overall goals of the military action, whether they are self-defence against unlawful aggression that threatens to obliterate the State, or otherwise. Conversely, under *jus ad bellum*, the proportionality of the attack is to be measured against the overall military goals such as subordinating the enemy, or fending off or repelling an attack. Conflating the two proportionality principles in such a manner transforms proportionality under IHL from a principle of limitation to one that can be invoked to justify a degree of injury and destruction which would otherwise be considered clearly excessive.<sup>17</sup>

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<sup>15</sup> Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), [1996] ICJ Rep. 226, para. 2E, dispositive.

<sup>16</sup> Dissenting Opinion of Judge R. Higgins, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), [1996] ICJ Rep. 226, p. 583

<sup>17</sup> See generally, J. Moussa ‘Nuclear Weapons and the Separation of *jus ad bellum* and *jus in bello*’ in Nuclear Weapons Under International Law, G. Nystuen, S. Casey-Maslen and A. G. Bersagel (eds.), (Cambridge University Press, 2014), pp. 59-88.

#### **4. Conclusion**

The prohibitions against indiscriminate and disproportionate attacks under *jus in bello* are intended to operate as a limitation on the extent to which the adversary can be injured. The prohibition of disproportionate attacks proscribes conduct normally allowed (targeting a lawful military objective) if the incidental harm is excessive. However, the vagueness of the proportionality principle and the ambiguity of its relationship with the prohibition against indiscriminate attacks has meant that these principles have been stretched and distorted to justify otherwise unlawful conduct. There is therefore much need for their further development and refinement.