

# Caught in the Crossfire: The Adequacy of International Humanitarian Law in Urban Warfare

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Master's Thesis

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## Summary

Contemporary armed conflicts are increasingly being waged within densely populated urban environments, exposing civilians to the immediate violence and long-term devastation that follows. Civilian populations, critical infrastructure, and military objectives are concentrated in close proximity, posing distinct challenges to the application and compliance with International Humanitarian Law (IHL). This is amplified by the prevalence of asymmetric armed conflicts, leading to a concerning trend where some armed groups deliberately exploit the protected status of civilians and civilian objects in urban areas to gain tactical advantage. In light of these developments and the projected rise in future urban warfare, this study examines the extent to which IHL, in its current form, can address the challenges posed by conducting warfare in densely populated urban environments.

The focus of this study is confined to four areas of IHL, which are particularly relevant to urban warfare: the principle of proportionality, precautionary measures, siege warfare, and loss of protection. Applying an interdisciplinary research design, combining doctrinal and non-doctrinal legal research, this study explores fundamental IHL rules, examining interpretive inconsistencies and their resulting implications, as well as conducting a single case study on the current armed conflict between Israel and Hamas. Findings of the study indicate that while IHL offers an adequate legal framework for addressing the challenges associated with urban warfare, inconsistencies in the interpretation of specific rules pose a risk of undermining civilian protection, thus underscoring the need for enhanced clarity and common understanding of these rules. Furthermore, the study suggests that political declarations can serve as an important means of facilitating the promotion of best practices for adhering to existing IHL obligations, while raising awareness and providing guidance for future policy action in addressing challenges related to urban warfare. Recognizing IHL as a minimum standard and prioritizing the maximization of civilian protection through political commitment becomes especially critical in conflicts where an adversary strategically exploits the civilian population through deliberate IHL violations. This is particularly relevant when considering the improbability of enhanced future compliance with IHL by such groups.

Lastly, the study demonstrates that IHL currently appears to be at a tipping point given its renewed focus within the international community. On the one hand, IHL is confronted with systematic violations in several ongoing armed conflicts as well as allegations of non-compliance becoming increasingly politicized within diplomatic forums. On the other hand, scholars are revisiting and contextually reexamining fundamental rules, while there has been notable rise in Court activity addressing IHL issues, possibly paving the way for future adjudication that can shape the interpretation and application of existing rules. While the outcome of this development remains to be seen, it will undoubtedly have relevance for the conduct of urban warfare and how its challenges are addressed.

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## List of Abbreviations

API	Protocol I Additional to the Geneva Conventions of 1949
CDEM	Collateral Damage Estimation Methodology
CIHL	Customary International Humanitarian Law
CJTF-OIR	Combined Joint Task Force – Operation Inherent Resolve
DCD	Danish Defense Command
DPH	Direct Participation in Hostilities
EWIPA	Explosive Weapons in Populated Areas
GC III & IV	Geneva Convention III & IV
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
IHL	International Humanitarian Law
ILC	International Law Commission
ISAF	International Security Assistance Force
ISIS	Islamic State of Iraq and Syria
LOAC	Law of Armed Conflict
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
NSAG	Non-State Armed Group
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

The accelerating course of global urbanization, with cities becoming ever more populated, has given rise to a multitude of challenges, including in the context of armed conflicts, which progressively unfold within urban areas.<sup>1</sup> Across history, warfare has left its mark on both rural and urban areas. Although open fields were for many years the traditional battleground for conflicts between nation-states, the 20th century witnessed a rise in urban warfare, with cities becoming strategic targets, particularly during World War II.<sup>2</sup> While cities remained at risk during the Cold War, armed conflicts largely shifted back to rural battlefields throughout this period. However, since the 1990s, contemporary armed conflicts, often intra-state rather than inter-state, have increasingly been waged within densely populated urban settings, giving rise to the modern understanding of urban warfare.<sup>3</sup> Urban warfare can be broadly defined as military operations occurring in built-up areas, such as cities, towns, and other densely populated areas.<sup>4</sup> The primary characteristics of the urban environment have been identified as a “complex man-made physical terrain, a population of significant size and density, and a supporting infrastructure”.<sup>5</sup>

The dense concentration of civilians in urban environments elevates the risk of civilian casualties during hostilities and complicates efforts to ensure their safety. The 2023 United Nations Secretary-General's report on civilian protection in armed conflict revealed that in 2022, the use of explosive weapons in populated areas resulted in a disproportionate impact on civilians, as they accounted for nearly 94 percent of the casualties.<sup>6</sup> Furthermore, the effects of urban warfare extend far beyond the immediate impact. The destruction of living spaces and infrastructure creates severe and long-lasting consequences for affected populations. Numerous cities, such as Aleppo, Donetsk, Gaza, Marawi, Mogadishu, Mosul, Raqqa, Sanaa, and Tripoli have recently witnessed the devastation of war, resulting in immense consequences for civilian populations.<sup>7</sup> Attention towards the issue of protecting civilians in urban warfare has increased in recent years. This trend has been evident within the academic literature, but also at the top levels of international governance. Notably, in 2022 the United Nations Security Council (UNSC) convened a high-level open debate dedicated to the topic of

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<sup>1</sup> François Grünewald, "War in The City: Lessons Learnt for The New Century of Urban Disasters," in *War: Global Assessment, Public Attitudes and Psychosocial Effects* (Nova Publishers, 2013), 123-24.

<sup>2</sup> Julien Antouly, "Urban warfare: a challenge for humanitarian law and action," *Alternatives Humanitaires*, no. 10 (2019): 1, [https://www.alternatives-humanitaires.org/wp-content/uploads/2019/03/AH\\_N10\\_3\\_Focus\\_8\\_Antouly\\_VEN.pdf](https://www.alternatives-humanitaires.org/wp-content/uploads/2019/03/AH_N10_3_Focus_8_Antouly_VEN.pdf).

<sup>3</sup> Grünewald, *supra* note 1, 124-25.

<sup>4</sup> Jeroen C. van den Boogaard and Arjen Vermeer, "Precautions in Attack and Urban and Siege Warfare," in *Yearbook of International Humanitarian Law 2017* (T.M.C. Asser Press, 2019), 165.

<sup>5</sup> Mirko Sossai, "The Place of Cities in the Evolution of International Humanitarian Law," *The Italian Yearbook of International Law Online* 31, no. 1 (2021): 230, [https://www.sidi-isil.org/wp-content/uploads/2022/11/3\\_12-Sossai.pdf](https://www.sidi-isil.org/wp-content/uploads/2022/11/3_12-Sossai.pdf).

<sup>6</sup> UNSC, *Protection of civilians in armed conflict - Report of the Secretary-General*, UN Security Council (S/2023/345, 2023), § 7.

<sup>7</sup> Kaja Sannerud Andersen and Magnus Løvold, "War in Cities: Joining forces to tackle the humanitarian impact," *rcrcconference.org*, 2021, <https://rcrcconference.org/blog/war-in-cities-joining-forces-to-tackle-the-humanitarian-impact/>.

protecting civilians in urban warfare as well as unanimously adopting a resolution in 2021, strongly condemning attacks against critical civilian infrastructure.<sup>8</sup> Furthermore, in 2022 the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (EWIPA Declaration) was adopted, currently endorsed by 87 States.<sup>9</sup>

Unlike rural battlefields, urban areas concentrate civilian populations, civilian infrastructure, and military objectives. Therefore, upon the outbreak of hostilities within these surroundings, considerable challenges are posed to ensuring lawful conduct of war.<sup>10</sup> It has been argued that urban settings are the most complex environments to conduct military operations. These challenges are, in part, attributable to restricted maneuverability and fragmented operational pictures for commanders, which complicates military decision-making.<sup>11</sup> Furthermore, in recent years we have witnessed non-state armed groups (NSAGs) deliberately moving the battleground into urban areas, seeking tactical advantages against technologically superior opponents by leveraging the presence of civilians and civilian infrastructure, often in direct violation of International Humanitarian Law (IHL).<sup>12</sup> This is commonly referred to as ‘asymmetric warfare’.

Current trends suggest that future conflicts will predominantly unfold in urban environments and that the primary threat will stem from irregular actors, such as NSAGs, employing unconventional tactics.<sup>13</sup> This development is of particular concern when taking into account a recent estimate suggesting that by the year 2050, a substantial 68 percent of the global population is anticipated to reside in urban areas.<sup>14</sup> In light of the growing prevalence of urban warfare, it seems pertinent to examine whether IHL, initially developed during a period of conventional warfare in open and rural areas, can address the distinct challenges posed by contemporary urban warfare.

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<sup>8</sup> "Protection of Civilians in Urban Warfare: High-level Open Debate," Security Council Report, 2022, <https://www.securitycouncilreport.org/whatsinblue/2022/01/protection-of-civilians-in-urban-warfare-high-level-open-debate.php>. ; UNSC, *Resolution 2573 (2021)*, UN Security Council (S/RES/2573, 2021), § 1.

<sup>9</sup> "List of endorsing states, as of 19 April 2024," Government of Ireland, 2024, <https://www.gov.ie/en/publication/585c8-protecting-civilians-in-urban-warfare/>.

<sup>10</sup> Sossai, *supra* note 5, 229.

<sup>11</sup> IHL, *New Dimensions and Challenges of Urban Warfare - 43rd Round Table on Current Issues of International Humanitarian Law (Online, 9th September - 7th October 2020)*, International Institute of Humanitarian Law (2021), 38, <https://iihl.org/round-table/43nd-round-table-on-current-problems-in-ternational-humanitarian-law-9-september-7-october-2020/>.

<sup>12</sup> Boogaard & Vermeer, *supra* note 4, 167.

<sup>13</sup> David J. Kilcullen, "The City as a System: Future Conflict and Urban Resilience," *The Fletcher forum of world affairs* 36, no. 2 (2012): 28, <https://www.jstor.org/stable/45289555>.

<sup>14</sup> UN-DESA, *World Urbanization Prospects - The 2018 Revision*, The United Nations Department of Economic and Social Affairs - Population Division (2018), 10.

## 1.1 Research question and delimitation

This study centers on the following primary research question:

- To what extent can IHL, in its current form, address the challenges posed by conducting warfare in densely populated urban environments?

To facilitate the investigation of the primary research question, the following supporting questions have been developed:

1. Where do we see inconsistent interpretations of fundamental rules of IHL, particularly those relevant to urban warfare, and what implications do these inconsistencies have for the application of the rules?
2. To what degree are fundamental rules of IHL being complied with by both parties to the current armed conflict between Israel and Hamas?
3. How can political declarations contribute to addressing the challenges posed by conducting warfare in densely populated urban environments?
4. What are the prospects for enhanced compliance with IHL by NSAGs?

The initial two supporting questions explicitly address “fundamental rules of IHL”. Here reference is made to relevant rules that fall under four key areas of IHL, chosen for examination in this study: 1) the principle of proportionality 2) precautionary measures 3) siege warfare 4) loss of protection. Focusing on these particular areas of IHL is driven by two main considerations: their particular relevance in the context of urban warfare and the constraints of the study’s scope. Apart from defining the legal framework of the study, the selected areas of IHL also provide structure and guide the content of chapter 3, which is dedicated to addressing the first supporting question regarding interpretive inconsistencies. This also applies to chapter 4, which is dedicated to addressing the second supporting question regarding the armed conflict between Israel and Hamas. The third and fourth supporting questions are largely discussion-oriented and are addressed under chapter 5.



## 2 Methodology

The following chapter describes the methodological framework within which the research is conducted. Firstly, the overall methodological approach, constituting an interdisciplinary research design, is presented. This is followed by a description of the research method, elaborating on the reasoning behind the case selection as well as the approach to collecting data and associated challenges. Lastly, there is a section on interpretation.

### 2.1 Methodological approach

In order to gain a comprehensive understanding of the research topic, this study employs an interdisciplinary approach, drawing on doctrinal and non-doctrinal legal research. Doctrinal legal research has for long been the cornerstone of traditional legal scholarship, primarily seeking to understand the law through internal legal analysis.<sup>15</sup> Consequently, the doctrinal approach is characterized by the analysis of legal doctrine such as codified law, case law, and regulation, seeking to gain a more comprehensive understanding, explanation, and reasoning of the law itself.<sup>16</sup> Focusing primarily on legal texts, it is often referred to as ‘research in law’.<sup>17</sup> This study will largely take on a doctrinal approach, as it will delve into certain rules and principles of IHL, exploring these legal elements, their interactions, and areas of inconsistency, through internal and textual analysis. However, given the research objective of examining the extent to which IHL can address the challenges posed by urban warfare, this social and contextual element will be incorporated into the methodological approach through non-doctrinal research. Also referred to as ‘socio-legal research’, the non-doctrinal approach takes into account the social context in which the law functions and thus integrates other areas of research beyond the legal discipline.<sup>18</sup> Hence, it allows for a more in-depth examination of the effectiveness and practical impact of rules, principles, and norms, e.g., the degree to which these are being complied with.<sup>19</sup> This is also referred to as ‘external effectiveness’, demonstrating how legal and non-legal disciplines can complement each other and contribute to a broader understanding of how a legal system functions.<sup>20</sup>

Since the primary research question of this study focuses on examining the extent to which IHL can address the challenges posed by urban warfare, applying an interdisciplinary research design appears to be a suitable approach. The study predominantly takes on a doctrinal approach. However, focusing exclusively on the law

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<sup>15</sup> Lydia A. Nkansah and Victor Chimbwanda, "Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm," *Asian Journal of Legal Education* 3, no. 1 (2016): 57, <https://go.exlibris.link/Gr19jYtg>.

<sup>16</sup> Ishwara Bhat, "Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles," in *Idea and Methods of Legal Research* (Delhi: Oxford University Press, 2020), 145.

<sup>17</sup> Paul Chynoweth, "Legal research in the built environment: a methodological framework," *Unknown* (2008): 672, <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=3430f4cb45ab598979565208340e0c08fa1e9b97>.

<sup>18</sup> Salim Ibrahim Ali, Zuryati Mohamed Yusoff, and Zainal Amin Ayub, "Legal Research of Doctrinal and Non-Doctrinal " *International Journal of Trend in Research and Development* 4, no. 1 (2017): 494, <https://www.ijtrd.com/papers/IJTRD6653.pdf>.

<sup>19</sup> Chynoweth, *supra* note 17, 673.

<sup>20</sup> Wendy Schrama, "How to carry out interdisciplinary legal research - Some experiences with an interdisciplinary research method," *Utrecht law review* 7, no. 1 (2011): 148, <https://go.exlibris.link/59Kdkz4Z>.

and its internal consistency would fail to address the practical nature of the research question which places emphasis on the law's interaction with society within the chosen framework of urban warfare. Apart from the law, armed conflicts are generally influenced by numerous factors such as culture, history, and politics. Particularly in relation to urban warfare, resulting in immense human suffering and destruction,<sup>21</sup> conflicts naturally tend to become highly politicized, which in turn has an impact on how they unfold. Therefore, factors within the political landscape must be incorporated in order to understand the broader social context of urban warfare. This study operationalizes a non-doctrinal approach through a detailed case study on the ongoing armed conflict between Israel and Hamas. In this sense, the non-doctrinal approach serves the purpose of giving *context* to the legal phenomenon, which is under examination. This is in contrast to an 'external effectiveness test', which to a larger degree emphasizes the *integration* of empirical data from various disciplines.<sup>22</sup>

## 2.2 Research method

This study employs a doctrinal legal research method in combination with a single case study, which includes elements of a non-doctrinal approach. The following sections provide a description of the reasoning behind the case selection and the data collection process.

### 2.2.1 Case selection

Although Israel and Hamas have engaged in several armed conflicts in the recent past, the current conflict unfolding in Gaza, triggered by Hamas' attack on Israel on October 7, 2023, has reached an unprecedented level of intensity.<sup>23</sup> Firstly, selecting this armed conflict as a case study arises from the fact that it shares several fundamental characteristics with previous urban armed conflicts, which have occurred over the past decades. Examples include Raqqa, Mogadishu, and Marawi, among numerous others.<sup>24</sup> One common feature is the asymmetrical power dynamic between involved armed groups, which is often the case in urban warfare.<sup>25</sup> Furthermore, common traits include a dense population, dense urban infrastructure, narrow streets, multi-story buildings, and a defensive party establishing itself among the civilian population, making use of the these

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<sup>21</sup> Antouly, *supra* note 2, 2.

<sup>22</sup> Schrama, *supra* note 20, 151.

<sup>23</sup> "Israeli-Palestinian Conflict," Global Conflict Tracker, 2024, <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict>.

<sup>24</sup> Andersen & Løvold, *supra* note 7.

<sup>25</sup> Sossai, *supra* note 5, 227.

features to gain tactical advantage, often in violation of IHL.<sup>26</sup> As previously highlighted, experts predict that armed conflicts of this nature will be commonly witnessed in the future.<sup>27</sup>

Besides the above-mentioned similarities, the armed conflict between Israel and Hamas is also unique in several ways. This can be attributed to Gaza's exceptionally dense population, Hamas' vast subterranean tunnel network, and the high level of intelligence obtained by the Israel Defense Forces (IDF) through previous armed conflicts in Gaza alongside continuous surveillance carried out over an extensive period.<sup>28</sup> Furthermore, the conflict is highly influenced by complex historical developments, extensive international scrutiny, and geopolitical dynamics.<sup>29</sup> Lack of clarity regarding the conflict's legal classification and whether Gaza falls under the category of occupied territory further contributes to its distinctiveness.<sup>30</sup> These unique traits contribute to the inherent limitation, typically associated with a single case study, of drawing generalized conclusions.<sup>31</sup> Nevertheless, based on the previously highlighted similarities between the armed conflict in Gaza and past armed conflicts in urban settings, several outcomes of the analysis will certainly be relevant in a broader context. Aiming to integrate this comparative framework, the case study draws repeated references to the 2017 armed conflict in Raqqa between the Syrian Democratic Forces (SDF), supported by a US-led coalition, against Islamic State of Iraq and Syria (ISIS). Apart from sharing key features with the current armed conflict in Gaza, such as those detailed earlier in this section, the large amount of literature on the 2017 armed conflict in Raqqa also contributed to its selection as an element of comparison for the case study.

### 2.2.2 Data collection

An important part of doctrinal legal research is the collection of data.<sup>32</sup> For this study, data is primarily collected through desk research, relying on primary and secondary sources. Primary sources include international treaties, customary international law, and Court rulings – as is also contained in Art. 38(1) of the Statute of the

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<sup>26</sup> Nils Hägerdal, "Starvation as Siege Tactics: Urban Warfare in Syria," *Studies in conflict and terrorism* 46, no. 7 (2023): 1245, <https://go.exlibris.link/zjMW94bC>. ; Michael N. Schmitt, "Israel – Hamas 2023 Symposium – Attacking Hamas – Part I, The Context," *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/attacking-hamas-part-i-context/>. ; Laurent Gisel et al., "Urban warfare: an age-old problem in need of new solutions," *International Committee of the Red Cross - Humanitarian Law & Policy Blog*, 2021, <https://blogs.icrc.org/law-and-policy/2021/04/27/urban-warfare/>.

<sup>27</sup> See e.g. Hägerdal, *supra* note 26, 1256 ; Vincent Bernard, "War in cities: The spectre of total war," *International review of the Red Cross* (2005) 98, no. 901 (2016): 4, <https://international-review.icrc.org/articles/editorial-war-cities-spectre-total-war>.

<sup>28</sup> Michael Knights, "Gaza's Urban Warfare Challenge: Lessons from Mosul and Raqqa," *The Washington Institute for Near East Policy*, 2023, <https://www.washingtoninstitute.org/policy-analysis/gazas-urban-warfare-challenge-lessons-mosul-and-raqqa>. ; Carlo J.V. Caro, "Unpacking the History of Urban Warfare and its Challenges in Gaza," *Stimson - Security & Strategy*, 2023, <https://www.stimson.org/2023/unpacking-the-history-of-urban-warfare-and-its-challenges-in-gaza/>.

<sup>29</sup> "Israel Gaza war: History of the conflict explained," BBC, 2023, <https://www.bbc.com/news/newsbeat-44124396>.

<sup>30</sup> Jérôme de Hemptinne, "Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter," *EJIL:Talk!*, 2023, <https://www.ejiltalk.org/classifying-the-gaza-conflict-under-international-humanitarian-law-a-complicated-matter/>.

<sup>31</sup> Eric W. K. Tsang, "Generalizing from Research Findings: The Merits of Case Studies," *International journal of management reviews : IJMR* 16, no. 4 (2014): 370, <https://onlinelibrary.wiley.com/doi/abs/10.1111/ijmr.12024>.

<sup>32</sup> Bhat, *supra* note 16, 151.

International Court of Justice (ICJ).<sup>33</sup> Furthermore, primary sources include military doctrines, political declarations, political statements, and UN documents such as resolutions, reports, and drafting documents. Secondary sources include journal articles, blog posts, books, legal commentaries, and studies such as the Customary International Humanitarian Law (CIHL) Study of the International Committee of the Red Cross (ICRC).<sup>34</sup> Although not a formal law itself, some suggest that the ICRC CIHL Study has gradually gained authority and become a respected reference point within the international legal system, frequently cited by legal experts and scholars.<sup>35</sup> Others have criticized it for falling short in its methodology and overreaching in its conclusions.<sup>36</sup> Content from the study is nevertheless drawn on frequently in this paper. However, in instances where the customary status of a given rule appears to be questionable, this is incorporated in the analysis. Regarding secondary sources, it has been important to collect a diverse range of representative materials in order to account for the possibility of differing IHL interpretations depending on one's professional background.<sup>37</sup>

Elicit, an artificial intelligence research assistant tool, was used to identify literature for the study. Furthermore, search engines such as Google and Google Scholar were used alongside various databases accessible via the University Library of Southern Denmark. Due to the ongoing nature of the armed conflict between Israel and Hamas at the time of conducting this study, data collection was undertaken continuously throughout the process, taking into consideration the constant flow of new information.

Interviews were also used as a form of data collection with the primary objective of supplementing the discussion-based sections of the study under chapter 5. Four experts in the field were interviewed, each providing their insights anonymously. These individuals are instead identified based on their expertise or relevant past experience, and are listed below according to the sequence of the interviews conducted:

1. Expert in international humanitarian law and policy relating to armed conflict (humanitarian background)
2. Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology
3. Former military legal advisor deployed with International Security Assistance Force (ISAF)

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<sup>33</sup> "Statute of the International Court of Justice," (United Nations, 18 April 1946, 33 *UNTS* 993), Art. 38.

<sup>34</sup> ICRC, "Customary International Humanitarian Law Study," (International Committee of the Red Cross, 2005). <https://ihl-databases.icrc.org/en/customary-ihl>.

<sup>35</sup> Marko Milanovic and Sandesh Sivakumaran, "Assessing the authority of the ICRC Customary IHL Study: How does IHL develop?," *International review of the Red Cross* (2005) 104, no. 920-921 (2022): 1897, <https://international-review.icrc.org/articles/assessing-the-authority-of-the-icrc-customary-ihl-study-920>.

<sup>36</sup> Yoram Dinstein, "The ICRC Customary International Humanitarian Law Study," *International Law Studies* 82 (2006): 110, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1227&context=ils>. ; John B. Bellinger and William J. Haynes, "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law," *International review of the Red Cross* (2005) 89, no. 866 (2007): 444-46, [https://international-review.icrc.org/sites/default/files/irrc\\_866\\_11.pdf](https://international-review.icrc.org/sites/default/files/irrc_866_11.pdf).

<sup>37</sup> David Luban, "Military Necessity and the Cultures of Military Law," *Leiden journal of international law* 26, no. 2 (2013): 321, <https://go.exlibris.link/fK6MZy11>.

#### 4. Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR)

The first two interviewees were identified and selected based on their humanitarian and military background, respectively. The subsequent two interviewees were identified and selected through the 'snowballing method' since they were referred to by one of the initial interviewees.<sup>38</sup> It was considered important to ensure representation of both humanitarian and military experts to include perspectives from both sides. In addition, experts with operational and practical experience were prioritized as a means of supplementing the otherwise largely theoretical data collected through secondary sources. As demonstrated by the list of interviewees, three individuals are of a military background, while only one is affiliated with the humanitarian field. A more balanced sample would have been optimal for the study. To address this imbalance, attention was given to the inclusion of supplementary literature sources written by humanitarian experts in the relevant discussion-based sections of the study. It is also worth noting that the interview sample size is relatively small. However, this is due to the intended supplementary role of the interviews with regard to the discussion-based sections.

The interviews were conducted in a semi-structured format, offering flexibility that permitted the introduction of new questions during the interviews.<sup>39</sup> Prior to the interviews, an interview guide was shared with participants to facilitate their preparation - this is included as Appendix A.

#### 2.2.3 Challenges in collecting data for the case study

As previously mentioned, the ongoing armed conflict between Israel and Hamas undergoes extensive international scrutiny and has attracted widespread media attention. This has increased the amount of information available on the conflict, thus contributing to data collection. Notwithstanding this increase, a challenge arises with regard to the lack of specific information on military operations and other ground activity taking place in Gaza. Furthermore, descriptions of ground activity may not accurately reflect the events that are unfolding and risk becoming outdated if new information emerges. It is important to highlight this as a limiting factor for the analysis, particularly when having to analyze the applicability and compliance with IHL by the involved parties. In order to address this challenge, several methods have been applied. These include relying on trustworthy publishers/sources, verifying information in multiple sources, examining the credibility of citations and references, and explicitly highlighting areas of uncertainty in the analysis. These methods are similarly applied to address the risk of bias, which might affect the credibility and reliability of information. This is particularly relevant given the politicized nature of the conflict. Lastly, it is important to stress that the study focuses on circumstances surrounding the armed conflict in Gaza as they existed at of the time of writing, based on the

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<sup>38</sup> "What is snowball sampling?," Dovetail, 2023, <https://dovetail.com/research/snowball-sampling/>.

<sup>39</sup> Ruslin et al., "Semi-structured Interview: A Methodological Reflection on the Development of a Qualitative Research Instrument in Educational Studies," *IOSR Journal of Research & Method in Education* 12, no. 1 (2022): 24, <https://www.iosrjournals.org/iosr-jrme/papers/Vol-12%20Issue-1/Ser-5/E1201052229.pdf>.

information available. Content in the study might therefore be subject to modification in response to any new information arising in the future.

### 2.3 Interpretation

Given that much of IHL takes the form of codified law, treaty interpretation is essential for this study. Interpretation of treaties is conducted in accordance with Art. 31 in the Vienna Convention on the Law of Treaties (VCLT), which expressly states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>40</sup> When interpreting treaty provisions in this study, priority is given to the text of the treaty, in line with the approach articulated by the ICJ.<sup>41</sup> As outlined in Art. 31(3)(b) of VCLT, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall also be taken into account in the process of treaty interpretation. The ways in which various elements of codified IHL are applied, and thus interpreted by States, bears significant importance in this study due to the evolving nature of IHL. However, as opposed to the subsequent practice described in Art. 31(3)(b) of VCLT, this study employs subsequent practice under Art. 32 of the VCLT as a *supplementary means of interpretation*.<sup>42</sup> Using subsequent practice as a supplementary means of interpretation is detailed in the International Law Commission’s (ILC) draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.<sup>43</sup> Subsequent practice under Art. 31(3)(b) obviously offers a greater interpretive value due to the requirement that such practice must establish an *agreement* regarding its interpretation. However, within the scope of this study, the element of agreement can be difficult to prove definitively, particularly in terms of obtaining and analyzing materials in all relevant languages. In contrast, subsequent practice under Art. 32 provides a more workable approach, allowing for the identification of “subsequent practice by one or more, but not all, parties to a given treaty”.<sup>44</sup> However, as emphasized by the ILC, it is in this context particularly important to be mindful of the fact that “the view of one State does not make international law”.<sup>45</sup>

In identifying State practice as an expression of treaty interpretation, this study primarily depends on military doctrines and official statements or publications by military forces. Acknowledging these sources as a valid method for identifying evidence of State practice is consistent with the perspective put forward by the ILC<sup>46</sup>

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<sup>40</sup> "Vienna Convention on the Law of Treaties," (Vienna, Austria: United Nations, 23 May 1969, *1155 UNTS 331*), Art. 31.

<sup>41</sup> "*Legality of Use of Force (Serbia and Montenegro v. Belgium)*," (International Court of Justice, 2004), Judgment, § 100. (“Interpretation must be based above all upon the text of the treaty”).

<sup>42</sup> Vienna Convention on the Law of Treaties, *supra* note 40, Art. 32.

<sup>43</sup> ILC, *Seventieth session. Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, International Law Commission - UN General Assembly (A/73/10, 2018), 2.

<sup>44</sup> ILC, *Seventieth session. Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, International Law Commission - UN General Assembly (A/73/10, 2018), 36.

<sup>45</sup> *Ibid.*

<sup>46</sup> ILC, *supra* note 44, 36-37.

as well as Dörr and Schmalenbach in their commentary to the VCLT.<sup>47</sup> The present writer's proficiency in English enables the understanding and analysis of English-language military doctrines and publications, resulting in their predominant use in this study. Furthermore, emphasis is placed on State practice demonstrated by specially affected States, understood in this context as those which have regularly been engaged in armed conflict in the recent past. In addition, State practice demonstrated by Israel is frequently referred to due to the selected case study.

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<sup>47</sup> Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed. (Springer Berlin Heidelberg, 2018), 597. ("the notion of "practice" comprises any external behavior of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision. No particular form is required, so that official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions.").

### 3 Explaining and Analyzing Key Principles of IHL

The following chapter delves into an explanation and analysis of relevant rules within the four areas of IHL selected for examination in this study: the principle of proportionality, precautionary measures, siege warfare, and loss of protection. Emphasis is placed upon identifying and exploring inconsistent interpretations of these rules, as well as resulting implications for their application.

#### 3.1 The principle of proportionality

Unlike conventional battlefields, warfare in urban areas significantly increases the risk of incidental harm to civilians and civilian objects. The argument that the principle of proportionality currently stands as the cornerstone for safeguarding civilians from the effects of hostilities<sup>48</sup> therefore becomes particularly relevant. Although a foundational principle of IHL, there are inconsistent interpretations of the meaning and scope of essential terms within it. These are outlined and explored in the following sections.

The principle of proportionality is most explicitly codified in Art. 51(5)(b) of Protocol I Additional to the Geneva Conventions of 1949 (AP I). Here it is stated that an attack is prohibited if it “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”.<sup>49</sup> This wording also appears in two separate provisions of AP I under the category of ‘precautions in attack’.<sup>50</sup> The principle of proportionality is also recognized as customary law, applicable to international armed conflicts (IACs) and non-international armed conflicts (NIACs)<sup>51</sup> and is outlined in Rule 14 of the ICRC CIHL Study.<sup>52</sup> Furthermore, the principle of proportionality is evident in Art. 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (Rome Statute), wherein it is established that an attack violating this rule constitutes a war crime.<sup>53</sup> This provision, however, refers to incidental harm which would be “clearly excessive in relation to the concrete and direct overall military advantage anticipated”, thereby adding the terms *clearly* and *overall* in comparison to the wording used in the aforementioned provisions. These insertions will not be addressed in this study. Rather, focus will be placed on the wording outlined in the relevant provisions of AP I and Rule 14 of the ICRC CIHL Study.

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<sup>48</sup> Yoram Dinstein, "Protection from Attack of Civilians and Civilian Objects," in *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2022), 177.

<sup>49</sup> "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)," (Switzerland, 8 June 1977, 1125 UNTS 3), Art. 51(5)(b).

<sup>50</sup> AP I, *supra* note 49, Art. 57(2)(a)(iii) and Art. 57(2)(b).

<sup>51</sup> Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House: The Royal Institute of International Affairs (2018), 7, <https://go.exlibris.link/zZ6rSqj5>.

<sup>52</sup> ICRC, *supra* note 34, Rule 14.

<sup>53</sup> "Rome Statute of the International Criminal Court," (Rome, 17 July 1998, 2187 UNTS ), Art. 8(2)(b)(iv).



### 3.1.1 Incidental harm

#### 3.1.1.1 *Damage to civilian objects*

Art. 51(5)(b) of AP I states that “damage to civilian objects” shall be taken into account when assessing proportionality. Civilian objects are defined under Art. 52(1) of the same protocol as “all objects which are not military objectives”.<sup>54</sup> However, much attention has been directed towards determining whether “damage to civilian objects” applies to so called dual-use objects. A dual-use object, although not an official term under IHL, is commonly used to describe a military objective that also holds a civilian function.<sup>55</sup> Discussion has revolved around whether such a civilian function, which would be impaired as a result of a given attack, falls within the term “damage to civilian objects”. The opinion held by the ICRC is that although a dual-use object does constitute a military objective, damage to its civilian component(s) must be taken into consideration when conducting a proportionality assessment.<sup>56</sup> Numerous experts agree with this interpretation.<sup>57</sup> In contrast, it has been suggested that a military objective cannot simultaneously be considered civilian, in which case there is no obligation to take into account any civilian function that would be compromised as a result of an attack.<sup>58</sup> Israel has adopted the approach that because a single building, used for both military and civilian purposes, becomes a military objective, any harm inflicted upon it is not collateral damage.<sup>59</sup> However, several other States, including the US, have adopted the opposite approach.<sup>60</sup> Given the prevalence of dual-use objects in urban areas, it is important to recognize that while they do constitute military objectives, such objects often hold a critical function in providing essential services to the civilian population. Hence, when it is expected that an attack on a dual-use object will damage its civilian function(s), it appears to be reasonable that this should be included when assessing proportionality. Disregarding such civilian impact arguably undermines the balance between civilian protection and military necessity, which is fundamental to IHL.

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<sup>54</sup> AP I, *supra* note 49, Art. 52(1).

<sup>55</sup> Gillard, *supra* note 51, 34-35.

<sup>56</sup> Helen Durham ‘Keynote address’ in: IHL, *Conduct of Hostilities: the Practice, the Law and the Future*, International Institute of Humanitarian Law (2015), 30-31, <https://iihl.org/round-table/37th-round-table-on-current-problems-in-international-humanitarian-law-4-6-september-2014/>.

<sup>57</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, “The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare: Final Report of the Study Group of the International Law Association on the Conduct of Hostilities in the 21st Century,” *International law studies* 93 (2017): 356, <https://go.exlibris.link/JRbmHrVQ>. ; Laurent Gisel, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law (International Expert Meeting Report)*, ICRC and Université Laval (2018), 39, <https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality>.

<sup>58</sup> Ori Pomson, “Israel - Hamas 2023 Symposium - The ICRC's Statement on the Israel-Hamas Hostilities and Violence: Discerning the Legal Intricacies,” *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/icrc-statement-israel-hamas-hostilities-violence-discerning-legal-intricacies/>.

<sup>59</sup> Michael N. Schmitt and John J. Merriam, “The Tyranny of Context: Israeli Targeting Practices in Legal Perspective,” *University of Pennsylvania Journal of International Law* 37 (2015): 120, <https://scholarship.law.upenn.edu/jil/vol37/iss1/3/>.

<sup>60</sup> The Commander's Handbook on the Law of Naval Operations, § 8.3 (US Department of the Navy, 2022). ; Gisel, *supra* note 57, 38.

### 3.1.1.2 Indirect effects

Another aspect, which is associated with proportionality and has drawn much attention in recent years, is whether indirect effects of attacks shall be factored into assessments. Indirect effects, often referred to as reverberating effects, have been defined as those which do not occur immediately and directly as a result of an attack. Instead, such effects are triggered by the direct impacts of an attack and can occur over short, medium, or long periods of time.<sup>61</sup> While several experts and States seem to agree that indirect effects shall be factored into proportionality assessments,<sup>62</sup> the required extent and scope of these effects remain uncertain. Some experts suggest that indirect effects are to be included only insofar as they are foreseeable or reasonably foreseeable.<sup>63</sup> This approach has also been adopted by the ICRC.<sup>64</sup> Another approach recognizes the inclusion of indirect effects as long as they are foreseeable and “not too remote”.<sup>65</sup> This perspective can arguably also be found in the Law of Armed Conflict (LOAC) manuals of the UK and US.<sup>66</sup> Israel has also adopted the approach of including indirect effects of attacks in collateral damage assessments, but only when these can be reasonably expected.<sup>67</sup> The wording of Art. 51(5)(b) of AP I clearly establishes a requirement of a causal effect between the attack and the expected incidental harm. However, there is no explicit requirement of a *direct* causation. In light of this, it is of the present writer’s opinion that indirect effects shall be factored into proportionality assessments. To ensure a comprehensive assessment, all reasonably foreseeable indirect effects, regardless of their remoteness, should be included. The extent to which indirect effects shall be included into proportionality assessments is especially relevant in urban contexts given the interconnectedness of critical civilian infrastructure, thus increasing the risk of such effects.<sup>68</sup> This topic is discussed in further detail in section 5.2.1.

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<sup>61</sup> ICRC, *ICRC Expert Meeting: Preventing and Mitigating the Indirect Effects on Essential Services from the Use of Explosive Weapons in Populated Areas*, International Committee of the Red Cross (2024), 6, <https://www.icrc.org/en/document/addressing-indirect-effects-explosive-weapons>. ; Isabel Robinson and Ellen Nohle, "Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas," *International review of the Red Cross* (2005) 98, no. 901 (2016): 108, <https://go.exlibris.link/YYnYP3XW>.

<sup>62</sup> Robinson & Nohle, *supra* note 61, 115-16 ; Ian Henderson and Kate Reece, "Proportionality under international humanitarian law: The "reasonable military commander" standard and reverberating effects," *Vanderbilt Journal of Transnational Law* 51, no. 3 (2018): 850, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3108324](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108324). ; Michael N. Schmitt and Chad Highfill, "Invisible Injuries: Concussive Effects and International Humanitarian Law," *Harvard National Security Journal* 9 (2018): 86, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3180677](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180677). ; Gisel, *supra* note 57, 47.

<sup>63</sup> Gisel, *supra* note 57, 46 ; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 353.

<sup>64</sup> ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, International Committee of the Red Cross (2015), 52, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

<sup>65</sup> Dinstein, *supra* note 48, 183.

<sup>66</sup> The Joint Service Manual of the Law of Armed Conflict, § 5.33.4 (UK Ministry of Defence, 2004). ; Department of Defense Law of War Manual, § 5.12.1.3 (US Department of Defense, 2015 (updated 2023)). (note that although the US, under this paragraph, confines its understanding of incidental harm to “immediate or direct harms”, the example subsequently outlined in the same paragraph, regarding the destruction of a power plant, arguably has a more indirect nature).

<sup>67</sup> The 2014 Gaza Conflict: Factual and Legal Aspects, 183 (State of Israel, 2015).

<sup>68</sup> ICRC, *supra* note 61, 9-10.

### 3.1.2 Concrete and direct military advantage

A key element under the principle of proportionality is the “concrete and direct military advantage anticipated”. The 1987 ICRC Commentary on the Additional Protocols to the Geneva Conventions describes that this wording was meant to demonstrate that military advantages should be “substantial and relatively close” and not “hardly perceptible and those which would only appear in the long term”.<sup>69</sup> Regarding the term ‘concrete’, experts have suggested that this indicates a requirement that the given military advantage be “real or tangible, definable and quantifiable”. The same group of experts proposed that the term ‘direct’ indicates a requirement of either a “clear causal relation” between the attack and the military advantage anticipated, or that the military advantage anticipated should have a causality that is “relatively close” to the attack.<sup>70</sup> Although the term ‘relatively close’ occurs twice in the above-mentioned, the exact scope of this wording remains unclear and arguably leaves a somewhat broad margin of interpretation.

To highlight a few examples, the UK’s LOAC manual explicitly interprets the term ‘concrete and direct’ to mean that “the advantage to be gained is identifiable and quantifiable and one that flows directly from the attack”.<sup>71</sup> In the LOAC manual of the US, it is stated that “the military advantage may not be merely hypothetical or speculative, although there is no requirement that the military advantage be “immediate””.<sup>72</sup> According to the LOAC manual of France, the advantage must be substantial and relatively close, thus applying the language previously mentioned in the 1987 ICRC Commentary on the Additional Protocols.<sup>73</sup> Israel has expressed that “unlikely possibilities” of military advantage may not be considered when conducting proportionality assessments.<sup>74</sup> A common thread in these interpretations is the requirement of a degree of certainty associated with the military advantage anticipated. However, a clear and common approach to the scope of the required causation between the attack and the military advantage anticipated is not evident.

Numerous States have expressed that the term “military advantage” is to be understood as the military advantage anticipated from ‘an attack as a whole’ as opposed to isolated or specific parts of an attack.<sup>75</sup> Yet, the way in which these States define the exact meaning and scope of ‘an attack as whole’ remains unclear.<sup>76</sup> There seems to be strong support among numerous experts that the concept must constitute a “*finite* operation with

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<sup>69</sup> Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), "Commentary on the Additional Protocols to the Geneva Conventions," (International Committee of the Red Cross, 1987), § 2209.

<sup>70</sup> Gisel, *supra* note 57, 17-19.

<sup>71</sup> UK Ministry of Defence, *supra* note 66, § 5.33.3.

<sup>72</sup> US Department of Defense, *supra* note 66, § 5.12.2.

<sup>73</sup> Manuel de Droit des Opérations Militaires, 117 (Ministère des Armées, 2022).

<sup>74</sup> State of Israel, *supra* note 67, 181.

<sup>75</sup> See e.g. declarations upon ratification of API by Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain, United Kingdom here: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>. In addition, see US Department of Defense, *supra* note 66, § 5.12.2.1.

<sup>76</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 346.

defined limits” and thus be distinguished from the entire war effort.<sup>77</sup> However, in the LOAC manual of the US, it is expressed that “military advantage” is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy”.<sup>78</sup> Under this interpretation, a target’s overall strategic value can be included when determining the military advantage of an attack. This implies that an attack might produce limited tactical gains but nevertheless still weigh heavily in terms of military advantage due to its strategic value. Similarly, the Canadian LOAC manual refers to the “advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole”, thus suggesting that anticipated military advantage can include broader campaign objectives.<sup>79</sup> Israel has also directly addressed the term ‘military advantage’ in a 2023 governmental document outlining various legal aspects related to its ongoing armed conflict against Hamas. Here it is stated that apart from including a variety of operational considerations, “military advantage moreover may refer to the advantage anticipated from an operation as a whole”, thereby also signaling a broad interpretation of the concept.<sup>80</sup> It is the opinion of the present writer that although some State practice clearly suggests that the anticipated military advantage from an attack extends beyond tactical gains to encompass broader operational and strategic gains, it is not yet evident whether this is reflective of a broad and consistent approach among States. It should be noted, however, that adopting a broad interpretation of the concept might complicate the measurement of the anticipated military advantage, as it may become more difficult to adhere to the requirements of it being *concrete* and *direct*. This could introduce additional complexity to an already complicated task of assessing proportionality, potentially leading to the impairment of civilian protection.

Another relevant point to address is whether ‘force protection’ falls under the scope of military advantage. Force protection, although not an official legal term, has been described as “minimizing risks and losses to preserve combat capability”.<sup>81</sup> Currently, it seems to be increasingly accepted that preserving the security of one’s own force can fall under the anticipated military advantage in a proportionality assessment.<sup>82</sup> The present writer is of the opinion that given the decreased military effectiveness which will typically occur as a result of losing personnel or equipment, including force protection under anticipated military advantage appears to be an acceptable interpretation. However, this importantly requires that the protection of one’s forces must amount to a *concrete* and *direct* military advantage, e.g., in a situation where a party directly faces an ongoing

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<sup>77</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 342-43 ; Gisel, *supra* note 57, 17.

<sup>78</sup> US Department of Defense, *supra* note 66, § 5.12.2.1.

<sup>79</sup> Law of Armed Conflict at the Operational and Tactical Levels, 4.15 (4-4) (Office of the Judge Advocate General - Canada, 2001).

<sup>80</sup> Hamas-Israel Conflict 2023: Key Legal Aspects, 10 (State of Israel, 2023).

<sup>81</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 366.

<sup>82</sup> See e.g. *ibid.* ; Dinstein, *supra* note 48, 193 ; Gisel, *supra* note 57, 16 ; Michael Bothe et al., *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949*, Second ed. (Martinus Nijhoff Publishers, 2013), 366. ; US Department of Defense, *supra* note 66, § 5.12.2 ; State of Israel, *supra* note 80, 10.

attack or imminent threat of attack. Another aspect, which appears to have received less attention, is whether military advantage can be assessed in terms of protecting civilians. This involves the consideration of harm to civilians which is likely to occur if the attack is *not* carried out. The US appears to support factoring in potential future harm to civilians when assessing proportionality, however not explicitly referring to it as an element of military advantage, thereby leaving their approach somewhat unclear.<sup>83</sup> Israel, however, considers civilian protection to be crucial when determining military advantage.<sup>84</sup> Determining military advantage based on the protection of civilians appears to be an acceptable interpretation, as long as it is not hypothetical or too remote. The relevance of including civilian protection as an element of military advantage under proportionality, particularly in the context of asymmetric urban warfare, is further addressed in section 5.2.2.

### 3.1.3 Assessing proportionality

It is important to highlight that that principle of proportionality requires an *ex ante* assessment of the expected incidental harm and anticipated military advantage. This can be derived from the wording “may be expected”, implying a reliance on the information that is available to, or is expected to be available to, the attacker at the time of planning, deciding upon, or executing an attack.<sup>85</sup> Also, it is worth noting that since the principle of proportionality is applicable to *parties* to an armed conflict, it is essentially binding on every soldier, irrespective of their rank.<sup>86</sup> In addition, the principle is applicable to all attacks, whether deliberate or dynamic.

The principle of proportionality requires that the expected incidental harm is not *excessive* in relation to the concrete and direct military advantage anticipated. Therefore, this entails a balancing act of distinct values. It has been argued that such a balancing act is inherently subjective because the dissimilar values on each side of the assessment hinder the possibility of carrying out an objective comparison.<sup>87</sup> The subjective element associated with assessing proportionality is also recognized in the 1987 ICRC Commentary on AP I.<sup>88</sup> However, here the ICRC also notes that “the interpretation must above all be a question of common sense and good faith for military commanders”.<sup>89</sup> The reference to “common sense and good faith” has been argued to demonstrate an objective standard, and there appears to be a consensus among many experts that the assessment of excessiveness bears a clear objective element.<sup>90</sup>

A concept which has become closely associated with proportionality is *reasonableness*. This development can be traced back to a judgment by the International Criminal Tribunal for the former Yugoslavia (ICTY), in

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<sup>83</sup> US Department of Defense, *supra* note 66, § 5.12.3.

<sup>84</sup> Schmitt & Merriam, *supra* note 59, 127.

<sup>85</sup> AP I, *supra* note 49, Art. 57(2)(a)(iii) and Art. 57(2)(b) ; Gisel, *supra* note 57, 57.

<sup>86</sup> Gillard, *supra* note 51, 43 ; Gisel, *supra* note 57, 59.

<sup>87</sup> Michael Wells-Greco, "Operation 'Cast Lead': Jus in Bello Proportionality," *Netherlands international law review* 57, no. 3 (2010): 416, <https://go.exlibris.link/Msck7ldX>.

<sup>88</sup> Sandoz et al., *supra* note 69, § 2208.

<sup>89</sup> *Ibid.*

<sup>90</sup> See e.g., Robinson & Nohle, *supra* note 61, 119 ; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 369 ; Gisel, *supra* note 57, 58.

which the Court defined that “In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack”.<sup>91</sup> This is similar to the notion of the ‘reasonable military commander’, which was associated with the principle of proportionality by the committee that reviewed the North Atlantic Treaty Organization (NATO) bombing campaign in Yugoslavia for the ICTY.<sup>92</sup> Several States, including Israel and the US, have also embraced the standard of the reasonable commander when assessing the proportionality of strikes.<sup>93</sup>

Given the inherent difficulty of comparing dissimilar values under proportionality, one might suggest that the reasonable commander standard represents a step forward in the development of a more precise approach to assessing proportionality. In light of the significant amount of subjectivity, which is unavoidable in the process of determining excessiveness, the reasonable commander standard at least seems to contribute with a semi-objective approach, arguably reflecting the norms of common sense and good faith, as outlined in the 1987 ICRC Commentary on AP I.

## 3.2 Precautionary measures

Precautionary measures occupy a central role under IHL, requiring actions from both attackers and defenders to minimize civilian harm. The rules of precautionary measures take on even greater significance in urban areas, as noted by the ICRC in its 1987 Commentary on AP I.<sup>94</sup> The following sections explore the two key aspects relevant to this area of IHL: precautions in attack and precautions against the effects of attacks.

### 3.2.1 Precautions in attack

This section provides a brief explanation of several rules linked to precautions in attack, also referred to as active precautions. However, a more in-depth examination will be conducted on Art. 57(2)(c) of AP I, concerning effective advance warnings, as this holds particular relevance in section 4.2, addressing the armed conflict between Israel and Hamas.

Art. 57(1) of AP I stipulates that “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”.<sup>95</sup> Although it falls under the category of ‘precautions in attack’ in AP I, this rule, which is customary and applicable to both IACs and NIACs,<sup>96</sup> arguably enjoys a broader and more general application in armed conflicts based on the wording “military operations”.

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<sup>91</sup> "*Prosecutor v. Stanislav Galic*," (IT-98-29-T) (The International Criminal Tribunal for the former Yugoslavia, 2003), Judgment, § 58.

<sup>92</sup> "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia," (ICTY, 2000), Final Report to the Prosecutor, § 50.

<sup>93</sup> State of Israel, *supra* note 67, 185-86. ; US Department of Defense, *supra* note 66, § 5.10.2.2.

<sup>94</sup> Sandoz et al., *supra* note 69, § 2190.

<sup>95</sup> AP I, *supra* note 49, Art. 57(1).

<sup>96</sup> Boogaard & Vermeer, *supra* note 4, 173.

Art. 57(2)(a)(i) of AP I requires those who plan and decide upon an attack to “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection (..)”.<sup>97</sup> Furthermore, Art. 57(2)(a)(ii) of AP I requires the aforementioned to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”.<sup>98</sup> These two provisions are reflective of well-established rules of customary law, which also appear under Rule 16 and 17, respectively, in the ICRC CIHL Study.<sup>99</sup> Lastly, Art. 57(2)(b) of AP I describes that an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one, is subject to special protection, or that the attack may be expected to cause excessive incidental harm or damage.<sup>100</sup> This aligns with the customary rule outlined in Rule 19 of the ICRC CIHL Study.<sup>101</sup>

In Art. 57(2)(c) of AP I, it is stated that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”.<sup>102</sup> This is reflective of a customary rule, which has previously been recognized in various codifications, one of them being Art. 26 of the Hague Convention IV (1907).<sup>103</sup> It is also included in the ICRC CIHL Study as Rule 20.<sup>104</sup> A crucial aspect of this rule, which has drawn much attention, is what exactly constitutes an *effective* warning. While it has not been possible to identify State practice explicitly addressing the meaning of this, the UN Fact-Finding Mission on the Gaza Conflict has suggested that an effective warning “must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning”.<sup>105</sup> An alternative interpretation suggests that there is no obligation to instruct the civilian population on actions to avoid harm - as long as a warning can be received by the civilian population, it can be considered effective.<sup>106</sup> Experts have proposed various approaches, but the International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA Study Group) has suggested a useful standard according to which the effectiveness of a warning must be based on “whether the warning efforts could have reasonably been expected to produce the intended protective effect in the circumstances ruling at the time, in view of information available from all sources to the commander”.<sup>107</sup>

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<sup>97</sup> AP I, *supra* note 49, Art. 57(2)(a)(i).

<sup>98</sup> AP I, *supra* note 49, Art. 57(2)(a)(ii).

<sup>99</sup> ICRC, *supra* note 34, Rule 16 and 17.

<sup>100</sup> AP I, *supra* note 49, Art. 57(2)(b).

<sup>101</sup> ICRC, *supra* note 34, Rule 19.

<sup>102</sup> AP I, *supra* note 49, Art. 57(2)(c).

<sup>103</sup> "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land," (The Hague, 1907), Art. 26.

<sup>104</sup> ICRC, *supra* note 34, Rule 20.

<sup>105</sup> FFM-Gaza, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Human Rights Council (A/HRC/12/48, 2009), § 530.

<sup>106</sup> Michael N. Schmitt, "Israel - Hamas 2023 Symposium - The Evacuation of Northern Gaza: Practical and Legal Aspects," *Lieber Institute - West Point*, 2023 <https://lieber.westpoint.edu/evacuation-northern-gaza-practical-legal-aspects/>.

<sup>107</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 385.

This approach seems to account for the fact that the effectiveness of a warning is highly influenced by the circumstances surrounding a given attack. It furthermore prevents an assessment of the effectiveness *ex post facto*, where circumstances might have changed.

Another notable element within Art. 57(2)(c) of AP I, as well as its customary equivalent, is the wording “unless circumstances do not permit”. In its 1987 Commentary on AP I, the ICRC attributes this to the element of surprise, which might be a condition for a successful attack.<sup>108</sup> Besides the element of surprise, the LOAC manual of the US also mentions force protection as a circumstance that could fall under this exception.<sup>109</sup> Israel has also elaborated on its interpretation of the phrase, providing examples of situations in which there is insufficient time to provide a warning, or where the intended target of an attack might escape due to the warning.<sup>110</sup>

The rule regarding effective advance warning clearly encompasses both humanitarian and military considerations, thus increasing its complexity and reliance on the context of each case. Furthermore, the rule would undoubtedly benefit from a clear and common understanding of what is required for an advance warning to be *effective*. This is particularly important in relation to urban warfare, where warnings constitute a critical measure in minimizing civilian harm.

### 3.2.2 Feasibility of precautions

A key concept related to several rules under precautionary measures is ‘feasibility’. This term appears in the aforementioned Art. 57(2)(a)(i) and 57(2)(a)(ii) of AP I as well as their customary equivalents. The term is also included in Art. 58, which is explained in the subsequent section.

It is mentioned in the 1987 ICRC Commentary on AP I that the words “everything feasible” gave rise to lengthy discussions during negotiations of the protocol.<sup>111</sup> Upon ratification, several States put forward in their declarations and reservations that they interpreted the term ‘feasible’ as meaning that which is practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>112</sup> This same wording has since been included in Protocol II to the 1980 Convention on Certain Conventional Weapons, and has generally gained broad acceptance, including by Israel.<sup>113</sup>

Based on this interpretation, the inclusion of the feasibility term again illustrates a clear balancing of humanitarian and military considerations. Adding this term to several precautionary measures arguably takes into

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<sup>108</sup> Sandoz et al., *supra* note 69, § 2223.

<sup>109</sup> US Department of Defense, *supra* note 66, § 5.11.5.4.

<sup>110</sup> State of Israel, *supra* note 80, 11.

<sup>111</sup> Sandoz et al., *supra* note 69, § 2198.

<sup>112</sup> See e.g. declarations upon ratification of AP I by Algeria, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain, United Kingdom here: <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>.

<sup>113</sup> "Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996)," (3 May 1996, CCW/CONF.I/16), Art. 3(10). ; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 374 ; Boogaard & Vermeer, *supra* note 4, 175 ; State of Israel, *supra* note 67, 169.



account the contingent and dynamic nature of armed conflicts, where some precautionary measures might be impossible to implement under certain circumstances. Consequently, because the feasibility of such measures will rely heavily on the context of a given situation, it is crucial that it is interpreted with common sense and good faith.

### 3.2.3 Precautions against the effects of attacks

Precautions against the effects of attacks, also referred to as passive precautions, are codified in Art. 58 of AP I. Here it is set forth that parties to the conflict shall, to the maximum extent feasible (a) endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives (b) avoid locating military objectives within or near densely populated areas (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.<sup>114</sup> According to the ICRC, these precautionary rules are also customary, applicable to both IACs and NIACs, thus included in the ICRC CIHL Study as Rules 22-24.<sup>115</sup> Furthermore, the ICTY, as well as the Eritrea-Ethiopia Claims Commission, have determined that these rules qualify as customary.<sup>116</sup> Israel also holds this position and has put forward that “customary international law obligates parties to an armed conflict to take various steps to mitigate, to the extent feasible, the harm to the civilian population under their control resulting from the dangers of military operations” – and that this customary rule is reflected in Article 58 of AP I.<sup>117</sup> Notwithstanding the above-mentioned support for the customary status of these rules, others remain critical towards recognizing them as such.<sup>118</sup>

It is worth highlighting that passive precautions are also subject to the concept of feasibility, as described in the previous section. It has however been argued that the increasing concentration of civilians in urban areas is placing immense strain on the rules of passive precautions in terms of what measures are actually feasible to carry out.<sup>119</sup> While this may be true, it is nevertheless crucial that passive precautions are undertaken whenever feasible, particularly given that precautionary obligations constitute a shared responsibility between the attacking and defending force and must function in complementarity to maximize effectiveness.

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<sup>114</sup> AP I, *supra* note 49, Art. 58.

<sup>115</sup> ICRC, *supra* note 34, Rules 22-24.

<sup>116</sup> "Prosecutor v. Kupreskić," (IT-96-16-T) (The International Criminal Tribunal for the former Yugoslavia, 2000), Judgment, § 524. ; Dinstein, *supra* note 48, 199.

<sup>117</sup> State of Israel, *supra* note 80, 9.

<sup>118</sup> Marco Sassòli and Anne Quintin, "Active and passive precautions in air and missile warfare," *Israel yearbook on human rights* 44 (2014): 105-09 (36-40), <https://access.archive-ouverte.unige.ch/access/metadata/327e98d6-3b30-4b70-bccb-9c0c23d6e3e9/download>. ; US Department of Defense, *supra* note 66, § 5.14 (note the wording “it may be appropriate to” in § 5.14.1 and § 5.14.2).

<sup>119</sup> Eric Talbot Jensen, "Precautions against the effects of attacks in urban areas," *International review of the Red Cross* (2005) 98, no. 901 (2016): 151, <https://go.exlibris.link/JKwSH5d9>.

### 3.3 Siege warfare

Sieges have been a common method of warfare for centuries and they remain highly relevant in the context of modern urban warfare.<sup>120</sup> While lacking a legal definition, a siege can be described as a method of warfare which is “marked by encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply”.<sup>121</sup> The following sections explore key rules of IHL that hold particular relevance in the context of sieges.

#### 3.3.1 Starvation of civilians as a method of warfare and protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of warfare is prohibited by Art. 54(1) of AP I.<sup>122</sup> In addition, Art. 54(2) of the same protocol describes that:

“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive”.<sup>123</sup>

Art. 54 of AP I has been acknowledged to reflect norms of customary law<sup>124</sup>, which is also indicated by the inclusion of Rules 53 and 54 in the ICRC CIHL Study, applicable to IACs and NIACs.<sup>125</sup> Furthermore, Art. 8(2)(b)(xxv) in the Rome Statute prohibits “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival”, applicable to IACs.<sup>126</sup>

With regard to the meaning of the term ‘starvation’, the ICRC described it in its 1987 Commentary on AP II as “the action of subjecting people to famine, i.e., extreme and general scarcity of food”.<sup>127</sup> However, it is noteworthy that the Preparatory Commission for the International Criminal Court (ICC) held a broader view of the term, suggesting that it also encompasses the deprivation of essential commodities, indicating that e.g., medicine also falls within the scope.<sup>128</sup>

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<sup>120</sup> Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, Chatham House: The Royal Institute of International Affairs (2019), 2, <https://go.exlibris.link/t9LMZQKL>.

<sup>121</sup> Yoram Dinstein, "Specific Methods of Warfare," in *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2022), 294.

<sup>122</sup> AP I, *supra* note 49, Art. 54(1).

<sup>123</sup> AP I, *supra* note 49, Art. 54(2).

<sup>124</sup> "*Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*," (HCJ 9132/07) (Supreme Court of Israel, 2008), Judgment, § 13-14.

<sup>125</sup> ICRC, *supra* note 34, Rule 53-54.

<sup>126</sup> Rome Statute, *supra* note 53, Art. 8(2)(b)(xxv).

<sup>127</sup> Sandoz et al., *supra* note 69, § 4791.

<sup>128</sup> Knut Dörmann, "Preparatory commission for the International Criminal Court: the elements of war crimes - part II," *International review of the Red Cross* (2005) 83, no. 842 (2001): 475-76, <https://go.exlibris.link/Zdj4G3dd>.

It can be derived from Art. 54(1) and 54(2) of AP I that starvation as a method of siege warfare can be a legitimate tactic if not purposefully targeting the civilian population. Art. 54(2) refers specifically to the “purpose of denying them for their sustenance value to the civilian population”. However, it is worth stressing that any attack on the objects mentioned in Art. 54(2), which do not aim to deny their sustenance value to the civilian population, will still be subject to the principle of proportionality. Although focus in Art. 54(2) is placed on the prohibition of *purposeful* starvation of civilians, it has been suggested that a combined reading with Art. 54(3) of AP I suggests an element of *incidental* starvation as well.<sup>129</sup> Art. 54(3) sets forth that the prohibitions in Art. 54(2) do not extend to objects specified within it when these are used by an opposing Party (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.<sup>130</sup> Therefore, a scenario could arise in which an attack on one of the objects mentioned in Art. 54(2), aimed at the opposing Party rather than the civilian population, might become unlawful if it can be expected to result in the civilian population having insufficient food or water, leading to starvation or displacement. However, there seems to be a lack of clarity as to whether all details of Art. 54(3) are considered customary.<sup>131</sup> It would therefore be inaccurate to suggest that the prohibition of *incidental* starvation under certain conditions, as argued based on a combined reading of Art. 54(2) and 54(3), is customary.

### 3.3.2 Access to indispensable resources and humanitarian relief supplies

Art. 23 of the Fourth Geneva Convention (GC IV) mandates that:

“Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.<sup>132</sup>

This article is relatively limited in its scope, allowing only medical and religious supplies for all civilians, and essential items for particular vulnerable groups. The article continues to describe that the requirement to allow free passage of consignments is contingent upon several conditions, namely that the Party in question is satisfied that there are no serious reasons for fearing (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, and (c) that it may lead to a definite advantage to the military

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<sup>129</sup> Gloria Gaggioli, "Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?," *EJIL:Talk!*, 2019, <https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/>.

<sup>130</sup> AP I, *supra* note 49, Art. 54(3).

<sup>131</sup> Gaggioli, *supra* note 129.

<sup>132</sup> "Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)," (Switzerland, 12 August 1949, 75 *UNTS* 287), Art. 23.

efforts or economy of the enemy. Lastly, the article describes that the Party in question retains the right to specify technical arrangements for such passage.<sup>133</sup>

In contrast to the limited scope of the above-mentioned, Art. 70 of AP I broadens the obligation to provide relief, encompassing all civilians who are not adequately provided with food and other supplies essential to their survival.<sup>134</sup> Art. 70 of AP I is also subject to several conditions, although different from those outlined in Art. 23 of GC IV. Art. 70 stipulates that Parties to the conflict and other Parties allowing the passage of relief actions may (a) retain the right to prescribe technical arrangements for such passage, (b) require that a Protecting Power oversees the aid distribution, and (c) shall not divert relief from its intended purpose or delay its forwarding, except in cases of urgent necessity for the benefit of the affected civilian population. Another important aspect to highlight is that relief actions, under Art. 70, are “subject to the agreement of the Parties concerned in such relief actions”.<sup>135</sup> It appears, however, to be increasingly accepted by the international community that consent may not be arbitrarily withheld by a Party. Indications of this can already be found in the drafting history of the Additional Protocols to the GCs where Parties expressed that refusal of agreement to relief actions was not entirely unrestricted and could not be based on arbitrary reasons.<sup>136</sup> The prohibition of arbitrarily withholding consent has since been referred to in numerous contexts, one of these being a presidential statement of the UNSC, in which it was recalled that “arbitrarily depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law”.<sup>137</sup> These words were reiterated in the UNSC’s Resolution 2139.<sup>138</sup>

In the 1987 ICRC Commentary on the Additional Protocols, it is described that Art. 70 of AP I constitutes a modification of Art. 23 of GC IV, and that the conditions outlined in Art. 23 “should be considered as obsolete in any armed conflict to which Protocol I applies”.<sup>139</sup> It has furthermore been suggested that Art. 70 of AP I reflects customary law, also applicable in the context of NIACs.<sup>140</sup> This is further demonstrated by the inclusion of Rule 55 in the ICRC CIHL Study.<sup>141</sup> Israel has also expressed that it considers Art. 70 of AP I to hold customary status.<sup>142</sup> However, in its recent governmental document on relevant legal aspects of the ongoing

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<sup>133</sup> *Ibid.*

<sup>134</sup> AP I, *supra* note 49, Art. 70.

<sup>135</sup> *Ibid.*

<sup>136</sup> Dapo Akande and Emanuela-Chiara Gillard, "Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict," *International law studies* 92, no. 483 (2016): 490, <https://go.exlibris.link/3hw9DfqV>.

<sup>137</sup> UNSC, *Statement by the President of the Security Council*, UN Security Council (S/PRST/2013/15, 2013). ; In addition, *see e.g.* UNGA, *Resolution adopted by the General Assembly on 18 December 2013*, UN General Assembly (A/RES/68/182, 2014), § 14. ; ICRC commentary to Rule 55 (ICRC, *supra* note 34, Rule 55).

<sup>138</sup> UNSC, *Resolution 2139 (2014)*, UN Security Council (S/RES/2139, 2014), in preambular paragraphs (p. 2).

<sup>139</sup> Sandoz et al., *supra* note 69, § 2851.

<sup>140</sup> Marina Sharpe, "Humanitarian access to Gaza," *EJIL:Talk!*, 2023, <https://www.ejiltalk.org/humanitarian-access-to-gaza/>.

<sup>141</sup> ICRC, *supra* note 34, Rule 55.

<sup>142</sup> Supreme Court of Israel, *supra* note 124, § 13.

conflict against Hamas, Israel cites both Art. 70 of AP I and Art. 23 of GC IV.<sup>143</sup> This includes an explicit reference to the conditions which are contained under Art. 23 of GC IV, implying its applicability.<sup>144</sup> This appears to indicate that Israel does not accept the ICRC's suggested interpretation that Art. 70 of AP I renders the conditions outlined in Art. 23 of GC IV obsolete. Considering that allowing free passage of relief consignments is subject to more restrictive conditions under Art. 23 compared to Art. 70, the exact impact of Art. 70 on the applicability of Art. 23 would benefit from further clarification.

As opposed to the above-mentioned legal provisions, IHL also includes rules specifically aimed at relief actions in occupied territories. Art. 59 of GC IV mandates that an occupying power "shall agree to relief schemes on behalf of the said population and shall facilitate them by all the means at its disposal" if the population under occupation is inadequately supplied.<sup>145</sup> Furthermore, Art. 69 of AP I mandates that an occupying power, to the fullest extent available, shall ensure the "provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship".<sup>146</sup> As opposed to Art. 23 of GC IV and Art. 70 of AP I, it is notable that the above-mentioned articles concerning relief actions in occupied territories are not subject to any conditions.

### 3.4 Loss of protection

The dense concentration of civilians in urban areas is associated with an increased risk of civilian involvement in armed conflicts that take place within these environments. The following sections explore two key components of IHL that under certain circumstances can lead to the loss of protected civilian status: direct participation in hostilities (DPH) and human shields.

#### 3.4.1 Direct participation in hostilities

In Art. 51(1) of AP I, it is stated that civilians enjoy general protection against dangers arising from military operations.<sup>147</sup> Art. 51(3) of the same protocol adds that this applies "unless and for such time as they take a direct part in hostilities".<sup>148</sup> This article reflects a basic principle which is also recognized as customary and applicable to IACs and NIACs.<sup>149</sup> Furthermore, Rule 6 in the ICRC CIHL Study sets forth that "Civilians are protected against attack, unless and for such time as they take a direct part in hostilities".<sup>150</sup> Lastly, the loss of

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<sup>143</sup> State of Israel, *supra* note 80, 12-13.

<sup>144</sup> *Ibid.*

<sup>145</sup> GC IV, *supra* note 132, Art. 59.

<sup>146</sup> AP I, *supra* note 49, Art. 69.

<sup>147</sup> AP I, *supra* note 49, Art. 51(1).

<sup>148</sup> AP I, *supra* note 49, Art. 51(3).

<sup>149</sup> "The Public Committee against Torture in Israel et al. v. The Government of Israel et al.," (HCJ 769/02) (Supreme Court of Israel, 2005), Judgment, § 30.

<sup>150</sup> ICRC, *supra* note 34, Rule 6.

civilian protection from attack while taking direct part in hostilities can also be derived from Art. 8(2)(b)(i) of the Rome Statute.<sup>151</sup>

While treaty law does not elaborate on DPH, this concept has become increasingly relevant in contemporary armed conflicts and has therefore undergone substantial debate in the recent past.<sup>152</sup> Much of this revolves around the meaning of “for such time” and “direct part in hostilities”. These phrases will separately be addressed below.

#### 3.4.1.1 “For such time”

In its Interpretive Guidance on DPH, the ICRC describes that *preparatory measures* that are aimed at carrying out a hostile act, as well as *deployment to and the return from* the location of such an act, falls within DPH.<sup>153</sup> Narrowing the temporal scope to only include the act itself is largely disapproved.<sup>154</sup> It is furthermore explained in the Interpretive Guidance that a civilian regains protection once his or her engagement in a hostile act ends - also commonly referred to as the ‘revolving door approach’.<sup>155</sup> Several experts have criticized this interpretation, accusing it of being too narrow and disregarding of the balance between military necessity and humanity which is inherent to IHL.<sup>156</sup> The revolving door approach has also been rejected by the US.<sup>157</sup> Another area of controversy arises on the basis of the ICRC’s distinction between ‘civilians who take direct part in hostilities’ and ‘members of organized armed groups’. According to the ICRC, the latter “cease to be civilians for as long as they remain members by virtue of their continuous combat function”.<sup>158</sup> A continuous combat function involves “the preparation, execution, or command of acts or operations amounting to direct participation in hostilities”.<sup>159</sup> Consequently, according to the ICRC’s approach, a *continuous* loss of protection is confined only to members of organized armed groups with a continuous combat function and cannot be imposed on civilians directly participating in hostilities, who instead would be subject to the revolving door approach. In contrast, the Supreme Court of Israel put forward a different approach in its 2006 decision on the Targeted Killings case. Here it is argued that “a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short

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<sup>151</sup> Rome Statute, *supra* note 53, Art. 8(2)(b)(i).

<sup>152</sup> Ryan Goodman and Derek Jinks, “The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law,” *New York University journal of international law & politics* 42, no. 3 (2010): 637, <https://nyujilp.org/wp-content/uploads/2012/04/42.3-Goodman-Jinks.pdf>.

<sup>153</sup> Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009,” *International review of the Red Cross* (2005) 90, no. 872 (2008): 65, <https://go.exlibris.link/F9KWM0rg>.

<sup>154</sup> Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” *The American journal of international law* 98, no. 1 (2004): 17, <https://go.exlibris.link/y7LCTMFm>.

<sup>155</sup> Melzer, *supra* note 153, 71.

<sup>156</sup> Dinstein, *supra* note 48, 203 ; Michael N. Schmitt, *Essays on Law and War at the Fault Lines* (T.M.C. Asser Press, 2012), 539-40.

<sup>157</sup> US Department of Defense, *supra* note 66, § 5.8.4.2.

<sup>158</sup> Melzer, *supra* note 153, 71.

<sup>159</sup> Melzer, *supra* note 153, 34.

periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts".<sup>160</sup> According to this interpretation, such an individual would still fall under the category of a civilian. However, a continuous loss of protection would be imposed on the person "for such time" as he or she is committing the chain of hostilities. It is worth noting in relation to this study that the IDF follows this approach.<sup>161</sup> Furthermore, the IDF acknowledges the category of 'members of organized armed groups', but argues that under customary law, such individuals are legitimately targetable solely due to their membership, in which case a 'continuous combat function' is not required.<sup>162</sup>

#### 3.4.1.2 "Direct part in hostilities"

In its Interpretive Guidance, the ICRC proposed three cumulative criteria that a particular act must meet in order to constitute DPH:

1. *Threshold of harm*: The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or to inflict death, injury, or destruction on protected persons or objects.
2. *Direct causation*: A causal link must exist between the act, or coordinated military operation of which it is part, and the harm likely to result from this.
3. *Belligerent nexus*: The act must be designed to support a belligerent party and to the detriment of another.<sup>163</sup>

The second criteria 'direct causation' has sparked some debate. On the one hand, it has been suggested as defined too narrowly, especially since it excludes conduct such as assembling improvised explosive devices (IEDs) in a workshop.<sup>164</sup> An opposing view is that this narrow approach resonates well with the wording and structure of the provisions concerning DPH.<sup>165</sup> The latter is also the opinion of the present writer. An act which does not cause harm directly, but causes harm through a series of connected events, seems too distant from the wording of the rule. It is worth noting that according to the ICRC's view, acts such as intelligence gathering and transport of personnel and weapons, will also amount to DPH insofar as they are conducted for the purpose of executing a *specific* hostile act.<sup>166</sup>

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<sup>160</sup> Supreme Court of Israel, *supra* note 149, § 39.

<sup>161</sup> Schmitt & Merriam, *supra* note 59, 112.

<sup>162</sup> State of Israel, *supra* note 67, 155-156.

<sup>163</sup> Melzer, *supra* note 153, 46.

<sup>164</sup> Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements," *New York University journal of international law & politics* 42, no. 3 (2010): 739, <https://go.exlibris.link/tLmRPRSq>.

<sup>165</sup> Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities," *EJIL:Talk!*, 2009, <https://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>.

<sup>166</sup> Melzer, *supra* note 153, 66.

The Supreme Court of Israel also addressed direct participation in their decision on the Targeted Killings case. Here the Court took on a broader interpretation, including civilians who perform the *function* of combatants, listing examples such as collecting general intelligence or providing service to unlawful combatants.<sup>167</sup> Furthermore, it was suggested that the concept also includes those who decide upon and plan a physical act of attack.<sup>168</sup> The IDF is also committed to this interpretation.<sup>169</sup> It has nevertheless been suggested that the Court's proposal leans too heavily towards military advantage and risks limiting the protection of civilians.<sup>170</sup>

Based on the above-mentioned, it can be established that the concept of DPH remains a matter of ongoing debate under IHL. This concerns both the temporal scope and activity involved. Therefore, clarification is needed. This is especially relevant in order to determine who can be legitimately targeted in urban contexts, which are characterized by heightened civilian presence and increased likelihood of involvement in hostilities.

### 3.4.2 Human shields

The prohibition against the use of human shields was already outlined in Art. 23 of the Third Geneva Convention (GC III) and Art. 28 of GC IV.<sup>171</sup> However, these were confined to the prohibition of rendering certain points or areas immune from military operations by using prisoners of war and protected persons, respectively. Art. 51(7) of AP I, however, sets forth a more expansive prohibition, establishing that:

“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations”.<sup>172</sup>

This prohibition against the use of human shields is customary, applicable to both IACs and NIACs<sup>173</sup> – as is also demonstrated by Rule 97 in the ICRC CIHL Study.<sup>174</sup> The use of human shields is also designated a war crime by Art. 8(2)(b)(xxiii) of the Rome Statute.<sup>175</sup>

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<sup>167</sup> Supreme Court of Israel, *supra* note 149, § 35.

<sup>168</sup> Supreme Court of Israel, *supra* note 149, § 37.

<sup>169</sup> State of Israel, *supra* note 67, 157.

<sup>170</sup> Kristen E. Eichensehr, "On Target? The Israeli Supreme Court and the Expansion of Targeted Killings," *The Yale law journal* 116, no. 8 (2007): 1881, <https://go.exlibris.link/zPLQ8gYc>.

<sup>171</sup> "Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)," (Switzerland, 12 August 1949, 75 *UNTS* 135), Art. 23. ; GC IV, *supra* note 132, Art. 28.

<sup>172</sup> AP I, *supra* note 49, Art. 51(7).

<sup>173</sup> Jean-François Quéguiner, "Precautions under the law governing the conduct of hostilities," *International review of the Red Cross* (2005) 88, no. 864 (2006): 812, [https://www.icrc.org/en/doc/assets/files/other/irrc\\_864\\_queguiner.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_864_queguiner.pdf).

<sup>174</sup> ICRC, *supra* note 34, Rule 97.

<sup>175</sup> Rome Statute, *supra* note 53, Art. 8(2)(b)(xxiii).



It is important to note that Art. 51(8) of AP I, arguably also reflective of customary law<sup>176</sup>, describes that if the prohibition against the use of human shields is violated, the parties involved in the conflict remain bound by their legal obligations towards civilians.<sup>177</sup>

Much debate has revolved around the distinction between involuntary and voluntary human shields and how these concepts relate to the principle of proportionality as well as the notion of DPH. The broad lines of this discussion are provided below.

With regard to the use of involuntary human shields, some experts have suggested that such use should allow for an adjustment in the proportionality assessment of behalf of the attacking party.<sup>178</sup> This adjustment essentially means that the criteria for determining collateral damage as ‘excessive’ can be relaxed. An opposing view insists that this approach has no legal justification and would be incompatible with the above-mentioned Art. 51(8) of AP I.<sup>179</sup> This is also the opinion of the present writer. The protection afforded to civilians under IHL should not be undermined by a belligerent party acting with malicious intent. Controversially, it has also been suggested that involuntary human shields lose their protected status altogether because they can be regarded as an ‘instrument’ used by the adversary. According to this argument, targeting involuntary human shields contributes effectively to military action and thus offers a definite military advantage.<sup>180</sup> This interpretation, however, clearly neglects the importance of civilian protection within the framework of IHL.

When it comes to voluntary human shields, the notion has been put forward by experts and several States that these individuals qualify as DPH and thus lose their protected status for the duration of their participation.<sup>181</sup> The ICRC has expressed a similar position in their Interpretive Guidance on DPH, although more restrictive, being applicable only to voluntary human shields who create a *physical* obstacle to military operations. In operations utilizing more powerful weaponry, like artillery or air strikes, the presence of voluntary human shields will, according to the ICRC, constitute a legal rather than physical obstacle. In such cases, the voluntary human shields will not meet the *threshold of harm* under the ICRC’s three cumulative criteria for DPH, because their presence will have “no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective”.<sup>182</sup> However, it is the opinion of the present writer that the presence of voluntary human shields in such cases actually might satisfy the ICRC’s threshold of harm criteria by potentially leading to the

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<sup>176</sup> Sassòli & Quintin, *supra* note 118, 104 (35) ; Schmitt & Merriam, *supra* note 59, 116.

<sup>177</sup> AP I, *supra* note 49, Art. 51(8).

<sup>178</sup> See e.g. Amnon Rubinstein and Yaniv Roznai, "Human shields in modern armed conflicts: the need for a proportionate proportionality," *Stanford law & policy review* 22, no. 1 (2011): 120-21, [https://law.stanford.edu/wp-content/uploads/2018/03/rubinstein\\_roznai.pdf](https://law.stanford.edu/wp-content/uploads/2018/03/rubinstein_roznai.pdf). ; Dinstein, *supra* note 48, 211.

<sup>179</sup> Sassòli & Quintin, *supra* note 118, 105 (36).

<sup>180</sup> Bence Kis Kelemen, "Human Shielding, Subjective Intent, and Harm to the Enemy," *Journal of conflict & security law* 25, no. 3 (2020): 559, <https://academic.oup.com/jcsl/article-abstract/25/3/537/5981764?redirectedFrom=PDF>.

<sup>181</sup> Dinstein, *supra* note 48, 211. (This approach has also been adopted by the following states: Germany, France, Norway, Denmark, and the United States – see Kelemen, *supra* note 180, 561-62).

<sup>182</sup> Melzer, *supra* note 153, 56-57.

cancellation of a planned attack. In this sense, the voluntary human shielding would be likely to “adversely affect the military operations” of the attacking party, as stated in the threshold of harm criteria.

It has also been argued that voluntary human shields cannot be considered as directly participating in hostilities given that they “do not pose direct danger or cause harm to the adversary”.<sup>183</sup> Furthermore, a notion has been put forward that civilians who do not heed warnings should be considered as voluntary human shields directly participating in hostilities. A counter argument to this lies in the fact that civilians are not obligated to heed warnings under IHL and therefore cannot lose their legal protection by not doing so.<sup>184</sup>

On a practical level, it can be extremely difficult to determine whether the presence of a human shield is voluntary or involuntary. This is especially relevant in urban warfare due to its complex and chaotic environment. In circumstances of doubt, it has been suggested that the reasonable approach is to assume the latter.<sup>185</sup> In addition, children must always fall under the category of involuntary human shields because they lack the legal capacity to form an intention to participate directly in hostilities.<sup>186</sup>

In the context of this paper, it is relevant to note that Israel has expressed the following interpretations to be applicable:

- the use of involuntary human shields does not allow for an adjustment in the proportionality assessment on behalf of the attacking party,<sup>187</sup>
- voluntary human shields can be considered as directly participating in hostilities,<sup>188</sup>
- civilians who do not heed warnings do not qualify as voluntary human shields directly participating in hostilities,<sup>189</sup>
- in case of doubt whether the presence of a human shield is voluntary or involuntary, the latter must be assumed.<sup>190</sup>

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<sup>183</sup> Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* (Springer, 2012), 287.

<sup>184</sup> Schmitt & Merriam, *supra* note 59, 119.

<sup>185</sup> Michael N. Schmitt, "Human shields in international humanitarian law," *The Columbia journal of transnational law* 47, no. 2 (2009): 335, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1600258](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600258).

<sup>186</sup> Dinstein, *supra* note 48, 210.

<sup>187</sup> State of Israel, *supra* note 67, xvii.

<sup>188</sup> Schmitt & Merriam, *supra* note 59, 117.

<sup>189</sup> Schmitt & Merriam, *supra* note 59, 119.

<sup>190</sup> Schmitt & Merriam, *supra* note 59, 117.

## 4 The Applicability and Compliance with IHL in the Israel-Hamas Armed Conflict

Building upon the legal aspects explored in the preceding chapter, the following chapter is an analysis of the ongoing armed conflict between Israel and Hamas. Firstly, adherence to the principle of proportionality is examined, predominantly focusing on IDF operations. Subsequently, the chapter explores the application of precautionary measures in both offensive and defensive actions undertaken by the IDF and Hamas. It then shifts focus to the humanitarian situation in Gaza and delves into the prohibition of civilian starvation and obligation to ensure unimpeded relief supplies. Finally, the analysis explores the use of human shields and relevant aspects related to the potential loss of civilian protection. To provide context, comparisons are repeatedly drawn to the 2017 armed conflict in Raqqa throughout the analysis.

The legal classification of the armed conflict between Israel and Hamas, including whether Gaza can be considered as occupied territory, remains a debatable topic.<sup>191</sup> While an examination of this falls outside the scope of this study, it is acknowledged that the classification of an armed conflict can impact the applicability of IHL. However, for a significant portion of IHL, the distinction between an IAC and a NIAC holds limited significance.<sup>192</sup> Therefore, the following analysis specifically addresses those instances where the conflict's classification or the question of occupation becomes relevant. It is worth noting that Israel has also acknowledged the uncertainty surrounding the conflict's classification and asserts that its military conduct adheres to the rules governing both IACs and NIACs.<sup>193</sup> Since Israel is not party to AP I, reference is primarily made to customary obligations when assessing the legality of its actions. Furthermore, reference is made to obligations in the Rome Statute, given the ICC's jurisdiction over events occurring in Gaza and the West Bank.<sup>194</sup>

### 4.1 Upholding the principle of proportionality

In section 3.1.2, it is described that Israel has expressed the view that military advantage, under the principle of proportionality in conducting attacks, "may refer to the advantage anticipated from an operation as a whole". Under this formulation ambiguity arises as to whether it is suggested that the anticipated military advantage of

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<sup>191</sup> Hemptinne, *supra* note 30 ; Ayesha Malik, "Classification of the Israel-Palestine Conflict under the Laws of War," *OpinioJuris*, 2023, <https://opiniojuris.org/2023/11/24/classification-of-the-israel-palestine-conflict-under-the-laws-of-war/> ; Supreme Court of Israel, *supra* note 149, § 18 ; Amichai Cohen and Yuval Shany, "Unpacking Key Assumptions Underlying Legal Analyses of the 2023 Hamas-Israel War," *Just Security*, 2023, <https://www.justsecurity.org/89825/unpacking-key-assumptions-underlying-legal-analyses-of-the-2023-hamas-israel-war/>.

<sup>192</sup> Michael N. Schmitt, "Israel - Hamas 2023 Symposium - The Legal Context of Operations Al-Aqsa Flood and Swords of Iron," *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/legal-context-operations-al-aqsa-flood-swords-of-iron/>.

<sup>193</sup> State of Israel, *supra* note 80, 7-8.

<sup>194</sup> Douglas Guilfoyle, "Israel - Hamas 2024 Symposium - What Happens if the ICC issues Warrants for Senior Hamas and Israeli Leaders?," *Lieber Institute - West Point*, 2024, <https://lieber.westpoint.edu/what-happens-icc-issues-warrants-senior-hamas-israeli-leaders/>.

an attack can be determined by considering its *contribution* to a broader military operation, or if the military advantage of an attack can constitute the objective of a broader military operation in and of itself. While explaining the principle of proportionality in relation to the armed conflict in Gaza, an Israeli spokesperson stated that “the expected military advantage here is to destroy the terror organization that perpetrated the deadliest massacre of Jews since the Holocaust (..)”,<sup>195</sup> implying that the objective of the military campaign itself can constitute the anticipated military advantage for each strike. This interpretation is a significant departure from the wording of the principle of proportionality, which refers to the *concrete* and *direct* military advantage anticipated from an attack. Such an approach severely undermines the protection of civilians by significantly raising the threshold for what would constitute “excessive” incidental harm in any given attack. However, if Israel’s interpretation suggests that the anticipated military advantage can be determined by evaluating an attack’s *contribution* to a broader military operation, such an approach would align with State practice observed among certain other States, as outlined in section 3.1.2.

On October 31, 2023, Israeli forces conducted a strike on the Jabalia Refugee Camp in Gaza. According to a report released by Airwars, at least 126 civilians were killed and 280 injured in the attack.<sup>196</sup> Palestinian authorities have claimed that the attack resulted in 195 deaths and approximately 777 injured.<sup>197</sup> Shortly following the strike, the IDF reported in a press release that the attack led to the death of the Commander of Hamas’ Central Jabalia Battalion, Ibrahim Biari, alongside numerous terrorists, and damaged Hamas’ command and control in the area.<sup>198</sup> This demonstrates that the targets were known by the IDF and that the attack likely was deliberate. It is therefore also reasonable to assume that the IDF anticipated the largescale civilian harm and damage from the attack. This is supported by the fact that there has been no subsequent indication from the IDF that this exceeded what was expected. It can also be assumed that the aforementioned consequences of the attack, which were referred to in the IDF press release within hours after the strike, likely represent the anticipated military advantage. These are undoubtedly significant and carry substantial weight. The press release also claimed that “Biari oversaw all military operations in the northern Gaza Strip since the IDF entered”, suggesting that the IDF foresaw the strike as a significant contribution to the broader military operation in Gaza, thus weighing heavily on the military advantage anticipated. However, these are merely speculations, and because proportionality requires an *ex ante* assessment of the expected incidental harm and anticipated military advantage, detailed pre-attack information is crucial to assess the legality of the attack. Meanwhile, the significant civilian casualties and property destruction inflicted by this strike rightfully raises strong concerns about its compliance with the principle of proportionality.

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<sup>195</sup> Leonard Rubenstein, "Israel's Rewriting of the Law of War," *Just Security*, 2023, <https://www.justsecurity.org/90789/israels-rewriting-of-the-law-of-war/>.

<sup>196</sup> "Airwars assessment," Airwars, 2023, <https://airwars.org/civilian-casualties/ispt0783-october-31-2023/>.

<sup>197</sup> "UN rights office says Israeli attacks on Jabalia could be ‘war crime’," Aljazeera, 2023, <https://www.aljazeera.com/news/2023/11/2/un-rights-office-says-israeli-attacks-on-jabalia-could-be-war-crime>.

<sup>198</sup> "IDF & ISA Eliminate Commander of Hamas' Central Jabaliya Battalion," IDF, 2023, <https://www.idf.il/144297/>.

In 2024, an investigation was carried out by +972 Magazine and Local Call based on information provided by six Israeli intelligence officers, all of whom had served in the ongoing armed conflict in Gaza. It was revealed that during the beginning of the conflict, the IDF adopted a policy permitting a death toll of up to 15 or 20 civilians for every junior Hamas operative, and on multiple occasions authorized the killing of over 100 civilians in operations targeting a single battalion or brigade commander.<sup>199</sup> The fixed “collateral damage degree” of up to 15 or 20 civilians for every junior Hamas operative was allegedly applied without the legally required case-by-case examination of attacks in which expected incidental harm must be balanced against anticipated military advantage.<sup>200</sup> Instead, attacks relied purely on information generated by automated and AI-driven systems. According to one of the officers “the principle of proportionality did not exist” in practice.<sup>201</sup> Insofar as this is correct, it constitutes a clear violation of the principle of proportionality. It should be mentioned that the IDF, in a response to the investigation, denied the accusations of having conducted assessments categorically as opposed to individually.<sup>202</sup> As of March 12, 2024, it was estimated that on average, approximately 54 civilians were killed per 100 airstrikes in the armed conflict in Gaza.<sup>203</sup> This can be compared to an average of 1,6 - 7 civilians killed per 100 airstrikes in the 2017 Battle of Raqqa.<sup>204</sup> This is despite the fact that the majority of attacks carried out by coalition forces in Raqqa were dynamic attacks, thus increasing the risk of civilian casualties given the limited timeframe in which proportionality assessments could be conducted.<sup>205</sup> These figures seem to demonstrate that the IDF has set an unusually high standard for what constitutes an acceptable level of civilian casualties in Gaza.

According to the above-mentioned investigation, which claims that the IDF conducted attacks without individually assessing their proportionality and instead relied on pre-established “collateral damage degrees”, it is relevant to consider how such an approach might have impacted the inclusion of indirect effects of attacks. In section 3.1.1.2, it is argued that IHL requires indirect effects of attacks to be factored into proportionality assessments, provided that they are reasonably foreseeable. In a document addressing legal aspects related to the 2014 Gaza conflict, it is asserted by Israel that “the IDF routinely used engineers and damage-assessment specialists to assist with the assessment of expected collateral damage by considering the specific

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<sup>199</sup> “‘Lavender’: The AI machine directing Israel’s bombing spree in Gaza,” +972 Magazine, 2024, <https://www.972mag.com/lavender-ai-israeli-army-gaza/>.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> “Israel Defence Forces’ response to claims about use of ‘Lavender’ AI database in Gaza,” The Guardian, 2024, <https://www.theguardian.com/world/2024/apr/03/israel-defence-forces-response-to-claims-about-use-of-lavender-ai-database-in-gaza>.

<sup>203</sup> Larry Lewis, “Israeli Civilian Harm Mitigation in Gaza: Gold Standard or Fool’s Gold?,” *Just Security*, 2024, <https://www.justsecurity.org/93105/israeli-civilian-harm-mitigation-in-gaza-gold-standard-or-fools-gold/>.

<sup>204</sup> Michael J. Mcnerney et al., *Understanding Civilian Harm in Raqqa and Its Implications for Future Conflicts*, RAND Corporation (2022), 34-35, 38, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RRA700/RRA753-1/RAND\\_RRA753-1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RRA700/RRA753-1/RAND_RRA753-1.pdf).

<sup>205</sup> Mcnerney et al., *supra* note 204, 52, 77.

circumstances of each case”.<sup>206</sup> However, considering the alleged absence of case-by-case proportionality assessments during the beginning of the current armed conflict, indirect effects of attacks obviously could not have been foreseen and taken into account. As was importantly highlighted in a report by the ILA Study Group: “indirect effects can be as or even more severe than the direct effects of an attack”.<sup>207</sup> This highlights the importance of conducting individual proportionality assessments, allowing for the context and physical surroundings of an attack to be taken into account.

Several experts point towards compliance with the principle of proportionality as particularly challenging in the context of urban warfare.<sup>208</sup> This can be attributed to the difficulties in determining indirect effects, the high density of civilians and civilian structures, and the dynamic and fast-paced character of urban warfare.<sup>209</sup> This undoubtedly also applies to the armed conflict in Gaza, particularly the fast-paced tempo of the combat environment which can be ascribed, in part, to Hamas’ tactics, characterized by utilizing their tunnel network, hit-and-run attacks, surprise assaults, and ambushes.<sup>210</sup> Similar tactics were used by ISIS in the 2017 armed conflict in Raqqa.<sup>211</sup> Such tactics presumably lead to a higher number of dynamic attacks on behalf of the opponent, which, as previously noted, typically results in a compressed timeframe for proportionality assessments. This can negatively affect estimates of collateral damage as well as the balancing act between incidental harm and anticipated military advantage. Furthermore, Hamas’ deliberate placement of military objectives in close proximity to civilians and civilian objects<sup>212</sup> undoubtedly increases the civilian casualty risk.

The principle of proportionality appears to be significantly challenged by the dynamic and densely populated urban battlefield, particularly when facing a defending force, such as Hamas, whose tactics heighten the risk of civilian harm. However, addressing these challenges by simply relying on pre-defined “collateral damage degrees” without individual assessments of attacks, as has been associated with the IDF’s approach in the initial stages of the armed conflict, constitutes a clear violation of the principle of proportionality. While individual assessments of proportionality are undoubtedly demanding for the IDF, requiring both time and

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<sup>206</sup> State of Israel, *supra* note 67, 183.

<sup>207</sup> International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 354.

<sup>208</sup> Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), 18.04.2024 (interview) ; Former military legal advisor deployed with International Security Assistance Force (ISAF), 16.04.2024 (interview) ; Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, 05.04.2024 (interview) ; Expert in international humanitarian law and policy relating to armed conflict, 27.03.2024 (interview).

<sup>209</sup> Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208 ; Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208.

<sup>210</sup> "Gaza's Underground: Hamas's Entire Politico-Military Strategy Rests on Its Tunnels," Modern War Institute - At West Point, 2024, <https://mwi.westpoint.edu/gazas-underground-hamass-entire-politico-military-strategy-rests-on-its-tunnels/>. ; "Ambushes and booby traps: Hamas tactics stir confusion, fear, danger," The Washington Post, 2023, <https://www.washingtonpost.com/world/2023/12/22/hamas-booby-traps-gaza/>.

<sup>211</sup> Mcnerney et al., *supra* note 204, 47-48.

<sup>212</sup> "IDF releases what it says is evidence of Hamas using civilian infrastructure to launch attacks," CNN, 2023, [https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-05-23/h\\_f5bf4ef2a7a6a9c8bfa377c2c48213d8](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-05-23/h_f5bf4ef2a7a6a9c8bfa377c2c48213d8).

resources, this does not make them impossible to conduct – particularly considering its well-known surveillance and intelligence gathering capabilities in Gaza. Neglecting such assessments altogether creates an unacceptable risk to civilians and fails to adequately balance military necessity and civilian protection.

## 4.2 Precautionary measures: Utilizing advance warnings and precautions in defense

Although there are several rules governing precautions in attack, this section, due to space constraints, mainly focuses on the rule of providing effective advance warning. This rule is examined in the context of IDF's call for civilian relocation from the north to the south of Gaza. Subsequently, the section explores Hamas' obligations under precautions against the effects of attacks.

In section 3.2.1, it was described that in both IACs and NIACs, IHL requires effective advance warning to be given of attacks which may affect the civilian population, unless circumstances do not permit.<sup>213</sup> Israel is especially known for its comprehensive use of various types of warnings during previous military operations in Lebanon and Gaza.<sup>214</sup> Some claim that the IDF, through these actions, exceeded legal requirements, raising the standard for how to deliver warnings.<sup>215</sup> Others, however, accused the warnings of being ineffective.<sup>216</sup> Although it has not been possible to identify State practice explicitly addressing the meaning of the term 'effective', it was suggested in section 3.2.1 that a useful interpretation can be based on whether it was reasonable to anticipate that the warning effort of an attack would produce the desired protective effect under the prevailing circumstances. The IDF has also made use of advance warnings during the ongoing armed conflict in Gaza, including measures such as distributing leaflets, announcements on radio and TV, posts on social media, as well as individual phone calls and text messages.<sup>217</sup> An occurrence which attracted much attention at the onset of the armed conflict in Gaza was the IDF's call on civilians in the northern Gaza to relocate to the south within 24 hours. This was released on October 13, 2023, where over a million Gazans were residing in the north.<sup>218</sup> Experts have expressed various opinions as to the legality of this IDF action. It has for example been argued that it qualified as an effective advance warning under precautions in attack.<sup>219</sup> Another argument suggests that it did not qualify as an effective advance warning, because it seemingly failed to provide civilians with the opportunity to protect themselves.<sup>220</sup> A third argument claims that the action did not fall under the category of

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<sup>213</sup> ICRC, *supra* note 34, Rule 20.

<sup>214</sup> Pnina S. Baruch and Noam Neuman, "Warning Civilians Prior to Attack under International Law: Theory and Practice," *International Law Studies* 87 (2011): 367-72, <https://digital-commons.usnwc.edu/ils/vol87/iss1/16/>.

<sup>215</sup> Baruch & Neuman, *supra* note 214, 372 ; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *supra* note 57, 384.

<sup>216</sup> *Ibid.*

<sup>217</sup> Michael N. Schmitt, "Israel - Hamas 2023 Symposium - Attacking Hamas - Part II, The Rules," *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/attacking-hamas-part-ii-rules/>.

<sup>218</sup> "Israel orders 1 million Gazans to evacuate; U.N. says that's impossible," *The Washington Post*, 2023, <https://www.washingtonpost.com/world/2023/10/13/israel-gaza-hamas-war-west-bank/>.

<sup>219</sup> Schmitt, *supra* note 106.

<sup>220</sup> Diakonia International Humanitarian Law Centre, *Legal Brief: 2023 Hostilities in Israel and Gaza*, Diakonia International Humanitarian Law Centre (2023), 67, <https://www.diakonia.se/ihl/news/legal-brief-on-the-2023-hostilities-in-israel-and-gaza/>.

effective advance warning, because the north of Gaza is not a military objective to which an attack can be directed.<sup>221</sup> A final argument worth mentioning is that the action did not amount to an effective advance warning, but instead possibly constituted an order of forced displacement.<sup>222</sup> When examining whether the IDF's action qualifies as an effective advance warning, it is worth noting that effective advance warnings must be given of *attacks*. Under IHL, attacks may only be directed at military objectives.<sup>223</sup> Therefore, it appears to be accurate when Sassòli, whose argument is referenced above, points out that the north of Gaza is not a military objective, in which case a call to relocate from this entire area cannot constitute an effective advance warning, as per the legal definition. Interestingly, according to the 1987 ICRC commentary on API, warnings may also have a general character. However, the examples provided in the commentary still refer to attacks on certain military objectives or types of military objectives.<sup>224</sup> Hence, the call to relocate from the northern Gaza does neither appear to qualify as an effective advance warning of a general character.

Interestingly, in its governmental document on legal aspects related to the armed conflict, Israel does not explicitly refer to the call for civilian evacuation as an advance warning under precautionary measures. Instead, it is referred to as an attempt "to mitigate civilian harm".<sup>225</sup> As was described in section 3.2.1, IHL requires that constant care be taken to spare the civilian population in the conduct of military operations.<sup>226</sup> It is therefore worth examining whether the IDF's action falls under the scope of this rule. It is the opinion of the present writer that although the IDF may have issued this call as an attempt to mitigate civilian harm, three key circumstantial elements contest its adherence to the rule of constant care. Firstly, the civilian population was initially given 24 hours to relocate. Anticipating the relocation of over a million individuals within a 24-hour timeframe does not seem to afford them adequate opportunity to ensure their safety. Secondly, the warning was carried out in the midst of a total siege of Gaza, consequently increasing the vulnerability of a population already heavily dependent on aid. Thirdly, there were allegations that the IDF had bombed a civilian evacuation route as Gazans were heading south.<sup>227</sup> Insofar as this is correct, conducting such actions on a route otherwise intended to ensure safe passage, does not align with an approach of constant care to spare the civilian population. In sum, the IDF's call for civilian evacuation may have fallen under the rule of constant care if it had been carried out in a more responsible manner, ensuring that civilians were provided better opportunity to protect themselves.

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<sup>221</sup> "How have Israel and Hamas broken the laws of war?," *The New Humanitarian*, 2023, <https://www.thenewhumanitarian.org/interview/2023/10/17/how-have-israel-and-hamas-broken-laws-war>.

<sup>222</sup> Yousuf Syed Khan, "The Directive to Evacuate Northern Gaza: Advance Warning or Forced Displacement?," *Just Security*, 2023, <https://www.justsecurity.org/89617/the-directive-to-evacuate-northern-gaza-advance-warning-or-forced-displacement/>.

<sup>223</sup> ICRC, *supra* note 34, Rule 7.

<sup>224</sup> Sandoz et al., *supra* note 69, § 2225.

<sup>225</sup> State of Israel, *supra* note 80, 3.

<sup>226</sup> ICRC, *supra* note 34, Rule 15.

<sup>227</sup> "Did Israel bomb a civilian evacuation route in Gaza?," *Financial Times*, 2023, <https://www.ft.com/content/95c5fcf1-c756-415f-85b8-1e4bbff24736>.



The topic of warnings was also raised in relation to the 2017 armed conflict in Raqqa. Prior to initiating the siege of Raqqa, coalition forces distributed leaflets advising civilians to evacuate the city and stay away from ISIS.<sup>228</sup> However, coalition tactics changed within a day, resulting in the SDF instead urging civilians to remain at home.<sup>229</sup> It has been argued that these directions should have been consistent and coordinated.<sup>230</sup> While this naturally would have been optimal, the need for a change in tactics may not have been predictable at the time of the initial warning, in which case it was probably anticipated to produce a protective outcome. This example seems to demonstrate that issuing warnings in a fast-paced and unpredictable urban environment can be a complicated task. However, as was highlighted by a former military legal advisor for the DCD, ensuring that civilians are removed from a besieged area must be a priority.<sup>231</sup> An important operational tool in attempting to facilitate such action is undoubtedly through warnings.

In section 3.2.3, it was described that under precautions against the effects of attacks, parties shall, to the maximum extent feasible, endeavour to relocate civilians and civilian objects away from military objectives and refrain from locating military objectives within or near densely populated areas. During the current armed conflict in Gaza, the IDF has provided evidence of Hamas, among other acts, locating rocket launchers near hospitals and children's playgrounds.<sup>232</sup> Furthermore, Hamas has been accused of attempting to hinder civilian evacuation out of Gaza City.<sup>233</sup> These actions directly violate the aforementioned rules of precautions in defense and thereby increase the risk of civilian harm and damage in the conflict. A reaffirmation of this disregard for safeguarding civilians can be found in a claim put forward by Hamas Official Mousa Abu Marzouk, indicating that the protection of civilians is not Hamas' responsibility.<sup>234</sup> Tactics similar to Hamas' were carried out by ISIS in the 2017 armed conflict in Raqqa. An analysis highlighted that during the final weeks of the operation in Raqqa, as ISIS fighters retreated to a more confined area, civilian casualties increased despite a decrease in overall coalition strikes. It was assumed that this was a result of the confined area to which ISIS had retreated, which offered their fighters a greater opportunity to block the escape of remaining civilians and use them as human shields.<sup>235</sup> Deliberate disregard of precautions in defense presents a significant challenge in urban warfare, undoubtedly leading to increased civilian harm. As previously emphasized, the obligation to

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<sup>228</sup> Mcnerney et al., *supra* note 204, 44.

<sup>229</sup> "Civilians face conflicting instructions as Coalition and SDF assault Raqqa," Airwars, 2017, <https://airwars.org/news/civilians-face-conflicting-instructions-as-coalition-and-sdf-move-to-take-raqqa/>.

<sup>230</sup> *Ibid.*

<sup>231</sup> Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208.

<sup>232</sup> CNN, *supra* note 212.

<sup>233</sup> *Ibid.*

<sup>234</sup> "Hamas Official Mousa Abu Marzouk: The Tunnels In Gaza Were Built To Protect Hamas Fighters, Not Civilians; Protecting Gaza Civilians Is The Responsibility Of The U.N. And Israel," The Middle East Media Research Institute, 2023, <https://www.memri.org/tv/hamas-official-mousa-abu-marzouk-tunnels-gaza-protect-fighters-%20not-civilians#:~:text=Mousa%20Abu%20Marzouk%2C%20a%20member,Israel%20from%20within%20the%20tunnels.>

<sup>235</sup> Mcnerney et al., *supra* note 204, 30.

minimize civilian harm through precautionary measures rests upon both the attacking and defending forces. Efforts must be undertaken in a complementary manner to ensure their greatest effectiveness.

### 4.3 Under siege: Assessing starvation of civilians and access to relief supplies

On October 9, 2023, Minister of Defense of Israel, Yoav Gallant, announced that he had “ordered a complete siege on the Gaza Strip” according to which no food, no water, no electricity, no fuel would be allowed in.<sup>236</sup> This action sparked international debate, particularly regarding its legality. Several argued that the complete siege on the Gaza Strip was incompatible with IHL, possibly violating the prohibition against deliberate starvation of civilians as a method of warfare.<sup>237</sup> However, proving such intent can be particularly challenging.<sup>238</sup> An opposing argument claimed that the siege did not deliberately target civilians and, if carried out as a temporary measure, could be permissible “until conditions require access to humanitarian aid or the immediate evacuation of the civilian population”, thus referring to the obligation to allow and facilitate passage of humanitarian relief to civilians in need.<sup>239</sup> However, comments by Israeli officials were raised, indicating that the duration of withholding essential supplies from Gaza depended on the release of Israeli hostages, thereby appearing to neglect the increase in civilian needs which would unavoidably occur under such circumstances. Minister of Energy and Infrastructure, Israel Katz, for example wrote that there would be no provision of electricity, water, and fuel, until the hostages were free.<sup>240</sup> Although one can reasonably assume that ordering the siege was aimed at coercing Hamas, the pursuit of this objective appears to have involved purposively depriving essential supplies to the entire population of Gaza, including civilians. This might be indicative of its possible violation of the prohibition against the starvation of civilians as a method of warfare.<sup>241</sup> This would furthermore violate the prohibition, applicable to IACs and NIACs, against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population.<sup>242</sup>

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<sup>236</sup> "Israel Orders 'Complete Siege' of Gaza and Hamas Threatens to Kill Hostages," *The New York Times*, 2023, <https://www.nytimes.com/2023/10/09/world/middleeast/israel-gaza-siege-hamas.html>.

<sup>237</sup> Tom Dannenbaum, "The Siege of Gaza and the Starvation War Crime," *Just Security*, 2023, <https://www.justsecurity.org/89403/the-siege-of-gaza-and-the-starvation-war-crime/>. ; "Israel and the occupied territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences," ICRC, 2023, <https://www.icrc.org/en/document/israel-and-occupied-territories-evacuation-order-of-gaza-triggers-catastrophic-humanitarian-consequences>. ; Diakonia International Humanitarian Law Centre, *supra* note 220, 78 ; ICRC, *supra* note 34, Rule 53 ; Rome Statute, *supra* note 53, Art. 8(2)(b)(xxv).

<sup>238</sup> Laurie R. Blank, "Joint Blog Series: Sieges, Evacuations and Urban Warfare: Thoughts from the Transatlantic Workshop on International Law and Armed Conflict," *EJIL:Talk!*, 2019, <https://www.ejiltalk.org/joint-blog-series-sieges-evacuations-and-urban-warfare-thoughts-from-the-transatlantic-workshop-on-international-law-and-armed-conflict/>.

<sup>239</sup> Rosa-Lena Lauterbach, "Israel - Hamas 2023 Symposium - A "Complete Siege" of Gaza in Accordance with International Humanitarian Law," *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/complete-siege-gaza-in-accordance-international-humanitarian-law/>.

<sup>240</sup> "No power, water or fuel to Gaza until hostages freed, says Israel minister," *The Guardian*, 2023, <https://www.theguardian.com/world/2023/oct/12/no-power-water-or-fuel-to-gaza-until-hostages-freed-says-israeli-minister>.

<sup>241</sup> Dannenbaum, *supra* note 237 ; ICRC, *supra* note 34, Rule 53 ; Rome Statute, *supra* note 53, Art. 8(2)(b)(xxv).

<sup>242</sup> ICRC, *supra* note 34, Rule 54.

On October 21, 2023, the Rafah border crossing to Gaza was opened, allowing restricted amounts of humanitarian aid into the Strip.<sup>243</sup> However, it has been argued that subsequent aid deliveries have been largely inadequate, particularly to the northern part of Gaza.<sup>244</sup> This can also be derived from the January 26, 2024, provisional measures order by the ICJ in the case brought by South Africa against Israel, alleging violations of the Genocide Convention. Here it was noted that basic services and humanitarian assistance was urgently needed, to which the Court considered that Israel take immediate and effective measures to enable its provision.<sup>245</sup> As described in section 3.3.2, IHL provides an obligation, applicable to IACs and NIACs, that parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.<sup>246</sup> The rule, furthermore, includes a right for parties to prescribe control measures for such passage, and Israel has exercised this right by conducting security checks on the aid prior to entering Gaza.<sup>247</sup> However, there have been repeated accusations of aid deliveries undergoing arbitrary and intentionally prolonged security checks, as well as access to the northern Gaza and Gaza City continuously being blocked.<sup>248</sup> As indicated in section 3.3.2, arbitrarily depriving civilians of objects indispensable to their survival can constitute a violation of IHL.

Highlighting the degree to which civilians in Gaza were not adequately provided with food and other supplies essential to their survival, it was, as of March 10, 2024, estimated by the Integrated Food Security Phase Classification (IPC) that half of the population in Gaza would confront catastrophic food insecurity (IPC Phase 5) from mid-March to mid-July.<sup>249</sup> On March 28, 2024, the ICJ ordered new measures requiring Israel to “ensure, without delay, in full cooperation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance (..) including by increasing the capacity and number of land crossing points”.<sup>250</sup> Furthermore, the UNSC adopted a resolution on March 25, 2024, in

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<sup>243</sup> "First aid convoy enters Gaza Strip from Egypt," Reuters, 2023, <https://www.reuters.com/world/middle-east/trucks-enter-gaza-carrying-medical-supplies-food-amas-2023-10-21/>.

<sup>244</sup> Michael Meier, "Top Legal Experts on Why Aid to Gaza Can't Be Conditioned on Hostage Release, in response to remarks by US Official," *Just Security*, 2023, <https://www.justsecurity.org/90196/top-experts-on-why-aid-to-gaza-cant-be-conditioned-on-hostage-release-in-response-to-remarks-by-us-official/>. ; Sharpe, *supra* note 140.

<sup>245</sup> "(*South Africa v. Israel*) Request for the Indication of Provisional Measures - Order," (International Court of Justice, 2024), Provisional Measures Order, § 80.

<sup>246</sup> ICRC, *supra* note 34, Rule 55.

<sup>247</sup> "PM says all aid to Gaza is checked by Israeli security officials, helps war aims," *The Times of Israel*, 2023, [https://www.timesofisrael.com/liveblog\\_entry/pm-says-all-aid-to-gaza-is-checked-by-israeli-security-officials-aids-war-aims/](https://www.timesofisrael.com/liveblog_entry/pm-says-all-aid-to-gaza-is-checked-by-israeli-security-officials-aids-war-aims/).

<sup>248</sup> "Gaza aid in-depth: Response leaders warn of extreme obstacles, even with a ceasefire," *The New Humanitarian*, 2024, <https://www.thenewhumanitarian.org/news-feature/2024/02/01/gaza-aid-leaders-warn-extreme-obstacles-ceasefire>. ; "Israel's Expanding Obligations in Gaza Pursuant to The Law of Occupation," *Diakonia International Humanitarian Law Centre*, 2024, <https://www.diakonia.se/ihl/news/israels-expanding-obligations-in-gaza-pursuant-to-the-law-of-occupation/>. ; "Top UN court orders Israel to allow food and medical aid into Gaza," *BBC*, 2024, <https://www.bbc.com/news/world-middle-east-68691095>.

<sup>249</sup> "Gaza Strip: Famine is imminent as 1.1 million people, half of Gaza, experience catastrophic food insecurity," *Integrated Food Security Phase Classification*, 2024, <https://www.ipcinfo.org/ipcinfo-website/alerts-archive/issue-97/en/>.

<sup>250</sup> "(*South Africa v. Israel*) Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures - Order," (International Court of Justice, 2024), Provisional Measures Order, § 45.

which it emphasized “the urgent need to expand the flow of humanitarian assistance to and reinforce the protection of civilians in the entire Gaza Strip” and reiterated “its demand for the lifting of all barriers to the provision of humanitarian assistance at scale, in line with international humanitarian law”.<sup>251</sup> Since resolutions by the UNSC and provisional measures orders by the ICJ are legally binding, these demonstrate clear legal requirements that any unreasonable obstacles hindering aid from reaching those in need are to be removed. It can be difficult to establish with certainty whether aid was, and continues to be, arbitrarily withheld and delayed by Israel. However, the requirements set forth by the ICJ and UNSC, alongside the ongoing and widespread accusations by UN agencies and various independent and neutral humanitarian organizations, strongly indicate that Israel, at the time of this study, was not fully complying with the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.

It is crucial to underscore that Hamas, being a party to the armed conflict, is also bound by the customary obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. Nevertheless, Israel alleged that Hamas had been hijacking substantial amounts of the aid entering Gaza.<sup>252</sup> The act of diverting aid supplies from civilians in need, aiming to reinforce military efforts, constitutes a clear violation of the obligation. Important to add is that Hamas’ obligation to ensure that humanitarian aid relief reaches civilians in need naturally encompasses the Israeli hostages, who are illegally held captive.<sup>253</sup>

The pre-conflict legal status of Gaza remains a subject of ongoing debate, as previously mentioned. However, towards the end of December, 2023, the IDF claimed near-complete full operational control in North Gaza, and in January, 2024, it claimed to have dismantled Hamas' command structure in the area.<sup>254</sup> The IDF’s exercise of such control in North Gaza may have led to its classification as an Occupying Power in this area, under Art. 42 of the Hague Convention of 1907. This article defines occupied territory as one “actually placed under the authority of the hostile army”.<sup>255</sup> This would have introduced new obligations for Israel, one of these being Art. 59 of GC IV, stipulating that if the whole or part of the population is inadequately supplied, “the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal”.<sup>256</sup> However, considering the alleged continuous blocking of humanitarian access to the northern Gaza by the IDF, along with the deteriorating humanitarian situation under which famine was

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<sup>251</sup> UNSC, *Resolution 2728 (2024)*, UN Security Council (S/RES/2728, 2024), § 1-2.

<sup>252</sup> BBC, *supra* note 248 ; "Bennett: 'The problem is that Hamas is hijacking the aid'," Jewish News Syndicate, 2024, <https://www.jns.org/bennett-the-problem-is-that-hamas-is-hijacking-the-aid/>.

<sup>253</sup> ICRC, *supra* note 34, Rule 96 ; Rome Statute, *supra* note 53, Art. 8(2)(a)(viii) and Art. 8(2)(c)(iii).

<sup>254</sup> "Israeli Military Says It Is Close to Controlling Gaza's North," The Wall Street Journal, 2023, <https://www.wsj.com/world/middle-east/israeli-military-says-it-is-close-to-controlling-gazas-north-cfda96ef>. ; "Hamas command in north Gaza destroyed, Israel says," BBC, 2024, <https://www.bbc.com/news/world-middle-east-67904259>.

<sup>255</sup> Hague Convention (IV), *supra* note 103, Art. 42.

<sup>256</sup> GC IV, *supra* note 132, Art. 59.

predicted to be imminent between mid-March and May 2024,<sup>257</sup> it is reasonable to assume that Israel was failing to meet its obligation to facilitate relief by all the means at its disposal, as required by Art. 59 of GC IV.

#### 4.4 Use of human shields and loss of protection

In a 2024 report by Francesca Albanese, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, top leaders of Israel are accused of consistently framing Gazan civilians as human shields, among whom Hamas embeds itself.<sup>258</sup> The report further claims that Israel frames hospitals in Gaza as the headquarters of Hamas and associates places of worship, schools, universities, and UN facilities with Hamas in order to “reinforce the perception of a population characterized as broadly ‘complicit’ and therefore killable.”<sup>259</sup> Through these accusations, Albanese appears to neglect the possibility, and high probability, of Hamas actually using civilians as human shields in Gaza, thereby also neglecting the existing documentation indicating that Hamas has indeed used human shields in past armed conflicts. According to a 2019 report by NATO’s Strategic Communications Center of Excellence, Hamas’ use of human shields has been noted through “Firing rockets, artillery, and mortars from or in proximity to heavily populated civilian areas (..); Locating military or security-related infrastructures such as HQs, bases, armouries, access routes, lathes, or defensive positions within or in proximity to civilian areas (..); Combating the IDF from or in proximity to residential and commercial areas, including using civilians for intelligence gathering missions”.<sup>260</sup> Moreover, in a governmental document addressing legal aspects of the 2014 armed conflict in Gaza, the IDF revealed evidence of Hamas’ training and doctrinal material, documenting their use of human shields as a deliberate tactic.<sup>261</sup> Hamas has also been accused of using human shields in the current armed conflict in Gaza, e.g. by preventing civilians from relocating to safer areas and by deliberately locating military objectives near civilian buildings.<sup>262</sup> Hamas’ use of human shields was also addressed by multiple speakers during a UNSC meeting in the early stages of the current armed conflict.<sup>263</sup> Similar tactics of shielding were applied by ISIS during the 2017 armed conflict in Raqqa. In a 2018 report of the Independent International Commission of Inquiry on the Syrian Arab Republic, it was noted that the terrorist organization made use of human shields by “deliberately placing civilians in areas where they were exposed to combat operations, for the purpose of

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<sup>257</sup> Integrated Food Security Phase Classification, *supra* note 249.

<sup>258</sup> Francesca Albanese, *Anatomy of a Genocide*, Human Rights Council (A/HRC/55/73, 2024), § 60.

<sup>259</sup> Albanese, *supra* note 258, § 62, 88.

<sup>260</sup> James Pamment et al., *Hybrid Threats. A Strategic Communications Perspective*, NATO Strategic Communications Centre of Excellence (2019), 149, <https://stratcomcoe.org/publications/hybrid-threats-hamas-use-of-human-shields-in-gaza/87>.

<sup>261</sup> State of Israel, *supra* note 67, 152-153.

<sup>262</sup> "What is a human shield and how has Hamas been accused of using them?," The Guardian, 2023, <https://www.theguardian.com/world/2023/oct/30/human-shield-israel-claim-hamas-command-centre-under-hospital-palestinian-civilian-gaza-city>. ; +972 Magazine, *supra* note 199 ; CNN, *supra* note 212.

<sup>263</sup> "Amid Increasingly Dire Humanitarian Situation in Gaza, Secretary-General Tells Security Council Hamas Attacks Cannot Justify Collective Punishment of Palestinian People – 9451ST Meeting," United Nations Press, SC/15462, 2023, <https://press.un.org/en/2023/sc15462.doc.htm>.

rendering those areas immune from attack".<sup>264</sup> Other tactics included using hospitals as headquarters and preventing civilians from leaving Raqqa.<sup>265</sup>

As described in section 3.4.2, the prohibition of the use of human shields constitutes a customary obligation applicable to IACs and NIACs.<sup>266</sup> Furthermore, although only applicable in an IAC context, the rule is also found in Art. 8(2)(b)(xxiii) of the Rome Statute.<sup>267</sup> It is important to emphasize that the prohibition on human shielding cannot be breached unless there is an *intent* to use civilians for such reasons. Although it may currently be challenging to definitively determine whether Hamas has been acting with such intent during the current armed conflict in Gaza, there are compelling reasons to believe that this is the case. Here reference can be made to the aforementioned reports of Hamas' previous use of human shields as well as evidence from training and doctrinal materials, revealing their use of human shields as a deliberate tactic. While it may be difficult to avoid operating near civilians in a region so densely populated as Gaza, positioning fighters or military objectives adjacent to, or within, civilian establishments, without any apparent military necessity, can strongly suggest the possibility of intent. This can for example be said of Hamas locating military objectives near or within schools or hospitals.<sup>268</sup> To this point, it is also important to add that certain facilities are granted special protection under IHL, including medical units.<sup>269</sup> Consequently, placing military objectives near or within hospitals would furthermore amount to a clear violation of such protection. Regarding the use of human shields by Hamas, it is essential to highlight that if civilians are coerced into such roles, they retain full civilian protection. Hence, this protection must necessarily be factored into proportionality assessments of IDF attacks.

In the previously referenced report by Albanese, Special Rapporteur on the situation of human rights in the Palestinian territories, Israel was accused of categorizing remaining residents in the northern Gaza as human shields and accomplices of terrorism, following the call to evacuate southward.<sup>270</sup> To support this accusation, Albanese pointed, among other things, towards one of the leaflets used by the IDF in relation to the evacuation. This leaflet stated that "anyone who chooses not to leave from the north of the [Gaza] Strip to south of Wadi Gaza may be determined an accomplice in a terrorist organization".<sup>271</sup> One could argue that the wording "may" is indicative of a possibility rather than a certainty. This message would technically not be incorrect, as it could

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<sup>264</sup> CoI-Syria, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Human Rights Council (A/HRC/37/72, 2018), § 48.

<sup>265</sup> Mcnerney et al., *supra* note 204, 48 ; Amnesty International, *"I won't forget this carnage" - Civilians trapped in battle for Raqqa - Syria*, Amnesty International (2017), 23, <https://www.amnesty.org/en/documents/mde24/6945/2017/en/>.

<sup>266</sup> ICRC, *supra* note 34, Rule 97.

<sup>267</sup> Rome Statute, *supra* note 53, Art. 8(2)(b)(xxiii).

<sup>268</sup> Michael N. Schmitt, "Israel - Hamas 2023 Symposium - What is and is not Human Shielding?," *Lieber Institute - West Point*, 2023, <https://lieber.westpoint.edu/what-is-and-is-not-human-shielding/>.

<sup>269</sup> ICRC, *supra* note 34, Rule 28.

<sup>270</sup> Albanese, *supra* note 258, § 78.

<sup>271</sup> "Israel/OPT: Israeli army leaflets ordering residents of northern Gaza to leave and threatening lives may amount to war crimes," Amnesty International, 2023, <https://amnesty.ca/human-rights-news/israel-opt-israeli-army-leaflets-ordering-residents-of-northern-gaza-to-leave-and-threatening-lives-may-amount-to-war-crimes/>.

apply if an individual who remained in the northern Gaza decided to take direct part in hostilities or become a member of an organized armed group. According to Israel's interpretation under IHL, such an individual could be determined an accomplice in a terrorist organization and lose protection. However, the leaflet does not specify any actions that might trigger this designation, therefore creating ambiguity in the message. Instead, the formulation in the leaflet appears to aim to pressure civilians to evacuate southward, rather than presenting it as a genuine choice. It seems to suggest that those who choose to stay behind risk being labeled as accomplices with a terrorist organization *because* they stay behind, which would be illegal. The IDF subsequently denied any intention to consider those who have not evacuated as members of the terrorist group.<sup>272</sup> This approach has also previously been expressed by Israel, as referenced in section 3.4.2. However, The Guardian interviewed a group of demobilized reservists from the IDF, who fought in the current armed conflict in Gaza, in which case some of these individuals claimed that they "considered those civilians who ignored Israeli instructions to flee as complicit with Hamas and thus legitimate targets".<sup>273</sup> Although not necessarily indicative of official IDF instructions, this constitutes a clear violation of the principle of distinction, mandating that civilians are protected from deliberate attack.<sup>274</sup> For a remaining civilian in the northern Gaza to be considered a legitimate target, he or she would have to take direct part in hostilities, or forfeit civilian status by becoming a member of an organized armed group.

In its 2014 document on legal aspects related to the armed conflict in Gaza, Israel wrote that "The IDF recognizes that civilians affiliated with Hamas are not lawful targets as such".<sup>275</sup> In the previously referenced investigation, carried out by +972 Magazine and Local Call based on information provided by six Israeli intelligence officers, it was revealed that the IDF heavily relied on an AI-system, called Lavender, to generate targets during the early stages of the armed conflict. However, the legitimacy of such targets were allegedly not subjected to any human verification, besides confirming that these individuals were not female. This occurred despite the system's known error rate of around 10 percent, and its occasional identification of individuals who had either a loose affiliation with militant groups or non-whatsoever.<sup>276</sup> Knowingly targeting unlawful targets, even if only approximately in 10 percent of the cases, amounts to a violation of the principle of distinction. Particularly considering the recognized error rate, generated targets should have undergone individual human verification. Therefore, it appears that Israel, as a matter of policy in the given context, decided to prioritize military necessity without ensuring proper compliance with existing obligations under IHL.

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<sup>272</sup> "Israel tells Gazans to move south or risk being seen as 'terrorist' partner," Reuters, 2023, <https://www.reuters.com/world/middle-east/israel-tells-gazans-move-south-or-risk-being-seen-terrorist-partner-2023-10-22/>.

<sup>273</sup> "The destruction is massive ... It's a disaster area': Israeli soldiers speak about fighting in Gaza," The Guardian, 2024, [https://www.theguardian.com/world/2024/feb/08/israeli-soldiers-idf-gaza-fighting-disaster-area?CMP=share\\_btn\\_tw](https://www.theguardian.com/world/2024/feb/08/israeli-soldiers-idf-gaza-fighting-disaster-area?CMP=share_btn_tw).

<sup>274</sup> ICRC, *supra* note 34, Rule 1 ; Rome Statute, *supra* note 53, Art. 8(2)(b)(i) and Art. 8(2)(e)(i).

<sup>275</sup> State of Israel, *supra* note 67, 157.

<sup>276</sup> +972 Magazine, *supra* note 199.

## 5 Discussion

The following chapter is a four-part discussion. Firstly, it initiates a discussion of whether IHL encounters shortcomings in addressing urban warfare challenges. This is followed by a discussion of evolving interpretations of the principle of proportionality, which are particularly relevant in the context of urban warfare. The subsequent section explores the role of political declarations in relation to urban warfare. Lastly, the chapter delves into prospects for enhanced compliance with IHL by NSAGs.

### 5.1 Does IHL encounter shortcomings in addressing urban warfare challenges?

As has been highlighted previously in this paper, urban warfare creates considerable challenges to ensuring lawful conduct of war. The dense population and the employment of defensive tactics that take advantage of civilian presence and infrastructure, commonly observed in these contexts, places immense strain on fundamental IHL principles such as proportionality and distinction.<sup>277</sup> The question then arises; considering that IHL originated in a time dominated by conventional warfare between distinguishable fighters, is it still equipped to address the contemporary challenges of urban warfare? This is especially relevant for urban warfare of an asymmetric character as it has been argued that the greater the asymmetry in a conflict, the more challenges arise in applying IHL.<sup>278</sup>

Several have explored this question, resulting in a range of opinions. One group of experts are of the general opinion that IHL is insufficient for present-day armed conflicts and would benefit from a revision, and some within this group point particularly to its suggested inadequacy in relation to urban warfare, highlighting its inability to ensure the safeguarding of civilians.<sup>279</sup> In contrast, another group of experts suggest that IHL is in fact adequate for urban warfare, provided that certain measures are taken by military actors. For instance, it has been suggested that IHL rules become particularly relevant in urban settings, however requiring the development of more robust operational standards, doctrine, training, and internalization of IHL values.<sup>280</sup> The notion has also been put forward that in order to effectively implement IHL in urban settings, a ground presence

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<sup>277</sup> Sossai, *supra* note 5, 251 ; Bernard, *supra* note 27, 6 ; Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208 ; Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208 ; Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208 ; Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208.

<sup>278</sup> Marco Sassòli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges," *Yearbook of International Humanitarian Law* 10 (2007): 57, <https://go.exlibris.link/5r7TrQf1>.

<sup>279</sup> Sassòli, *supra* note 278, 64 ; Peter V. Kessing, "Hvilke regler gælder i krig?," (2016). <https://videnskab.dk/kultursamfund/hvilke-regler-gaelder-i-krig/>. ; Alvina Hoffmann, "The Urbanization of Warfare: Historical Development and Contemporary Challenges for International Humanitarian Law," *St Antony's International Review* 12, no. 2 (2017): 187-88, <https://www.jstor.org/stable/26229179>. ; Michael John-Hopkins, "Regulating the conduct of urban warfare: lessons from contemporary asymmetric armed conflicts," *International review of the Red Cross* (2005) 92, no. 878 (2010): 493, <https://go.exlibris.link/hPj5wyB6>.

<sup>280</sup> Gisel et al., *supra* note 26 ; Roos Boer, Laurie Treffers, and Chris Woods, *Seeing Through the Rubble: The civilian impact of the use of explosive weapons in the fight against ISIS*, PAX Humanitarian Disarmament & Airwars (2020), 43, <https://protectionofcivilians.org/report/seeing-through-the-rubble/>.



by armed forces is required.<sup>281</sup> It has also been suggested by a former military legal advisor in ISAF that IHL is applicable regardless of specific domains, locations, or demographics, and that although urban warfare presents greater challenges to the application of IHL, this does not necessarily imply shortcomings in IHL itself.<sup>282</sup> A similar argument, put forward by a former military legal advisor for the DCD, is that IHL's fundamental principles are sufficiently broad to allow for interpretive adjustments.<sup>283</sup>

The present writer also holds the opinion that IHL generally offers sufficient rules to address the challenges posed by urban warfare. However, as found in chapter 3, several rules under IHL, particularly relevant in urban warfare, are subject to inconsistent interpretations. This includes key issues such as the scope of expected incidental harm and anticipated military advantage under the principle of proportionality, whether damage to civilian components of dual-use objects must be factored into proportionality assessments, the definition of an effective advance warning, as well as the timeframe and activities that constitute DPH. Therefore, an important step forward would rely on a stronger focus on the interpretation of relevant rules within the existing framework of IHL, rather than revising the rules directly. However, a key challenge lies in identifying State practice and *opinio juris*, which can establish new customary rules or interpretative developments of existing rules.<sup>284</sup> One way States can address this issue is by revising existing LOAC manuals to include clear interpretations of relevant IHL rules, particularly those subject to inconsistent interpretations, as found in chapter 3. An obstacle in this regard presumably lies in the preference of many States to maintain a degree of flexibility and room for interpretation regarding certain IHL rules. This, however, could lead to self-serving interpretations in the context of armed conflict, potentially weakening the overall effectiveness of the law in terms of protecting civilians. Another way of potentially establishing more consistent and common interpretations of relevant IHL rules is through Court adjudication. This is briefly touched upon in chapter 6.

Although several rules of IHL are subject to inconsistent interpretations, it can be drawn from the case study on the armed conflict between Israel and Hamas that the main challenges in this particular context rather appear to be deliberate violations of IHL by both parties to the conflict. Although the case study reveals that the conditions of urban warfare clearly pose challenges to the application of IHL, it does not suggest that the rules under examination are inapplicable altogether. For instance, given the density of civilians in Gaza and Hamas' use of human shields and violations of passive precautions, individual assessments of proportionality are undoubtedly demanding for the IDF, making them more time- and resource-consuming. However, this does not

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<sup>281</sup> Nathalie Durhin, "Protecting civilians in urban areas: A military perspective on the application of international humanitarian law," *International review of the Red Cross* (2005) 98, no. 901 (2016): 198-99, <https://go.exlibris.link/8W88tRQW>.

<sup>282</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208.

<sup>283</sup> Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208.

<sup>284</sup> *Ibid.*

suggest that they are impossible to conduct. Instead, the fundamental principle of non-reciprocity under IHL arguably takes on even greater significance when fighting a defensive actor who blatantly violates IHL.<sup>285</sup>

While chapter 3 explored multiple rules under IHL, several experts highlight a fundamental difficulty with regard to upholding the principle of proportionality in urban warfare. It was also found in section 3.1 that various components of proportionality are subject to inconsistent interpretations. Consequently, this warrants a dedicated discussion in the following sections.

## 5.2 Evolving interpretations of the principle of proportionality

Two aspects of the principle of proportionality, particularly relevant to urban warfare, are discussed in this section. The first concerns the inclusion of indirect effects when determining expected incidental harm, while the other relates to the inclusion of civilian protection when determining anticipated military advantage.

### 5.2.1 Indirect effects of attacks

In the context of urban warfare, experts point to the dense population as a key challenge for the application of the principle of proportionality.<sup>286</sup> This significantly increases the risk of collateral damage, especially when explosive weapons are employed.<sup>287</sup> The application of proportionality presents a further challenge with regard to determining indirect effects of attacks, which are more acute in an urban environment.<sup>288</sup> It was established in section 3.1.1.2 that there is a growing recognition among States that indirect effects shall be factored into proportionality assessments. However, it was also noted that some States qualify their position on this matter by suggesting a limitation, i.e., that such effects shall be included insofar as they are foreseeable and not too remote. In line with the ICRC's approach, it was suggested that *reasonable foreseeability* could serve as a useful criterion in determining the extent to which indirect effects shall be incorporated. During the 43rd Sanremo Round Table on New Dimensions and Challenges of Urban Warfare, it was highlighted by one of the participants that “attempts to require that all reverberating effects be taken into account for the purposes of targeting (..) need very careful consideration so as not to place difficult, if not impossible, standards on military commanders that are problematic in terms of compliance”.<sup>289</sup> This point was also stressed by a former military legal advisor in CJTF-OIR.<sup>290</sup> Building on this important consideration, the reasonable foreseeability criterion appears to be an appropriate and realistic way forward.

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<sup>285</sup> ICRC, *supra* note 34, Rule 140.

<sup>286</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208 ; Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

<sup>287</sup> Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208.

<sup>288</sup> Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208.

<sup>289</sup> IHL, *supra* note 11, 40-41.

<sup>290</sup> Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

As has been emphasized by the ICRC, considering foreseeable reverberating effects as a part of proportionality holds significant importance due to the complex and interdependent nature of essential service systems in urban areas.<sup>291</sup> It has also been argued that with the accumulating amount of evidence demonstrating reverberating effects in urban armed conflict, the notion that these consequences are simply unforeseeable becomes increasingly invalid.<sup>292</sup> While this may be true, it is also worth noting that incorporating foreseeable indirect effects requires the direct engagement of specialized engineers and health experts, along with a stronger understanding of urban infrastructure by military professionals.<sup>293</sup> Consequently, this development will naturally demand additional efforts from military forces, including the development of methodologies that equip planners and decision makers with comprehensive data on indirect effects. A method which is currently applied by several States in relation to targeting is the Collateral Damage Estimation Methodology (CDEM).<sup>294</sup> The CDEM was initially developed by the US, and it provides a step-by-step methodology for pre-attack identification and mitigation of potential collateral harm. It has, however, been pointed out that in the application of the CDEM, States assess only the immediate effects of attacks, without taking into account indirect effects.<sup>295</sup> Efforts to integrate indirect effects into collateral damage estimations offers a potentially valuable opportunity for advancement.

Although the CDEM constitutes just one aspect of the targeting process and other guidance may account for the inclusion of indirect effects, armed forces' actual inclusion of indirect effects, as a matter of practice, remains largely unclear and presumably minimal. Therefore, States claiming incorporation of indirect effects within their proportionality assessments should demonstrate greater transparency regarding their practice. This necessitates a more open discussion through which established practices, or those intended for the future, are shared. The EWIPA Declaration, currently endorsed by 87 States, includes a commitment that "armed forces, including in their policies and practices, take into account the direct and indirect effects on civilians and civilian objects which can reasonably be foreseen in the planning of military operations and the execution of attacks in populated areas".<sup>296</sup> This commitment, although not establishing a legal interpretation of the principle of

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<sup>291</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, International Committee of the Red Cross (2019), 18, <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>.

<sup>292</sup> Clark Orr, "Reverberating Effects and International Law," *Center for Civilians in Conflict*, 2021, <https://civiliansinconflict.org/blog/reverberating-effects-and-international-law/>.

<sup>293</sup> Robinson & Nohle, *supra* note 61, 136 ; Mark Zeitoun and Michael Talhami, "The impact of explosive weapons on urban services: Direct and reverberating effects across space and time," *International review of the Red Cross* (2005) 98, no. 901 (2016): 54, <https://international-review.icrc.org/articles/impact-explosive-weapons-urban-services-direct-and-reverberating-effects-across-space-and>.

<sup>294</sup> Pieter van Malderen and Simon Gerard, "Legal and operational challenges related to methods and means of warfare in urban conflicts," *The Military Law and the Law of War Review* 58, no. 2 (2020): 164, <https://www.elgaronline.com/view/journals/mlwr/58-2/mlwr.2020.02.09.xml>.

<sup>295</sup> Malderen & Gerard, *supra* note 294, 168 ; ICRC, *supra* note 61, 24.

<sup>296</sup> Government of Ireland, *supra* note 9 ; "Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas," (Dublin, Ireland, 2022), § 3.4.

proportionality, is an important step forward. It brings attention to the issue and can hopefully function as an encouragement for States to take action as a matter of policy, if not as a matter of law. The EWIPA Declaration is addressed in further detail in the following section.

In sum, while the inclusion of indirect effects in proportionality assessments will place additional requirements on military conduct, especially in the fast-paced environment of urban warfare, the significant civilian harm caused by such effects does call for action. States should, as a matter of practice and *opinio juris*, make it clear that indirect effects of attacks are to be included in proportionality assessments, insofar as they are reasonably foreseeable. Furthermore, methodologies should be developed that aim to provide military professionals involved in attacks with comprehensive data on indirect effects. This includes exploring ways to strengthen collaborative efforts between military professionals, civilian engineers, and health specialists.<sup>297</sup>

### 5.2.2 Civilian protection

Another topic which was briefly addressed in section 3.1.2 is whether civilian protection can be included as a component of anticipated military advantage in proportionality assessments. This approach involves integrating into the proportionality assessment the anticipated harm to civilians which can be *prevented* by carrying out a given attack. While this topic remains largely unaddressed, it arguably requires more attention, particularly due to the prevalence of contemporary and future asymmetric armed conflicts. Recent asymmetric armed conflicts, such as that against ISIS and the ongoing conflict in Gaza, demonstrate a pattern where the actors with limited conventional capabilities prioritize inflicting harm on civilians over debilitating the adversary's armed forces. In such cases, ensuring the safety of civilians from attack becomes a crucial aspect of the conflict.<sup>298</sup> During the 43rd Sanremo Round Table on New Dimensions and Challenges of Urban Warfare, it was described by an IDF colonel that "The adversary's aim is not like in the past – to weaken our armed forces and beat us militarily, but rather to hurt our civilian population (..) There is a military advantage in taking action against any targets whose purpose is to harm the civilian population".<sup>299</sup>

In situations of armed conflict where a party demonstrably intends to inflict harm on civilians, it will often be an objective of the opposing force to protect those civilians. Therefore, it is reasonable, as suggested by the IDF colonel, to assume that any attack capable of preventing such civilian harm could constitute a military advantage. It is, however, important to reiterate that the principle of proportionality refers to the *concrete* and *direct* military advantage anticipated. Therefore, introducing considerations of hypothetical, remote, or speculative civilian harm into the proportionality calculus would not be consistent with this wording. Moreover, such an approach would inevitably increase uncertainty in the assessment process, further complicating the

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<sup>297</sup> ICRC, *supra* note 61, 15.

<sup>298</sup> Jeffrey Lovitky, "Israel – Hamas 2024 Symposium – Civilian Protection as an Element of Military Advantage in Determining Proportionality," *Lieber Institute - West Point*, 2024, <https://lieber.westpoint.edu/civilian-protection-element-military-advantage-determining-proportionality/>.

<sup>299</sup> IIHL, *supra* note 11, 68-69.

already challenging task of weighing the expected incidental harm against the anticipated military advantage of an attack. Consequently, while the protection of civilians does appear to constitute a relevant component of the proportionality assessment, particularly in contemporary urban warfare, it is crucial that any such considerations be strictly limited to situations where a concrete and direct connection between the attack and the safeguarding of civilians can be established.

### 5.3 The role of political declarations in relation to urban warfare

As the nature of armed conflict evolves, so too does the discussion on how best to regulate it and whether political declarations can play a role in shaping the landscape of IHL. Proponents argue that political declarations can supplement and strengthen IHL, while others do not see a need for them and express concerns about their potential to undermine existing legal frameworks.

As mentioned in the introduction to this study, a disturbingly large percentage of casualties resulting from the use of explosive weapons in populated areas are civilians. Moreover, damage to civilian objects, such as critical infrastructure, exacerbates the suffering undergone by the civilian population. The term ‘explosive weapons’ encompasses weapons that use high explosives to generate a blast wave, fragmentation, or thermal energy upon detonation.<sup>300</sup> In light of the aforementioned consequences, organizations such as the UN, ICRC, and International Network on Explosive Weapons (INEW), have for several years urged States to confront this issue.<sup>301</sup> As early as 2011, the ICRC established a clear position advocating for the avoidance of the use of explosive weapons with wide area effects in densely populated areas.<sup>302</sup> An avoidance policy means that the use of such weaponry in populated areas is to be refrained from, unless accompanied by sufficient mitigation measures that significantly reduce the wide area effects and risk of civilian harm.<sup>303</sup> Building on momentum from the October 2019 Vienna Conference on Protecting Civilians in Urban Warfare, Ireland launched consultations aimed at developing a political declaration to tackle the humanitarian effects caused by explosive weapons in populated areas. Following consultations throughout 2020-2022, the process culminated in a signing ceremony for the EWIPA Declaration on November 18, 2022, where 83 States endorsed the document.<sup>304</sup> A paragraph that has drawn much attention is § 3.3., establishing a commitment by States to ensure that their

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<sup>300</sup> Zeitoun & Talhami, *supra* note 293, 58.

<sup>301</sup> Simon Bagshaw, "Protecting Civilians from Explosive Weapons in Populated Areas: A New Political Declaration," *Just Security*, 2022, <https://www.justsecurity.org/82220/protecting-civilians-from-explosive-weapons-in-populated-areas-a-new-political-declaration/>.

<sup>302</sup> ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts, report to the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November-1 December 2011*, International Committee of the Red Cross (2011), 40-42, <https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

<sup>303</sup> Eirini Giorgou, "Explosive weapons with wide area effects: a deadly choice in populated areas," *ICRC, Humanitarian Law & Policy*, 2022, <https://blogs.icrc.org/law-and-policy/2022/01/25/explosive-weapons-populated-areas/>.

<sup>304</sup> "Process for a political declaration on the use of explosive weapons in populated areas," Reaching Critical Will, <https://www.reachingcriticalwill.org/disarmament-fora/ewipa/political-declaration>.

armed forces “adopt and implement a range of policies and practices to help avoid civilian harm, including by restricting or refraining as appropriate from the use of explosive weapons in populated areas, when their use may be expected to cause harm to civilians or civilian objects”.<sup>305</sup> Worth noting is that the “restricting or refraining as appropriate from the use of explosive weapons in populated areas” is not confined to situations where the civilian harm is expected to be excessive. Instead, the commitment applies to situations where such weapons use is expected to cause any harm to civilians or civilian objects. It is, however, notable that the wording “as appropriate” introduces a degree of flexibility to the commitment. While it may be argued that this paragraph essentially just restates precautionary obligations under IHL, particularly with regard to taking all feasible precautions in the choice of means and methods of attack, it should also be recognized that it specifies a particular action, namely restricting or refraining from using explosive weapons in populated areas, thereby contributing with a more tangible commitment for militaries to implement. It has furthermore been argued that the commitment to “adopt and implement a range of policies and practices” is expected to ensure a heightened level of protection that goes beyond what is mandated under IHL.<sup>306</sup>

While the adoption of the declaration signifies an increasing international recognition of the need to address the issue of explosive weapons in populated areas, an interesting point of discussion, however, is whether such political declarations should aim to raise the bar of IHL by e.g., establishing new standards for interpreting existing IHL obligations. During negotiations, States such as the US and Israel, continuously and clearly expressed that the EWIPA Declaration is a non-legally binding instrument, not intended to change or interpret existing IHL obligations, or establish customary law.<sup>307</sup> In contrast, it has been suggested by an IHL expert that political declarations should intend to raise the bar, and that if they merely restate existing IHL, there is no need to undergo the negotiation process – however also noting that political declarations do contribute by drawing more attention to a thematic issue as well as calling for more transparency, which is important.<sup>308</sup> It was also mentioned by a former military legal advisor for the DCD that political declarations are positive in that, although they are non-legally binding, they create a space for States to express their practice and opinio juris and commit to political restrictions.<sup>309</sup> Other experts have argued that there is no need for political

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<sup>305</sup> “*Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas*”, *supra* note 296, § 3.3.

<sup>306</sup> Michael W. Meier, “A New Political Declaration on Civilian Harm: Progress or Mythical Panacea,” *Lieber Institute - West Point*, 2022, <https://lieber.westpoint.edu/political-declaration-civilian-harm/>.

<sup>307</sup> Charles Trumbull, Final Consultation on the draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (U.S. Statement), (U.S. Mission to International Organizations in Geneva, 2022). ; Michal Maayan, Statement by Mrs. Michal Maayan, Minister-Counsellor Deputy Permanent Representative to the Conference on Disarmament, (Permanent Mission of Israel to the UN Geneva, 2022).

<sup>308</sup> Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208.

<sup>309</sup> Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208.

declarations aiming to address challenges related to urban warfare, as the existing IHL obligations are sufficient.<sup>310</sup> Although it is suggested that there is no need for them, it has been recognized that such declarations can contribute positively by expanding knowledge of how to comply with IHL.<sup>311</sup>

As previously expressed, it is the opinion of the present writer that IHL principles and rules remain largely sufficient to address the challenges of urban warfare. However, this type of warfare does entail significant harm to civilians, also when conducted in compliance with IHL, and there is reason to address this at a political level. Focusing on the use of explosive weapons in populated areas serves as an important initial step. Beyond the concerning direct and indirect civilian harm inflicted by explosive weapons, their use also carries the risk of generating resentment towards attackers, which in turn can increase civilian support for the enemy and prolong conflicts – a critical consideration in relation to the ongoing conflict in Gaza. On the other hand, it is also a reality that rules strictly prohibiting the use of explosive weapons would not be respected by most actors. Furthermore, such an approach would fail to acknowledge that the use of explosive weapons may in certain situations be necessary to gain military advantage over a well-entrenched enemy that deliberately transforms the urban infrastructure into a battlefield. As a political tool, there is reason to acknowledge the importance of the EWIPA Declaration. First of all, it serves to raise awareness of an issue which is particular to urban warfare. Moreover, it provides a more tangible foundation for future State action. Additionally, negotiations of the declaration presented an opportunity for States to formulate and express their official positions on the issue. Lastly, it serves as a commitment to hold regular follow-up meetings, hopefully leading to information exchange. This initiative undoubtedly constitutes a promising initial step, albeit its practical effectiveness remains to be assessed.

#### 5.4 Prospects for enhanced compliance with IHL by non-state armed groups

Considering the undeniable relevance of NSAGs within the framework of urban warfare given their involvement as parties to recent and potential future conflicts, this section discusses whether it is possible to increase NSAG compliance with IHL. Although compliance issues extend to both State and non-State actors, certain NSAGs have been observed to deliberately violate IHL by applying tactics designed to exploit civilians or civilian objects in populated areas, thereby raising serious concern and adding to the relevance of this discussion. This issue was also recognized in the EWIPA Declaration.<sup>312</sup>

Regarding the prospects of increasing IHL compliance by NSAGs, several experts highlight that this will vary depending on the given context and group. Certain armed groups prioritize their international or national

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<sup>310</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208 ; Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

<sup>311</sup> Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

<sup>312</sup> "Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas," *supra* note 296, § 2.4.

reputation, while others intentionally disregard any notion of compliance.<sup>313</sup> The latter is often linked to the asymmetry of an armed conflict. Faced by an opposing party who is militarily superior, some NSAGs believe that demoralizing and taking advantage of the civilian population is their most viable strategy to avoid defeat.<sup>314</sup> Therefore, because IHL has a fundamental humanitarian purpose, gaining respect becomes challenging when the objectives of a given party are inhumane.<sup>315</sup> On the other hand, there are NSAGs that may indeed be motivated to comply with IHL. This may be due to a fear of facing international condemnation and a desire to protect their reputation. Another reason might be concern for potential third State intervention. A third reason may of course be based on moral considerations for civilian safety.

Since international law is created through the sovereign actions of States, NSAGs generally lack participation in the development of the legal and normative framework. So, what are the prospects of engaging NSAGs as a way of increasing their IHL compliance? As was emphasized by a former military legal advisor in ISAF, NSAGs that rely on violating IHL for strategic reasons will have no interest in participating in any normative developments.<sup>316</sup> This narrows it down to whether NSAGs, demonstrating an interest in adhering to IHL, should have a role in the development of norms or good standard practices relating to the conduct of hostilities, e.g., in urban settings. While increased engagement with such NSAGs may raise concern among States regarding the possible legitimization of their objectives, it has been suggested that this should rather be viewed as legitimization of these groups as rights-holders and duty bearers.<sup>317</sup> Increased engagement might include consulting, involving and collaborating with NSAGs in development processes of good practice and guidelines and creating the opportunity for NSAGs to endorse outcome documents.<sup>318</sup> Another important step could be the development of mechanisms that incentivize NSAGs that comply with IHL.<sup>319</sup> However, by engaging NSAGs, challenges may arise with regard to ensuring fair representation. Should groups that lack centralized structures and clear lines of command, often making it difficult to ensure compliance, also be included? What about clearly unstable groups that demonstrate internal power struggles?

Nonetheless, because NSAGs will remain parties to armed conflicts, it is important to explore ways of engaging those expressing a willingness to comply. However, for groups that deliberately violate IHL for strategic reasons, engagement seems unlikely to be effective. Since compliance appears to be unrealistic by such NSAGs, a necessary response should at the very least take the form of clear and consistent condemnation by

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<sup>313</sup> Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208 ; Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208 ; Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208.

<sup>314</sup> Sassòli, *supra* note 278, 58.

<sup>315</sup> Sassòli, *supra* note 278, 59.

<sup>316</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208.

<sup>317</sup> Ezequiel Heffes and Jonathan Somer, *Inviting non-state armed groups to the table: inclusive strategies towards a more fit for purpose international humanitarian law*, Overseas Development Institute (2020), 8-9, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3761793](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761793).

<sup>318</sup> Heffes & Somer, *supra* note 317, 10.

<sup>319</sup> Sassòli, *supra* note 278, 64.



the international community to the largest extent possible – something which has been insufficiently directed towards Hamas during the current armed conflict in Gaza. Additionally, as highlighted by a former military legal advisor in CJTF-OIR, one could hope that a more rigorous pursuit of accountability for crimes committed by such actors could serve as a potential deterrent.<sup>320</sup> To this end, the ICC prosecutor, at the time of conducting this study, had taken an important step by applying for arrest warrants against three Hamas leaders for war crimes and crimes against humanity committed in Israel and Gaza, potentially adding to the ICC's existing record of pursuing individuals affiliated with NSAGs.<sup>321</sup> In instances where a party to an armed conflict deliberately and systematically engages in IHL violations leading to grave implications for civilians, it is nevertheless important that opponents do not simply accept the increased civilian suffering as an inevitable consequence. In such circumstances, there arises a pressing need for heightened civilian protection. Thus, it is important to recognize IHL as a foundation of minimum standards, and that military decisions should be guided by a commitment to maximizing civilian safety, also as a matter of policy.

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<sup>320</sup> Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

<sup>321</sup> "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine," International Criminal Court, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

## 6 Conclusion: Implications of a Renewed International Focus on IHL

This study set out to examine the extent to which IHL, in its current form, can address the challenges posed by conducting warfare in densely populated urban environments. It was found, based on the specific areas of IHL examined in this study, that IHL generally provides adequate rules to address the challenges posed by urban warfare. However, inconsistent interpretations of certain rules pose a risk of leaving civilians more vulnerable in urban warfare, thus highlighting the need for greater clarity and common understanding.

The study revealed that several elements related to the scope of expected incidental harm and anticipated military advantage under the principle of proportionality are subject to inconsistent or unclear interpretations among States and experts. This includes whether, and the extent to which, indirect effects of attacks as well as damage to civilian components of dual-use objects shall be factored into proportionality assessments under expected incidental harm. Furthermore, it extends to whether force protection and preventable civilian harm can be factored into proportionality assessments under anticipated military advantage. In addition, although reflected in some State practice, it is not entirely clear whether the anticipated military advantage from an attack extends beyond tactical gains to encompass broader operational gains. Apart from the principle of proportionality, it was found that the definition of an effective advance warning under precautionary measures is also subject to inconsistent interpretations by experts, with no apparent interpretation offered by States. Furthermore, inconsistent interpretations exist in relation to the timeframe for DPH as well as the activities that qualify as such. The issues outlined above arguably increase the risk of self-serving interpretations by States in the context of armed conflict, potentially leaning excessively towards military necessity and undermining the protection of civilians. This becomes particularly relevant in the context of urban warfare, where civilians experience greater risk from the conduct of hostilities.

The case study on the current armed conflict between Israel and Hamas clearly demonstrates the challenges posed by urban warfare in applying the rules of IHL. The study also revealed that although inconsistencies persist in the interpretation of certain IHL rules, as mentioned above, the main challenges associated with this particular conflict appear to be the deliberate violations of IHL by both belligerent parties.

Because of the significant harm that is inflicted on civilians in urban warfare, even when IHL is complied with, there is reason to address this issue at a political level. Political declarations on thematic issues can play a crucial role in bringing more focus to a given topic, while also advocating for greater transparency among States. Although some States will make sure to emphasize that political declarations are non-binding instruments, not intended to alter or interpret existing IHL rules, as evidenced during negotiations on the EWIPA Declaration, such declarations can contribute by facilitating promotion of best practices for adhering to existing IHL obligations and providing a more tangible foundation for future policy action.

It was found that prospects for enhanced compliance with IHL by NSAGs will be highly contextual, depending on the intentions of the given group. Some NSAGs may for various reasons be motivated to enhance compliance with IHL. It should be further explored how such actors can be included in development processes of good practice and guidelines and granted the opportunity to endorse outcome documents. However, for NSAGs that deliberately violate IHL as a strategy by demoralizing and exploiting civilians, enhanced compliance seems to be extremely unlikely. A possible deterrent in this regard could rely on a more determined pursuit of accountability for crimes perpetrated by such actors.

In the present international landscape, we have witnessed a rapid increase in attention and awareness on IHL. Although armed conflicts are unfolding in multiple regions of the world, the conflicts in Ukraine and Gaza have significantly contributed to this. Inevitably, it becomes relevant to consider how this renewed focus might affect IHL and the adherence to it going forward. Some experts view the current situation as a tenuous point for IHL which could go in either direction in terms of more or less compliance.<sup>322</sup> Furthermore, it has been suggested that although the increased scrutiny is positive, the underlying cause, namely the aforementioned armed conflicts with systematic violations of IHL, is problematic for the integrity of IHL as a system.<sup>323</sup> Apart from an increased focus on IHL within the political realm, there has been a notable rise in engagement within the academic community. Various aspects of IHL are being reexamined and scrutinized in light of current contexts. This trend is undoubtedly beneficial for enhancing overall awareness of IHL and exploring areas of interpretive ambiguity and inconsistency. Also worth noting is the ICC which received an unprecedented 43 referrals in relation to the situation in Ukraine.<sup>324</sup> Thus far, it has issued arrest warrants against four individuals, all of whom are allegedly responsible for war crimes.<sup>325</sup> Additionally, it has received several referrals on the situation in the State of Palestine, to which the prosecutor has filed applications for arrest warrants against top Israeli and Hamas leaders, allegedly responsible for war crimes and crimes against humanity.<sup>326</sup> On February 12, 2024, the Hague Court of Appeal ordered the Netherlands to halt all exports of F-35 fighter jet parts to Israel, noting a clear risk that these were being used to commit grave violations of IHL in Gaza.<sup>327</sup> It has been argued that because much of IHL finds its primary application by non-jurists in the context of armed conflict, this reduces the potential to develop IHL through legal precedent based on Court adjudication.<sup>328</sup> Although

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<sup>322</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208 ; Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208.

<sup>323</sup> Former military legal advisor for the Danish Defense Command (DCD) and researcher in military technology, *supra* note 208.

<sup>324</sup> "Situation in Ukraine," International Criminal Court, <https://www.icc-cpi.int/situations/ukraine>.

<sup>325</sup> *Ibid.*

<sup>326</sup> ICC, *supra* note 321.

<sup>327</sup> Yussef Al Tamimi, "Dutch Appeals Court, Finding Clear Risk of IHL Violations, Orders Government to Halt Military Deliveries to Israel," *Just Security*, 2024, <https://www.justsecurity.org/92196/dutch-appeals-court-finding-clear-risk-of-ihl-violations-orders-government-to-halt-military-deliveries-to-israel/>.

<sup>328</sup> Marco Sassòli, "How will international humanitarian law develop in the future?," *International review of the Red Cross* (2005) 104, no. 920-921 (2022): 2063-64, [https://international-review.icrc.org/articles/how-will-international-humanitarian-law-develop-in-the-future-920#footnoteref43\\_c1o9peh](https://international-review.icrc.org/articles/how-will-international-humanitarian-law-develop-in-the-future-920#footnoteref43_c1o9peh).

this is true, we have witnessed former tribunals such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR) significantly influencing IHL.<sup>329</sup> Hence, it is notable that increased Court activity, some of which is demonstrated by the aforementioned examples, might over time lead to adjudication, potentially shaping the interpretation and application of existing IHL rules. This is, however, not guaranteed to take place anytime soon. In the meantime, it is important to emphasize that current armed conflicts create an opportunity for other States and armed forces to reevaluate their own areas of focus and consider how best to act if confronted with a comparable situation.<sup>330</sup> This is particularly relevant within the domain of urban warfare, where it is critical that the international community learns from current and past conflicts.

An important concern raised by a former military legal advisor in ISAF is the politicization of IHL and double standards currently employed by many States.<sup>331</sup> The application of IHL as a political tool is a major issue. While raising awareness of potential IHL violations remains crucial, accusations must be grounded in concrete evidence. In the absence of such evidence, accusations should at least acknowledge this limitation. Verifiable facts and reports from independent observers are vital to building a strong case. The legitimacy of IHL is undermined when accusations of non-compliance become politicized, and in the long run this can ultimately harm those it is meant to protect. Furthermore, an IHL expert has underscored the importance of acknowledging what IHL can and cannot achieve, rather than using it as an excuse to avoid the resolution of conflicts.<sup>332</sup> Resolutions require political solutions, and when diplomacy fails, strict adherence to IHL is essential.

As the nature of warfare continues to evolve, so too must the interpretation and application of IHL. Although IHL generally provides a sufficient framework for addressing challenges posed by urban warfare, three important considerations should guide future efforts; States ought to articulate clear interpretations of IHL rules that currently lack a common and consistent understanding, e.g., through the revision of LOAC manuals. Secondly, parties engaged in armed conflict ought to comply with IHL at all times. Thirdly, because much civilian harm is bound to occur in the context of urban armed conflict, even when IHL is complied with, military decision-making should be guided by a strong emphasis on protecting civilians as a matter of principle and policy.

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<sup>329</sup> Hortensia D. T. Gutierrez Posse, "The relationship between international humanitarian law and the international criminal tribunals," *International review of the Red Cross* (2005) 88, no. 861 (2006), <https://international-review.icrc.org/articles/relationship-between-international-humanitarian-law-and-international-criminal-tribunals>.

<sup>330</sup> Former military legal advisor deployed with International Security Assistance Force (ISAF), *supra* note 208 ; Former military legal advisor deployed with Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), *supra* note 208.

<sup>331</sup> *Ibid.*

<sup>332</sup> Expert in international humanitarian law and policy relating to armed conflict, *supra* note 208.

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## 8 Appendix A: Interview Guide

- What are the key difficulties in maintaining lawful conduct of war in urban environments?
- Do you think that IHL, in its current form, is adequate to effectively address the complexities of asymmetric armed conflict in urban environments?
- Do you think that IHL, in its current form, adequately balances military necessity and humanitarian considerations?
  - o In the context of asymmetric armed conflict in urban environments - is it possible to maintain a balance between these two principles, or does it become necessary to prioritize one over the other?
- The armed conflicts in Ukraine and Gaza have arguably increased international attention on IHL. How do you anticipate that this might influence the adherence to, and perhaps development of, IHL going forward?
- Some non-state armed groups tend to strategically violate IHL for their own benefit, for example by using human shields or deliberately locating military objectives within densely populated areas. Is it possible to enhance compliance with IHL by such actors – if so, how?
- When we witness non-state armed groups that consistently and for strategic reasons violate IHL, what implications does this have for IHL? Does it undermine the fundamental aspects of IHL?
- Going forward, how do you see the role of political declarations or resolutions in developing IHL to better respond to urban warfare?
- What concrete military measures would contribute to addressing the challenges of urban warfare? (e.g., better training, intelligence gathering, use of technology, improved communication, and exchange of best practice between military forces)