



Beyond Compliance: International Humanitarian Law, Humanitarian Need and Civilian Harm in Armed Conflict

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Executive Summary

This exploratory study examines the relationship between International Humanitarian Law (IHL) compliance, humanitarian need and civilian harm. Its aim is to better understand how IHL compliance may impact outcomes for civilians in armed conflicts. The study also widens the scope of analysis beyond a compliance approach, to reflect more broadly on law's role in enhancing quality of life for war-affected populations. The study is primarily conceptual in nature, though it connects to concrete findings and recommendations designed to influence the field of practice.

The study is based on an exploration of the following research questions:

- 1) What types of humanitarian need and civilian harm are produced by armed conflict, and which aspects of need and harm are implicated by IHL?
- 2) Which specific IHL rules are most relevant to reducing humanitarian need and civilian harm?
- 3) What is the precise relationship between compliance with these particular IHL rules — or restraint from violence more generally — and a reduction in humanitarian need and civilian harm?
- 4) Based on the findings of the research, what larger questions are generated for future exploration?

Key findings

The starting point of the study is that IHL compliance matters greatly, and that there is value in identifying, and attempting to prevent or mitigate, IHL violations. At the same time, if we step back from an IHL framing and start the analysis from the lived experiences of war, we begin to understand that an approach framed around IHL does not cover the whole spectrum of needs and harms that arise.

The study presents the concepts of 'humanitarian need' and 'civilian harm' as two different (yet complementary) ways of thinking about IHL's role in reducing human suffering and promoting quality of life for war-affected populations. To understand the role of IHL in a more granular way, we examine its relevance across five key drivers of need and harm: (1) conduct of hostilities; (2) access to goods and services; (3) displacement; (4) conflict-induced hunger; (5) sanctions. We additionally examine IHL's role in connection with the cross-cutting issue of frontline humanitarian negotiations.

(1) Conduct of hostilities

o Definition:

- ▶ Conduct of hostilities refers to military operations, targeting decisions, and choices of means and methods of warfare that implicate cardinal IHL rules such as the principles of distinction, proportionality, and precautions in attack and defence.

o Findings:

- ▶ It remains crucial to engage with belligerents to strengthen compliance with conduct of hostilities rules. We suggest some practical ways to enhance their implementation in practice.
- ▶ We also highlight that the rules tolerate harm to civilians and civilian infrastructure. For example, the rule of proportionality tolerates significant 'incidental harm', and cumulative casualties over multiple attacks are not factored into proportionality calculations.
- ▶ In some cases, a focus on restraint – which goes beyond the letter of the law – can reduce the impact of hostilities on civilians.

(2) Access to goods and services

o Definition:

- ▶ Access is split into two dimensions: the ability of (humanitarian) organizations to respond to people in need, and the ability of populations to access goods and services essential to daily life.

o Findings:

- ▶ Approaches that focus on 'humanitarian access' often neglect the primary responsibilities of state and non-state actors to meet the needs of war-affected populations, and they overlook the agency of civilians. The move towards 'localization' of humanitarian action may be an important corrective.

- ▶ The central obligation of IHL rules on relief obligations — allowing and facilitating rapid and unimpeded access — is vague and would benefit from further elaboration. IHL's focus on humanitarian operations also overlooks the role of commercial actors and transactions in sustaining life during armed conflict.
- ▶ Civilians routinely draw upon their own resources and those of their communities to survive armed conflict and access basic goods and services (e.g. water distribution). More attention could be paid to ensuring that such services are delivered in an equitable and non-discriminatory manner.
- ▶ (Legal) understandings of what is needed to survive in armed conflict must be updated, to include for example access to banking and digital services.

(3) Displacement

o Definition:

- ▶ We refer here to displacement across national borders, including refugee rights issues, as well as internal displacement¹ in camp, urban and rural settings.

o Findings:

- ▶ IHL should play an important role in preventing (forced) displacement in armed conflict, averting secondary displacement, ensuring appropriate treatment of displaced persons, and outlining the conditions under which they eventually return home.
- ▶ Myriad aspects of displacement are not addressed by IHL, however. People might be forcibly displaced in non-conflict situations, due to climate change, disasters, development projects, human rights violations, and violence that does not amount to an armed conflict. People might also flee before anticipated attacks or before a violent situation becomes an armed conflict, to avoid harm.

- ▶ There are many instances in armed conflicts and other situations when it is not IHL, but other bodies of law like international human rights law (IHRL) and refugee law, non-binding international principles and standards, and non-legal approaches, that can offer fuller guidance as to the support needed by displaced populations. The 1998 UN Guiding Principles on Internal Displacement are particularly important here.

(4) Conflict-induced hunger

o Definition:

- ▶ We refer here to hunger and starvation that is caused directly or indirectly by the conduct of hostilities in armed conflicts, including a general loss of livelihoods.

o Findings:

- ▶ IHL includes an express prohibition of starvation of the civilian population as a method of warfare, as well as prohibitions on attacks against objects indispensable to the survival of the civilian population. If complied with, the IHL rules offer a first line of defence against conflict-induced hunger.
- ▶ Despite these provisions, the IHL rule of proportionality does not adequately account for food insecurity in armed conflict. Loss of livelihoods, for example, is not considered 'incidental harm'. A potential way of factoring it into calculations would be in the weight accorded to damage to civilian objects.
- ▶ Beyond the letter of the law, belligerents could be encouraged to take measures to minimize the impact of military operations on food security.
- ▶ More attention is needed on the role of the private sector and commercial actors in addressing food insecurity in conflict.

(5) Sanctions

o Definition:

- ▶ Sanctions form part of domestic and international counter-terrorism efforts to address support to (those designated as) terrorist groups. Sanctions often result in restrictions being added into funding agreements between donors and humanitarian aid agencies.

o Findings:

- ▶ Ever more frequent recourse is being had to targeted sanctions, including to promote compliance with IHL. The assumption is that this will minimize civilian harm.
- ▶ In practice, sanctions often impede humanitarian operations and have an adverse impact on the ability of civilians to access essential goods and services.
- ▶ The broad exception for humanitarian action to the Afghanistan sanctions — where an explicit 'carve out' exempts providers of humanitarian services from UN Sanctions against the Taliban and others — is an example of good practice that invites replication.

(6) Cross-cutting issue: Humanitarian negotiations

o Definition:

- ▶ This is a (diplomatic) process through which humanitarian actors engage with conflict parties to secure access to, and protection of, war-affected populations.

o Findings:

- ▶ Humanitarian negotiations with armed actors are one of the most important ways in which the dissemination of IHL rules, and education of conflict actors about their implementation, could inform frontline engagement in armed conflict. While it is often assumed that armed groups lack IHL knowledge, it is also evident that humanitarian actors may themselves have low levels of legal literacy. This suggests a need for capacity building in the sector.

- ▶ Negotiations to secure humanitarian access may not necessarily complement or reinforce negotiations for protection. Humanitarian actors worry that gains made in access will be lost if they subsequently raise conduct of hostilities issues with belligerents, or imply that the latter have violated IHL.

Moving beyond IHL compliance

Conduct that complies with IHL will generally lead to better outcomes for civilians and protected persons than conduct that falls short of, or violates, IHL. However, in instances where IHL rules still permit a host of harms to befall civilian populations and protected persons, a compliance focus only gets us partway to addressing the problems of concern.

A crucial aspect of IHL dissemination efforts is the attempt to socialize IHL norms amongst actors who use violent means. Such efforts aim to secure their buy-in to IHL rules and to incentivize good behaviour. A concept that is relevant to this aspect of compliance discussions—but that potentially takes us beyond a strict compliance paradigm—is that of restraint.

Restraint could be associated with conduct that exceeds what is required by IHL, as articulated in the influential ICRC Roots of Restraint study. But restraint could also encompass conduct that is not covered by IHL at all - for example with respect to urban gang violence or 'drug wars' where the threshold of violence required for an 'armed conflict' to exist has not been technically met but there is organised violence against civilians. Further innovations that go beyond IHL compliance include a recent Deed of Commitment launched by Geneva Call, that non-state armed groups can sign on to, that addresses starvation prevention and food security in armed conflict.

Rather than expand the concept of IHL compliance in unconventional ways, our discussion of drivers of civilian harm advocates for an approach that includes but goes beyond IHL compliance issues as traditionally understood. A key contribution of this study is thus to widen the scope of IHL thinking beyond a compliance approach.

1.0 Background of the study

This study aimed to better understand how IHL compliance may impact outcomes for civilians in armed conflicts. We focused on developing and testing the boundaries of two key concepts that lie at the heart of this project. The first is the concept of 'humanitarian need', and the second is the role of compliance with IHL in reducing humanitarian need – or, more broadly, in enhancing prospects for civilian survival and quality of life in war. This final report further elucidates these concepts and explores their interplay.

This study is primarily conceptual, but it also seeks to inform practice, in that it aims to better equip practitioners who must decide whether invoking IHL will be strategic in each instance. It also indicates how additional concepts could support the application of IHL and extend civilian protection and support.

Starting Assumptions

IHL is the body of law that aims to regulate hostilities and to reduce human suffering in armed conflicts. In legal circles, discussions about civilian survival and protection in armed conflict tend to revolve around questions of IHL compliance. The main assumption is that if there could be more or better compliance with IHL by conflict parties (state and non-state actors), then outcomes for war-affected populations would be improved. This assumption is true in many cases, and justifies identifying, and attempting to prevent or mitigate, IHL violations. Non-legal practitioners, such as operational humanitarian actors without legal training, might equally deem IHL compliance crucial. However, there is often a lack of consensus on how and when to engage with IHL in operational settings – for example when attempting to influence armed interlocutors. At this point, a more in-depth investigation is needed of precisely how, when, why, and where IHL compliance — or restraint more broadly — can have the greatest impact on the lives of war-affected populations. It is equally crucial here to identify instances in which IHL does not play a significant role, such that other bodies of law (or non-legal responses) may have more impact.

Aims

- 1) To inform and contribute to longer-term initiatives that better prepare in-country teams that focus on humanitarian crisis to grasp the relevance and utility of IHL in connection with various drivers of humanitarian need and civilian harm (e.g. conduct of hostilities, sanctions).
- 2) To gather practitioner perspectives on how terms like 'humanitarian need' are understood at field level, and how (legal and non-legal) practitioners view the role of IHL compliance in reducing humanitarian need and civilian harm.
- 3) To build a conceptual framework of how IHL and humanitarian need intersect, that can support the development of practice to deal with humanitarian need in a holistic manner.
- 4) To advise on further research questions and other avenues of inquiry that can support a deeper understanding of IHL and humanitarian need and civilian harm.

Research Questions

- 1) What types of humanitarian need and civilian harm are produced by armed conflict, and which aspects of need and harm are implicated by IHL?
- 2) Which specific IHL rules are most relevant to reducing humanitarian need and civilian harm?
- 3) What is the precise relationship between compliance with these particular IHL rules — or restraint from violence more generally — and a reduction in humanitarian need and civilian harm?
- 4) Based on the findings of the research, what larger questions are generated for future exploration?

Methodology

This study explores the above research questions by examining IHL's relevance to the most significant drivers of humanitarian need and civilian harm. We have identified five drivers: (1) conduct of hostilities; (2) humanitarian access; (3) displacement; (4) conflict-induced hunger; (5) sanctions. We also examine one cross-cutting theme: humanitarian negotiations. The goal in breaking things down into separate drivers is to introduce some granularity into conversations about when and where IHL compliance arguments might be most effective. This drivers-based approach should also assist practitioners and policy makers to better grasp where IHL fits in to the bigger picture of war's impact on the lives of individuals and communities.

Research for this study was conducted through a desk study and through engagement with practitioners who have a wide variety of first-hand experiences in different conflict settings globally. The main contact with experts and practitioners happened through the expert consultation with legal, operational, and policy experts held virtually on 28 March 2022.² Where appropriate, relevant individuals and groups were subsequently contacted and asked to give a remote/virtual interview to share their work and to consult on the above research questions. Confidentiality and anonymity have been preserved in the study, except in instances where it was important to identify the source of a contribution and permission was given.

2.0 The analytical framework

In armed conflict, the daily lives of civilians are constrained and disrupted in many ways. Individuals and populations contend not only with threats to their lives, bodily integrity, property and infrastructure from violent attacks, but they also must navigate disruption to their livelihoods, a lack of access to essential goods and services, and agonizing decisions about whether and when to flee their homes and communities for safety – assuming that they are not forced out unwillingly.

As the body of law that aims to regulate hostilities and to reduce human suffering in armed conflict, IHL offers a legal framework that can prevent some of these needs and harms from arising in the first place; it can also address such dynamics when they do occur. It is undoubtedly the case that if conflict actors followed IHL rules — for example on the conduct of hostilities — armed conflict would generate fewer humanitarian needs and less civilian harm than it would if the rules were breached. At the same time, there will be instances in which IHL compliance is not enough to ensure civilian survival and a meaningful quality of life in times of war. In such cases, it might be strategic to look instead to other bodies of international law (such as international human rights law or refugee law), or to engage with non-legal responses that are based on a more holistic understanding of life and civilian agency in wartime.

This section of the discussion shares our findings on the value and relevance of several key concepts: 'humanitarian need', 'civilian harm', and IHL compliance. This lays the ground for a more detailed account of different drivers of need/harm, and the relationship of each driver to IHL, in Section 3.

2.1 Conceptualizing humanitarian need and civilian harm

A first concern is how the term 'humanitarian need' resonates with different stakeholders.

The benefits and pitfalls of 'humanitarian need'

At first glance, the concept of 'humanitarian need' might seem uncontroversial. It has the obvious benefit that it directs attention to war-affected populations, themselves, and it considers what people affected by war require in order to survive and to go about their daily lives with as little hindrance as possible. On the surface 'humanitarian need' offers a potentially clear and innocuous way of signalling an interest in the lived experience of armed conflict. Helpfully, the concept also focuses practically and concretely on the supports, services, and interventions that individuals and communities might need to access.

However, there are myriad ways of speaking about, and conceptualizing, human suffering and survival prospects in war. The choice to focus on 'humanitarian need' therefore requires further probing, especially for how it erects boundaries around what is in and what is out of consideration. A human rights lawyer, for example, might assess the emphasis on 'need' as inadequate, calling instead for a more political understanding of (legal) entitlements. Focusing here on the humanitarian sector, it was apparent from our expert consultation on 28 March that humanitarian aid practitioners and international lawyers do not share a coherent understanding of humanitarian need. Indeed, some communication challenges that arise between diplomatic, legal, operational and academic actors appear to stem from these actors holding different definitions of the concept in their minds.

Those experts who were sceptical of the 'humanitarian need' concept viewed it as a relatively narrow or restrictive concept that tends to be linked to material resources. They highlighted the importance of avoiding an approach which focuses too much on the delivery of humanitarian goods (i.e. humanitarian 'assistance') and neglects an equally important range of other activities — traditionally referred to as 'protection' responses. Even where 'humanitarian need' is explicitly stated to encompass material humanitarian responses as well as protection activities, these practitioners still advised that 'humanitarian need' might be limiting when we think of all the ways in which IHL is relevant to the lives of war-affected populations. Taking this into consideration, any future projects that aim to minimize needs should emphasize that responses to these needs are not limited to delivery of goods ('assistance') but also encompass a protection dimension.

The alternative concept of 'civilian harm'

As an alternative to broadening the meaning of 'humanitarian need', there is the option of employing an entirely different concept to capture the kinds of dynamics that policy actors and practitioners wish to intervene on. The main alternative approach that our research into the literature on IHL has uncovered is that of 'civilian harm'. The concept of civilian harm is arguably both broader and narrower than 'humanitarian need'. Broader, because the notion of 'harm' can be more expansive than need. Narrower, because civilian harm refers only to civilians and thus excludes other persons protected under IHL, such as prisoners of war, wounded and sick fighters, or medical personnel belonging to a state's armed forces. Care must therefore be taken not to unintentionally exclude non-civilian harm when this is relevant to IHL – as is the case for example when it comes to medical care. Projects or studies that employ the 'harm' concept may in some instances thus need to drop the 'civilian' modifier.

We propose that there is value in adopting a 'harm' framing, given the feedback from experts that 'humanitarian need' risks leaving important conflict dynamics out of the picture. Our approach throughout the study is to centre the harm concept where we deem it appropriate, and more generally to employ broad language such as 'humanitarian need and (civilian) harm' or need/harm. This inclusive framing widens the parameters of discussion to incorporate dynamics relating to humanitarian or development-type needs in conflict, while accounting for the ways in which civilians and other protected persons are harmed in war.

For background, the term 'civilian harm' has recently been used in two important resources that interpret the concept broadly rather than narrowly: the new PAX Book *On Civilian Harm*,³ and the Rand Corporation Report *Understanding Civilian Harm in Raqqa and Its Implications for Future Conflicts*.⁴ The PAX book proposes a definition of 'civilian harm' that frames harm around 'reverberating effects'⁵ — used as a non-legal term — and argues that simply speaking of 'IHL compliance' (see Section 2.2, below) neglects the full spectrum of harms in war. Seeking to account for the true impact of armed conflict on civilians, PAX includes aspects such as damage to infrastructure, interruption of basic services, and mental health.⁶

The Rand Corporation Report also notes that 'civilian harm' is often equated simply with civilian casualties (sometimes using the language of 'citizens') killed or wounded in military operations. It again advocates for a broader definition of harm that takes account of effects on the health, safety, and well-being of the population. The Rand Corporation approach also includes: 'displacement of populations and damage to structures and community infrastructure, such as bridges, hospitals, power sources, education and healthcare facilities, religious and cultural sites, and transportation hubs.'⁷

While we are alive here to the risk that concepts will become so broad that their utility or meaning is compromised, there is yet a further expansion to consider with respect to harm. Amongst lawyers, there is an increasing awareness of the mental harm caused by conflict — in particular, in the conduct of hostilities.⁸ As a matter of law, there is no reason in principle why the rules of IHL that refer to civilian injury should be limited to physical injury. However, the nature of mental harm raises a number of challenges to its inclusion in practice in the assessments conducted by belligerents, including most notably in relation to targeting rules on proportionality.

Three key issues arise which make it difficult to integrate mental harm into proportionality assessments, and these have yet to be adequately resolved. First, assessing causation requires determining in advance whether a specific attack is likely to cause mental harm, and this is especially challenging in the case of prolonged hostilities. Second, assessing foreseeability requires a determination of whether exposure to a specific attack will lead to mental harm; this is challenging given that mental harm is more subjective than physical harm and varies according to individuals. Third, assessing the weight, and quantifying the risk of the occurrence of mental harm, is no easy feat.⁹ With respect to the last issue, however, it is unclear why the weight element should be more difficult for mental harm than for other types of harm. On the contrary, it is precisely at this weighing stage of proportionality assessments that some of the difficulties currently raised by mental harm can be addressed. These include the likelihood of it occurring and its severity.

The above observations generate further questions about the framing of this study with reference to armed conflict. Dynamics that do not amount to armed conflict in the legal sense, and that are therefore not addressed by IHL, can nonetheless give rise to needs, harms, and tensions that (i) are as grave as those we see within armed conflict, or that (ii) eventually lead to armed conflict. Specific concerns here include access to natural and other resources, the climate crisis, and structural forms of marginalization or so-called 'slow violence'. Conflict compounds these existing vulnerabilities, and there is more to humanitarian need and civilian harm than what is directly inflicted by the conduct of hostilities. If the end goal is to minimize need/harm in armed conflict, then these wider dimensions must also be considered - while noting this introduces considerable complexity to the analysis.

Experts also advised that even IHL lawyers and those focused on urgent humanitarian need should contemplate the (eventual) shift from humanitarian to development responses. The 'triple nexus' linking humanitarian, development, and peace practices offers one way of thinking about how to promote, or at least facilitate, the shift to development responses after emergencies.

In sum, any future research initiatives that aim to make an intervention relating to humanitarian need — or our proposed alternative concept of civilian harm — must pin down a clear definition that can translate for different audiences.

2.2 The role of IHL compliance

This discussion situates IHL amongst other bodies of international law relevant for armed conflict, and outlines ways of thinking about compliance with IHL. We focus here on a legal perspective and deepen the analysis in Section 3 when we address the drivers of civilian harm.

What body of law?

When considering how to address civilian harm in violent contexts, selecting the relevant body of international law will determine the kinds of dynamics and problems that are addressed. If one focuses solely on IHL, for example, then only situations that amount to 'armed conflict' will be included in an analysis. This poses potential problems for addressing an issue such as displacement, which can occur on a wide scale outside of armed conflict. In situations of low-intensity internal violence, for example, civilians who anticipate that attacks on their homes and communities are imminent may opt to flee internally or across borders before the violence rises to satisfy the threshold of an armed conflict. IHL will not apply here, and yet many of the needs of people on the move (and the harms they might be exposed to) will be as significant as in an armed conflict. In a similar vein, civilians and protected persons will continue to grapple with the upheavals of war long after fighting ends and IHL ceases to apply.

Moreover, even focusing on situations of armed conflict, IHL is not the only body of international law that will be relevant in minimizing or responding to civilian harm. Other bodies of international law likely to be of relevance to the kinds of harm that policy actors wish to address include: international human rights law, international refugee law, and international criminal law.¹⁰ It is important that these also be considered in any legal response as IHL does not purport to address all needs and harm that may arise. While we centre IHL in the present study, we advise that future initiatives should engage with these other bodies of law.

IHL compliance: A legal perspective

This study defines IHL compliance simply as the 'observance and implementation of IHL'.¹¹ A starting point of this discussion is that it is not generally an absence of law that generates civilian harm in armed conflicts, but rather a lack of compliance with IHL treaty rules and customary law. As Gillard writes in connection with the targeting of hospitals, it is not a lack of rules protecting these types of facilities but rather flagrant breaches of IHL that inflict the damage.¹²

Common Article 1 of the Geneva Conventions stipulates that all parties to the Geneva Conventions must undertake to 'respect and to ensure respect' for the present Convention in all circumstances.¹³ This has been recognized as a rule of customary international law that applies in both International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIAC). A widely followed interpretation of Common Article 1, promoted by the ICRC, is that 'ensure respect' refers both to the obligation for states to adopt measures to ensure that state entities (and individuals within state jurisdiction) respect IHL, and also to ensure that other (non-)state actors comply with IHL rules in their own conduct.¹⁴ States owe this obligation to the international community as a whole as an obligation *erga omnes*.¹⁵

The obligations of non-state actors under IHL merit separate consideration from state parties to the Geneva Conventions and their Additional Protocols. As non-state actors are legally unable to accede to IHL treaties, this potentially creates problems in terms of 'ownership' of IHL. Nonetheless, these actors are still subject to customary IHL rules that apply in NIAC, Common Article 3 to the Geneva Conventions,¹⁶ and Additional Protocol II rules in conflicts that qualify as AP II conflicts. Non-state actors can also unilaterally declare their intent to comply with (particular) IHL rules, for example by signing Deeds of Commitment with Geneva Call. Frontline humanitarian negotiations, which are one practical way in which humanitarians (and others) seek to influence the behaviour of non-state armed groups, are discussed in Section 3.6 below.

Conventional IHL enforcement approaches tend to address violations that have already happened, but it is also important to consider prevention so that violations do not occur in the first place. The starting point for any discussion of promoting compliance should thus be on internal compliance by state (and arguably non-state) actors. These actors must ensure compliance amongst their own forces and suppress violations, and if this is achieved then much harm in warfare would be prevented.

A key element of prevention in the IHL framework is the dissemination of IHL rules and norms to military and civilian populations. This activity is to take place in both IACs and NIACs, as well as in peacetime. IHL rules are disseminated in three main ways: training programmes for state armed forces; civil society educational programmes and instruction in universities; the incorporation of IHL rules into domestic legislation.¹⁷ One of the key messages of this study is that this dissemination aspect should be an integral part of governmental and diplomatic efforts to promote IHL globally - in peacetime and in wartime.

IHL further establishes three formal compliance mechanisms in IACs that are more external in nature: Protecting Powers; a formal enquiry procedure; and the International Humanitarian Fact-Finding Commission. There is widespread agreement that these mechanisms are not effective overall, and we thus view them as less relevant for the present discussion.¹⁸

A wider enforcement problem to highlight is that IHL, like other bodies of international law, is not subject to a hierarchical system or set of institutions to enforce the relevant rules. IHL's decentralized system of enforcement — whereby implementation is by country signatories, rather than a centralised international IHL mechanism — includes diplomatic measures such as the expulsion of diplomatic staff, as well as (quasi-) judicial and legislative mechanisms.¹⁹ To address violations, IHL advocates may pursue international dispute settlement, support sanctions, bring legal cases in domestic and international courts (e.g. to pursue individual criminal accountability for the war crime of starvation), or 'name and shame' perpetrators through public denunciations. While issues of enforcement and accountability are not central to this study, these dynamics are an important part of 'IHL in action' and they also determine whether IHL has 'teeth' in armed conflicts.

Beyond compliance

At the core of this study lies the belief that compliance is both important and relevant to addressing humanitarian need and civilian harm in war. At the same time, we do not assume that there is a straightforward relationship between IHL compliance, on the one hand, and the minimizing of need and harm, on the other.

While conduct that complies with IHL will generally lead to better outcomes for civilians and protected persons than conduct that falls short of, or violates, IHL, it may sometimes be the case that IHL is simply not enough. In instances where IHL rules still permit a host of harms to befall civilian populations and protected persons, a compliance focus only gets us partway to addressing the problems of concern.

Coming back to the issue of dissemination, a crucial aspect of this is to socialize IHL norms amongst actors who use violent means. Such efforts aim to secure their buy-in to IHL rules and to incentivize good behaviour. A concept that is relevant to this aspect of compliance discussions — but that potentially takes us beyond a strict compliance paradigm — is that of restraint. The ICRC defines the 'roots of restraint' as 'factors that induce weapon bearers across the spectrum to observe certain limits when engaging in armed violence and to preserve a minimum of humanity even in the heat of battle.'²⁰

The *Roots of Restraint* report examines the political, ethical, and socio-economic reasons for which state armed forces and non-state actors behave as they do in armed conflicts, identifying the socialization of IHL norms and rules amongst these actors as crucial for restraint. To promote a culture of restraint, the report finds that the social integration of IHL and of humanitarian norms needs to happen not only in a top-down fashion (i.e. from commanders down to the lower ranks), but also informally and horizontally. While the ICRC focuses on the relationship between restraint and IHL rules, one could also conceptualize restraint as something broader. Restraint could be associated with conduct that exceeds what is required by IHL, as well as conduct that is not even covered by IHL - for example with respect to urban gang violence or 'drug wars' where the threshold of violence required for an 'armed conflict' to exist has not been met. Further innovations that go beyond IHL compliance include a recent Deed of Commitment launched by Geneva Call, which non-state armed groups can sign on to, that addresses starvation prevention and food security in armed conflict.²¹

We revisit ideas of restraint in the next section. Rather than expand the concept of IHL compliance itself in unconventional ways, our discussion of drivers of civilian harm advocates for an approach that includes but goes beyond IHL compliance issues as traditionally understood.

3.0 Drivers of humanitarian need and civilian harm

There are many dimensions of human experience in armed conflict — and in situations of violence or upheaval that do not meet the threshold for classification as armed conflict — that give cause for concern. As Slim points out in *Solferino 2021*, most people experience war not as violent conflict but as poverty. For every civilian killed in hostilities, countless others flee and/or face a drastic reduction in their livelihoods and quality of life.²² Such observations potentially introduce a limitless set of needs and harms to address. An important contribution for this study is to suggest specific drivers that should receive consideration in future policy initiatives that seek to address humanitarian need and civilian harm.

Given that our main concern is the role of IHL and its limits, we focus here on selected aspects of need and harm in relation to which IHL compliance could have (some) impact. We have indicatively identified five drivers of humanitarian need and civilian harm in armed conflict: the conduct of hostilities, access to goods and services, displacement, conflict-induced hunger, and sanctions. We further engage with a cross-cutting issue: humanitarian negotiations with armed actors.

There is a further driver of humanitarian need and civilian harm that is not considered separately here as it receives considerable attention elsewhere: access to medical care, and the protection of medical facilities and caregivers. This issue is central to reducing civilian harm in armed conflict, and the law is clear on this point. IHL clearly stipulates the entitlement of the wounded and sick – civilians and fighters – to receive medical care, the protection from attack of medical facilities and staff, and the prohibition to punish people who have provided medical care. Despite this, both dimensions have come under physical and legal attack in contemporary conflicts. Attacks on healthcare have been the topic of numerous initiatives in recent years: the ICRC's *Healthcare in Danger* project, Security Council resolution 2286 (2016) and the World Health Organization's *Surveillance System for Attacks on Health Care*, as well as the work of *Physicians for Human Rights* – to name but a few.

3.1 Conduct of hostilities

Hostilities in armed conflict generate humanitarian need as well as civilian harm that includes, but goes beyond, death and physical injury. This driver focuses on military operations, targeting decisions, and choices of means and methods of warfare that implicate cardinal IHL rules such as the principles of distinction, proportionality, and precautions in attack and defence.

Discussion

It is commonly assumed that if parties to armed conflict comply with the rules on conduct of hostilities, conflict-related civilian harm will be minimized and humanitarian need will correspondingly be reduced. Compliance with IHL is of course desirable, and our analysis suggests some practical ways this could be enhanced. We also emphasize that compliance might not of itself suffice to improve outcomes for civilians in armed conflicts.

IHL requires belligerents to take constant care in the conduct of military operations to spare civilians. Compliance with core rules such as the principles of distinction and proportionality is one of the most important ways in which IHL can improve outcomes for civilian populations in armed conflicts. However, it must also be acknowledged that the rules regulating the conduct of hostilities 'tolerate' significant harm to civilians and to civilian infrastructure. Attacks which are not directed at civilians or civilian objects, and thus comply with IHL, may nonetheless lead to loss of life and injury, damage to civilian property, displacement and loss of livelihoods for civilian populations.

In view of this, a focus on restraint that goes beyond what is required by IHL and accounts for other factors that can exacerbate harm, is necessary in addition to compliance. It may be appropriate to ask parties to go beyond IHL rules to ensure higher levels of civilian protection and thus lower levels of civilian harm.

Putting mechanisms in place to implement the rules of IHL

The key elements of the IHL rules regulating the conduct of hostilities are clear, and in recent years more complex aspects, such as the notion of 'direct participation in hostilities' or elements of proportionality assessment, have been explored by expert processes and in academic writings.²³ Nonetheless, differences of view exist as to very basic concepts, such as who should be considered a civilian,²⁴ or whether there is a presumption of civilian status in case of doubt.²⁵

What is frequently lacking are internal policies and mechanisms within armed forces and groups to give effect to the rules in practice. These include measures for proper identification of intended targets and, significantly, for the proper identification of expected incidental civilian harm for the purpose of proportionality assessments.

Another important measure is civilian casualty tracking, whereby armed forces and groups systematically gather data on civilian deaths and injuries, property damage or destruction, and other types of harm to civilians caused by their operations. Such tracking allows armed forces to understand in real-time the nature and scope of harm to civilians. This understanding can be used to inform operational changes in theatre as well as broader policy development to strengthen the protection of civilians. Casualty tracking also supports the identification of possible violations of IHL that require further investigation and, if substantiated, accountability for perpetrators and redress for victims.²⁶ At present, only a very small number of armed forces undertake such tracking.

The limits of proportionality and the role of precautions

As important as the above mechanisms are, they are a way of implementing IHL. As noted above, the rules on conduct of hostilities, and in particular the rule of proportionality, allow for considerable incidental civilian casualties or damage. Moreover, the incidental harm to be considered is narrow: only death or injury to civilians and damage to civilian property. Other types of harm – including displacement, for example, which as elaborated below is a source of and exacerbates civilian harm – are not considered in proportionality assessments.

A key problem is that the IHL rule of proportionality balances the expected collateral harm with the anticipated military advantage of a specific attack. However, even if each individual attack complies with this rule, over time the cumulative number of civilian casualties may nonetheless reach intolerable figures.²⁷ *Ius ad bellum* - the rules regulating resort to armed force in the first place - also includes a proportionality requirement; its legal effect once war has begun is contested, however, as is its applicability to conflicts against non-state actors.

Belligerents' obligations to take precautions are broader in scope: in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.²⁸ Despite the important role of precautions in minimising civilian harm arising from military operations, this set of IHL rules has received far less attention.

Moreover, as one expert emphasized at the 28 March consultation, it is important to focus not just on the party carrying out attacks: IHL also imposes obligations to take precautions on the parties who are being targeted. For example, if the latter fail to comply with the obligation to refrain from situating military objectives in populated civilian areas, they can contribute to civilian harm.

In terms of the types of consequences of military operations that may lead to civilian harm, an additional point that came up in the consultation is whether sufficient attention has been given to practices or occurrences such as loss of access to electricity and water during urban warfare - as has occurred in Ukraine recently. Access to these essentials might be deliberately cut off or inadvertently disrupted by hostilities, with severe adverse consequences for civilians.²⁹

Engagement with communities affected by hostilities is essential in order to determine the precise nature of the impact of military operations, but also precautions belligerents could take to minimise this impact. Multi-stakeholder consultations like the InterAction/Care project on conflict-induced hunger (see below), can play an important role in this regard.

When compliance is not enough

The protection of civilians in the conduct of hostilities might look very different in urban (and other populated) areas than in an open battlefield context. In crowded urban centres, acts that comply with IHL can nonetheless lead to considerable civilian harm. Recent endeavours by the ICRC and others highlight this problem through the lens of means and methods of warfare. The use of explosive weapons (in densely populated areas) for example, can have deleterious impacts on civilians in crowded urban areas that are not adequately captured by conventional IHL compliance paradigms.³⁰ These very real concerns have led to an initiative to adopt a political declaration to address the humanitarian harm arising from the use of explosive weapons in populated areas (EWIPA).³¹ These dynamics highlight the link between civilian harm and what we might think of as humanitarian need or development-related need: if civilian harm can be minimized by restrictions on certain means and methods of warfare, then in theory this will help to reduce the (humanitarian) needs of war-affected populations – for example by improving availability of, and access to, basic goods and services in daily life.

Building on the earlier discussion of restraint (Section 2.2), the 2021 Geneva Call Deed of Commitment on the Prevention of Starvation and Addressing Conflict-Related Food Insecurity offers a way of integrating IHL rules with other sources. The preamble to this Deed includes the recognition that 'the rights to food, safe water and a safe, clean, healthy and sustainable environment are indispensable for human dignity' and the Deed's framing is in terms of broad humanitarian norms, human rights law and IHL. One of the specific commitments included is: 'to respect the means of subsistence of the civilian population and to meet their basic needs' in areas where the armed group exercises control.³² The Interaction/CARE initiative 'Catalysing Efforts to Prevent and Respond to Conflict-Induced Hunger' adopts a similarly holistic approach, addressing protection risks and population displacement which compound vulnerabilities relating to food insecurity in armed conflict.³³ These kinds of initiatives demonstrate how one might go beyond the letter of the law without significantly limiting belligerents' margin of manoeuvre.

Further questions/suggestions

On the whole, the rules of IHL regulating conduct of hostilities have been explored comprehensively. New initiatives should focus on ways of giving effect to them in practice.

- ▶ Consideration should be given to elaborating a compilation of precautions – in attack and defence – that address a broad range of adverse impacts of military operations on civilians. This would specifically include broader humanitarian needs that arise in armed conflict.
- ▶ Consideration should be given to elaborating a model of the measures that armed forces should implement to give effect to their obligations under the rules on conduct of hostilities. A related exercise could be the development of model civilian casualty tracking arrangements.
- ▶ Recognition should be fostered that despite existing mechanisms to facilitate implementation of IHL, compliance with the conduct of hostilities rules may not adequately minimize civilian harm caused by military operations. Consider what approaches or incentives could lead belligerents to restraint – going over and above the letter of IHL. This issue should also be addressed in the specific case of conduct of hostilities in urban contexts.
- ▶ Beyond the concept of restraint, explore other ways of enhancing internal mechanisms for reducing civilian harm, including mechanisms which might fall strictly outside the scope of IHL.
- ▶ To promote the political commitments made in the Explosive Weapons in Populated Areas (EWIPA) declaration, good practices could be elaborated to guide use of explosive weapons in populated areas.

3.2 Access to goods and services

There are two dimensions to the access driver: first, the ability of humanitarian organizations to respond to people in need as foreseen by IHL and in accordance with humanitarian principles; second, the ability of people to access basic goods and services despite the armed conflict. We take this two-part approach instead of employing the overarching concept of 'humanitarian access'. This change was made based on the expert consultations. Many operational actors in the field felt that the humanitarian access concept too often privileges the work of humanitarian aid workers and downplays the agency of affected populations. A wider concern is that an emphasis on the role of relief agencies obscures the central role that belligerents are supposed to play in meeting the needs of populations.

3.2.1 Ability of humanitarian actors to respond to people in need

Description

IHL includes a set of rules regulating humanitarian relief operations. They address the situations in which offers to conduct operations to meet basic needs may be made, and the obligations of belligerents to allow and facilitate relief operations that have been authorised. Two key rules, which are part of customary IHL, provide that parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel to the exercise of their functions;³⁴ and allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.³⁵

These rules regulating relief operations are complemented by those on the entitlement of the wounded and sick — civilians and fighters alike — to receive medical care, and protecting persons who provide medical assistance, as well as medical facilities.

Discussion

It is commonly assumed that the rules of IHL on humanitarian relief operations constitute an adequate framework to ensure basic needs are met. However, we would argue that the central obligation of the rules on relief operations — the obligation to allow and facilitate rapid and unimpeded access — is vague.

Moreover, the IHL rules focus on commodities necessary for the survival of the civilian population, such as food, water, medicines, and means of shelter. These aim to meet the most essential needs, but the letter of the law does not cover the types of services that in 2022 are necessary for survival – nor, we would add, for a meaningful quality of life. The types of things that are overlooked by IHL here include electricity, access to banking services, and communications connectivity (see below).

Advances have been made in recent years to recognize that many of the providers of humanitarian services are not the classic international agencies such as the ICRC or MSF, but rather local organizations based in the relevant societies. In the future, it will be important to ensure that 'localization' conversations are also connected to IHL initiatives, so that local organizations— and the specific challenges they face in delivering assistance — are properly factored into analyses of how law can facilitate humanitarian access.

Finally, a limitation of IHL is its focus on humanitarian operations. In practice, commercial transactions and services play a central role in minimising need during conflict; they are also negatively impacted by conflict and by measures taken to respond to conflict, such as sanctions. Disruptions of markets exacerbate needs, often leading to shortfalls the extent of which humanitarian action simply cannot compensate for.

While it is beyond the scope of this study, we would add that looking to the IHL rules on relief access rarely gives a full picture of the types of operational impediments that shape access in practice. Participants in the expert consultation highlighted the importance of not neglecting populations in significant need who may be geographically or logistically outside the reach of humanitarian agencies. Northeastern Nigeria was mentioned as an important example here. This point underscores the need to look beyond what operational humanitarian agencies do, to consider the survival strategies and agency of war-affected populations in their own right.

Further questions/suggestions

- ▶ Focusing on the rules of IHL on relief operations, the central obligation to allow and facilitate rapid and unimpeded access is framed in very general terms. Consideration should be given to elaborating guidance on good practices to give effect to the obligation to allow and facilitate rapid and unimpeded relief operations.
- ▶ Consideration should be given to elaborating good practices on 'humanitarian arrangements' such as humanitarian corridors³⁶, pauses and evacuations. The current situation in Ukraine shows that, while these very practical arrangements can play an important role in minimizing harm, inadequate attention has been paid to them. Remedying this would involve setting out the — limited — legal obligations that underpin these arrangements and, more importantly, clarifying the measures that different stakeholders must take to give effect to them.
- ▶ Greater attention should be given to how commercial actors can continue to operate in armed conflict. Consideration should be given to analysing the key impediments they face, how they are addressed – if at all – in existing IHL and other bodies of law, and to making recommendations to facilitate continuity of operations in key sectors of relevance to civilian populations.

3.2.2 Ability of people in need to access basic goods and services

Description

Traditionally, discussions of access in armed conflict have focused on the first dimension: the ability of humanitarian organisations to respond to people in need. While this may be understandable, not least because it reflects the approach of IHL which is framed around the obligations of belligerents and other states to allow and facilitate relief operations, it generates a reductive analysis. Frequently, it leads to overlooking the primary responsibilities of belligerents to meet the needs of people under their control. This approach also ignores civilian populations' agency, and how they draw upon their own resources and those of their families and communities to survive and access basic foods and services.

This civilian agency dimension – and ‘self-protection’ strategies more specifically – tends to be overlooked in IHL. A less legalized understanding of civilian survival can be found in international relations and political science approaches, however, and this better captures the wide range of protective strategies that civilians deploy in war.³⁷ Moreover, IHL rules on humanitarian access focus on a specific set of life-saving goods and services that do not reflect all the types of services that are necessary to minimising need and harm in 2022, and to which civilians need access.

Discussion

There should be greater attention on the primary responsibilities of states, and armed groups, to provide basic goods and services to civilians under their control in a non-discriminatory manner. This primary responsibility is only alluded to in IHL. IHRL provides a firmer basis for it, with respect to states. There is increasing acceptance of a comparable positive obligation for organised armed groups, and some research of how it is being discharged in practice.³⁸ Geneva Call’s 2021 Deed of Commitment for the Prevention of Starvation and Addressing Conflict-Related Food Insecurity addresses this. It incorporates a commitment by armed groups to ‘Provide means of subsistence, for example through food or water distribution, to the extent of our capacity’.³⁹ This obligation arguably has two limitations for the purpose of our analysis: the responsibility to provide basic services is only mentioned after the one to not impede humanitarian actors providing basic services; it also does not elaborate on the need for a non-discriminatory and equitable approach to basic service provision. Nonetheless, it is an important innovation on armed groups and basic services.

Except for the rules on access to medical care, IHL does not address access to goods and services by civilians in any detail. In this regard too it is IHRL that can provide a better grounding. The access issue must address both the practical aspects of being able to reach the goods and services in terms of freedom of movement/prohibition of forced displacement, and also the entitlement to access and receive the goods and services in a manner that is equitable and non-discriminatory.

As noted in the previous section, the IHL rules on relief operations focus on certain basic goods and services necessary to the survival of civilians. These are the goods and services that were considered 'life saving' when the additional protocols were adopted in 1977. Forty-five years later, other services are also essential to minimising civilian harm in armed conflict, such as electricity, access to information, communication services (including digitality), and banking services to name a few.⁴⁰

More practically, humanitarian responses still generally overlook the need to facilitate civilians' own access to goods and services. Although some organisations have been highlighting this dimension of 'access' for decades, it is only now beginning to be reflected in interagency operational response plans.⁴¹

Further questions/suggestions

- ▶ Research should be conducted on the legal basis of organised armed groups' positive obligations to meet the basic needs of civilians and provide them access to services, coupled with case studies of how this has been implemented in practice.
- ▶ Consideration should be given to elaborating a document based on IHL, IHRL and other relevant bodies of law, that identifies the rules that promote people's entitlement to reach and access goods and services in modern armed conflicts. The starting point of this work needs to be not on the operations of humanitarian organizations, but on the daily lives of war-affected populations and their ability to obtain things they need.

3.3 Displacement

Description

This driver encompasses displacement across national borders, including refugee rights issues, as well as internal displacement⁴² in camp, urban and rural settings. Displacement is one of the most significant ways in which civilians are impacted by armed conflict and which exacerbates civilian harm. Given this, and the fact that it is often under-studied in IHL circles, we have given it a relatively lengthy treatment here.

The main practical problem in terms of engaging international law is that displacement in armed conflict frequently occurs on a massive scale as a result of fighting, targeted violence against populations, and loss of access to basic goods and services. There are many instances both within and outside of armed conflict in which it is not IHL, but rather (non-binding) international principles and standards, other bodies of law like IHRL and refugee law, and non-legal approaches, that can offer more for displaced populations. The overarching point we make is that while IHL offers a point of departure, more is needed to respond adequately to all stages of displacement.

Discussion

Taking IHL as a starting point, this body of law theoretically has an important role to play in the prevention of (forced) displacement in armed conflict, averting secondary displacement once people have already been displaced, ensuring appropriate treatment of displaced persons, and outlining the conditions under which they eventually return home.

IHL rules may inform the treatment of refugees who are in the hands of a party to an armed conflict,⁴³ the provision of humanitarian assistance to displaced persons, and provide for (a degree of) physical safety through the rules on the conduct of hostilities. Some of the main reasons for which displacement occurs in armed conflict are also violations of IHL in and of themselves. For example: civilians are directly attacked or ill-treated, they are subject to sexual violence, they cannot access the essential services they need in order to survive, or their property is destroyed.⁴⁴

For those issues that are directly addressed in IHL, greater compliance with and respect for IHL would help to alleviate the problems posed by displacement. At the same time, there are serious limitations in what IHL covers in terms of displacement dynamics. An IHL compliance-focused approach to displacement is insufficient, as we explore below in more detail.⁴⁵

The initial displacement

Forced displacement does not only occur in connection with armed conflict. Populations might be forcibly displaced in non-conflict situations, due to climate change, disasters, development projects, human rights violations, and generalized violence that does not meet the threshold for an 'armed conflict' in IHL. Crucially, populations may sometimes opt to flee in advance of anticipated attacks or before a violent situation becomes an armed conflict, so that they can avoid harm before it occurs. The very decision to go to war could thus trigger massive population movements, yet IHL might not even apply to the situation yet.

Within armed conflicts, some practices which are in fact IHL compliant may still lead to, or be in keeping with, massive displacement internally or across borders. Once again, individuals and families who understand that they are at risk of being harmed (even incidentally) by armed attacks in the context of an armed conflict will flee - because even IHL-compliant operations may endanger them. An example here would be where civilians are anxious that they will be perceived as combatants, or they anticipate that they may become 'collateral damage' in attacks on nearby military objectives.

The effectiveness of IHL in preventing displacement is also related to the conduct of hostilities driver examined above. Displacement caused by fighting is not adequately taken into account by IHL targeting rules. For example, the displacement of civilians is not traditionally factored into the types of civilian harms to be considered in proportionality assessments. Gillard has argued elsewhere that there are potentially ways of giving some weight to displacement in proportionality calculations, as for 'reverberating' or 'knock on effect' of attacks.⁴⁶ This remains an inadequate approach.

There are also exceptions to the IHL prohibition on forced displacement. Article 49 GC IV prohibits deporting or forcibly transferring the civilian population of an occupied territory, in whole or in part, 'unless the security of the civilians involved or imperative military reasons so demand'. Article 17 AP II lays down a similar prohibition in NIACs. Even in cases where these exceptions are met, displacement should only be temporary (i.e. until the reason for the exception ceases). A potential shortcoming of this approach is that it allows belligerents to legitimize displacement as being necessary for civilian security or military reasons – and to maintain that these conditions still apply as time goes on.

Other bodies of law (and non-binding instruments) become important in such situations. The UN Guiding Principles provide that forced displacement will be considered arbitrary where it fails to meet the exception criteria outlined above. In extreme circumstances, forced displacement can also constitute a crime against humanity (CAH) or a war crime under international law.⁴⁷ Displacement would rise to the level of CAH, for example, if it is part of a widespread and systematic policy (without meeting the exception criteria).⁴⁸

Within and outside of armed conflict, human rights law also offers important protections for displaced populations. While there is no one specific rule in human rights law that prohibits forced displacement, protections against forced displacement can be read in. Some core human rights — especially the right to freedom of movement and choice of residence⁴⁹ — implicitly contain a right not to be forcibly displaced. Under IHRL, forced displacement is only lawful under a very strict set of conditions and minimal procedural guarantees must be met. For forced displacement by a state to be justified, for example, the displacement in question must be provided for by law and it must be designed to achieve some identified (and legitimate) aim such as to maintain public order. The displacement must be both necessary and proportionate to the problem at hand, and it must be carried out in a non-discriminatory manner.

Principle 8 of the 1998 UN Guiding Principles on Internal Displacement (see below) further provides that displacement shall not be carried out in a manner that 'violates the rights to life, dignity, liberty and security of those affected'. Where displacement violates rights such as the prohibition on torture, inhuman or degrading treatment, for example, it will be unlawful. The same applies if populations are not informed of the reasons for the displacement and given an opportunity to challenge the decision.

A limitation of IHRL is that, where an armed conflict exists, state authorities may sometimes legally suspend or derogate from certain human rights that could have a big impact on displacement.⁵⁰ In such scenarios, IHL may step in to play an important role because no derogation as such is permitted. This highlights the fact that we need to contextualize IHL's role in (preventing) displacement, rather than side-line this body of law or overlook its importance.

Conditions during displacement

Potential legal violations do not end with the initial displacement. Once civilians are displaced, whether across a national boundary or not, they may (again) be subject to violence, contend with generalized insecurity or crime in their displacement setting,⁵¹ and face problems accessing essential services. The latter problem is compounded if they are without official documentation, which is often the case.

While in the new location, IHL provides that displaced people need to be cared for under appropriate conditions – for example in terms of health and hygiene. IHL also states that ‘all possible’ measures must be taken to protect the shelter and other property of displaced people while they are away.⁵² Beyond these minimalist protections, however, IHL has very little to say in concrete terms about conditions during displacement. This is where other bodies of law again become important.

Historically, Internally Displaced Persons (IDPs) have been more legally vulnerable than refugees to poor treatment during displacement. This is in part because the 1951 Refugee Convention, a universal legal instrument that is binding upon states, has no equivalent for those who are internally displaced. IDPs are thus protected by a combination of IHL, IHRL, regional and domestic law. The UN Guiding Principles are a crucial resource here,⁵³ and they emphasize that states have a central role in preventing, addressing, and responding to displacement. Rather than introduce new rules or laws, the Guiding Principles essentially take relevant IHL and IHRL provisions and tailor them to the situation of IDPs. This approach showcases the kind of blend of IHL and IHRL that is useful when addressing a complex situation like (internal) displacement. A few key provisions of the UN Guiding Principles will now be highlighted to make the point.

First, certain Guiding Principles capture IHL-style rules that are relevant to armed conflict settings. Principle 10 of the UN Guiding Principles provides: 'Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities⁵⁴ are prohibited in all circumstances.' Internally displaced persons shall be protected, in particular, against:

- (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
- (b) Starvation as a method of combat;
- (c) Their use to shield military objectives from attack or to shield, favor or impede military operations;
- (d) Attacks against their camps or settlements; and
- (e) The use of anti-personnel landmines.

Principles 25-27 of the UN Guiding Principles apply the IHL rules on humanitarian assistance specifically to IDPs (e.g. 'All authorities concerned shall grant and facilitate the free passage of humanitarian assistance....to the internally displaced'). Principle 21 of the UN Guiding Principles protects the property and possessions of IDPs, including from acts of pillage, being made objects of reprisal, and 'being used to shield military operations or objectives'.

In addition to these IHL-style rules, some of the Guiding Principles attend to the broader protection needs and human rights of IDPs. Principle 14 of the UN Guiding Principles, for example, provides that IDPs have the right to move freely in and out of camps or other settlements. The engagement with IHRL is important here — and parallels could be drawn for refugee rights under IHRL as well. Displacement may also violate IHRL where the effects of it have a long-term impact on the ability of the displaced person to enjoy human rights. The threshold is likely to be higher in the case that displaced people have a special attachment to their land, for example pastoralists or indigenous groups.⁵⁵

There is a further layer in which efforts by international protection actors to address forced displacement — including through prevention or response — could also have the effect of constraining populations movements. Humanitarian services and protection programming must thus not influence decision-making and movement of individuals and groups.

Return after displacement

A timely return is required under IHL once the reasons for the displacement no longer hold.⁵⁶ Where civilian security or military reasons is the exception under which people are displaced in an armed conflict, IHL provides that displaced persons must be allowed to return (voluntarily) as soon as these conditions no longer apply. Still, the return home may be fraught with further potential legal violations, as when populations are forced to return to an area that is not safe. Once again, it will be important here to draw on IHRL and non-legal avenues of recourse to ensure that the promise of a safe return home is meaningfully realised by displaced populations.

Further questions/suggestions

- ▶ Instead of trying to expand IHL rules and their meaning to better accommodate concerns associated with displacement, it might be advisable to focus on holistic frameworks that connect IHL protections to those already available under other bodies of law such as IHRL. The UN Guiding Principles offer a good example of this kind of practical blending.
- ▶ Those interested in supporting and protecting displaced populations, including IHL advocates, must acknowledge the limitations of IHL to addressing the problem of displacement. So much displacement happens prior to, and outside of, armed conflict, such that IHL does not apply. Some IHL-compliant activity can also induce displacement on a massive scale.
- ▶ More work needs to be done to identify the barriers to high level actors, such as diplomats, donors, and policy makers, grasping the significance of displacement as a form of civilian harm. The next step will be to find ways of better communicating and framing these dynamics for different (legal and non-legal) audiences.
- ▶ Interdisciplinary approaches reaching beyond law are needed in order to address forced displacement. Specifically, sociological and political science approaches that take the lived experience of displaced populations as their starting point can provide a 'bottom-up' view on the everyday lives of displaced persons, helping to ensure that international law is relevant and fit for purpose.

3.4 Conflict-induced hunger

Description

Conflict-induced food insecurity is a key driver of civilian harm. IHL includes a number of rules which, if complied with, offer a first line of defence. It also includes an express prohibition against starvation of the civilian population as a method of warfare, as well as prohibitions on attacks against objects indispensable to the survival of the civilian population. Starvation is also treated as a war crime in the Rome Statute of the ICC, albeit with a somewhat different formulation than the relevant IHL rule.

Discussion

The legal framework

In recent years there has been considerable legal debate as to the scope of the prohibition of starvation of the civilian population, including whether it only covers actions whose purpose is causing starvation or also actions whose foreseeable effect is starvation. While clarification of the rules of IHL is always useful, in most cases it is the failure to comply with (other) rules that drives conflict-induced hunger, rather than the prohibition of starvation.

Many of these other rules are already addressed under the previous headings – such as those regulating the conduct of hostilities and humanitarian access. In analysing and applying those rules greater emphasis should be given to the consequences for food security. Using the rule of proportionality as an example once again, the incidental harm to be considered is death or injury of civilians. Loss of livelihoods, which can in turn lead to displacement and exacerbate vulnerabilities, does not traditionally fall within the harm to be taken into account under IHL. Applying a food security lens to the analysis could allow this latter dimension to be brought out more clearly, for example, in the weight to be given to damage to civilian objects.

As far as the rules on humanitarian relief operations are concerned, during the expert consultations it was noted that IHL simply does not address certain needs that exacerbate food insecurity. These can include loss of access to, or unavailability of, cash and banking services.

As noted in the discussion of humanitarian access above, the situation in Ukraine has highlighted the severe human suffering that arises from siege tactics. In the context of discussions on food insecurity, it would again be important to pay more attention to modalities for concluding humanitarian arrangements such as humanitarian corridors, pauses and evacuations.

Promoting a greater awareness of the impact of military operations on food security

Looking beyond the letter of the law, belligerents could also be encouraged to take measures to minimize the impact of military operations on food security. Valuable guidance in this regard should come from the multi-stakeholder consultation launched by InterAction and Care. On the basis of discussions at international, regional, national, and community levels that project aims to map the patterns of behaviour that contribute to conflict-induced hunger, and to propose practical measures to prevent or minimise their impact. Examples given in preliminary discussions include avoiding military operations during planting or harvesting.⁵⁷

The Security Council and conflict-induced hunger

In May 2018, as part of its work on protection of civilians, the Council adopted Resolution 2417 on conflict-induced food insecurity. Although the only specific follow-up that SCR 2417 requires is enhanced reporting, the resolution was nonetheless an important affirmation of the Council's awareness of this dimension of conflicts. This includes the fact that in certain circumstances, denial of humanitarian access may constitute a threat to international peace and security – the trigger for Council action.

In the four years since the adoption of SCR 2417, progress on its implementation has been mixed. The most evident achievement has been on the normative front, with the adoption in December 2019 of an amendment to the Statute of the International Criminal Court (ICC) to include the crime of using starvation of civilians as a method of warfare also in non-international armed conflicts.⁵⁸ To date eight states have ratified the amendment.

Beyond this, discussions continue on how SCR 2417 could be further operationalised. Already in 2020-2021, the unanimity that existed in the Council in May 2018 on this topic had given way to divisions and tensions over the impact of unilateral sanctions in specific contexts, and whether the Council should be considering climate change – also a key of driver of food insecurity. Since then, the agenda has flagged further. When Niger's term on the Council ended in December 2021 no state replaced it as 'co-lead' alongside Ireland on the topic. Similarly, the UK and the Dominican Republic are stepping down as co-chairs of the Group of Friends on Action on Conflict and Hunger, and they are struggling to find states to replace them.

Russia's invasion of Ukraine – while bringing to the fore the numerous and reverberating connections between conflict and food insecurity – makes any meaningful Council thematic action on this topic even less likely. In the foreseeable future, any progress on this agenda item is likely to occur by giving effect to the relevant elements of SCR 2417 in a country-specific manner.

Commercial actors' concerns

In addition to the actions of belligerents, the private sector also plays a central role in food availability and accessibility. Sanctions can lower the risk appetite of key private actors such as commodity providers, freight companies and financial institutions to operate in certain areas, as can other factors such as security and increased insurance premiums. While, as discussed below, safeguards can be included in sanctions to allay some of the private sector's concerns, some of these other dimensions are beyond the scope of IHL.

Further questions/suggestions

- ▶ Consider the elaboration of a document, bringing together the rules of IHL relevant to minimizing conflict-induced hunger, highlighting how this dimension could be taken into account more fully in all aspects of the implementation of IHL.
- ▶ The above could be coupled with examples of good practices, not addressed in the letter of the law, to guide belligerents to minimize the impact of military operations on food security. It would be important to engage here with the ongoing Interaction/CARE initiative on conflict-induced hunger.

- ▶ We would repeat the point made in the humanitarian access section about developing good practices for the agreement and implementation of 'humanitarian arrangements' such as humanitarian corridors, pauses and evacuations. In addition to the movement of persons these would also specifically focus on arrangements to reduce food insecurity.
- ▶ As far as the Security Council's work on conflict-induced hunger is concerned, one product could be elaborated to guide and encourage it to include conflict-induced hunger considerations in its country-specific work. This would be a 'checklist' setting out the possible measures the Council could take in relation to food insecurity. This would be akin to the Security Council Aide Memoire for the Consideration of Issues pertaining to the Protection of Civilians in Armed Conflict, but it would only focus on conflict-induced food insecurity.⁵⁹

3.5 Sanctions

Description

Ever more frequent recourse is being had to targeted sanctions as an often well-intended tool for achieving various foreign policy objectives without resort to the use of force, including promoting compliance with IHL. The implicit assumption is that, by dissuading resort to armed force or at least promoting compliance with IHL when conflicts are underway, sanctions will minimize civilian harm.

Discussion

While the actual effectiveness of sanctions in modifying behaviour remains open to debate, their adverse impact on humanitarian actors' capacity to operate in accordance with humanitarian principles and as foreseen by IHL is increasingly evident.

Moreover, sanctions also fuel the risk-adverseness of commercial actor providers whose services are necessary for humanitarian action, including financial institutions, commodity providers, freight companies and insurers. In some contexts – Yemen being a case in point – sanctions are undermining commercial imports, which exacerbates humanitarian need and civilian harm to a degree that humanitarian action simply cannot respond to.

This is not a new challenge, and there have been some recent encouraging developments at UN Security Council level - most notably the adoption in December 2021 of a broad exception for humanitarian action to the Afghanistan sanctions that also expressly covers the processing and payment of funds. That said, in view of current Council dynamics, it is individual states and the EU that are likely to be the principal actors adopting sanctions in the immediate future. To date the approach to including safeguards for humanitarian action in Ukraine-related sanctions has been mixed, creating a 'patchwork' of different restrictions that are difficult to navigate (and that in practice may nullify the effect of more forward leaning measures adopted by some states).

Further questions/suggestions

There has been considerable analysis of international practice of bodies that adopt sanctions, most notably at Security Council level. Until now, the regional (i.e. EU) and national dimensions have received less attention. They are increasingly significant in view of Security Council dynamics, and also because there are important comparative lessons to be drawn - which are particularly relevant for the UK now that it is adopting autonomous sanctions following its exit from the EU.

- ▶ Consideration should be given to supporting a consultative process that engages with the different sectors involved in the imposition/enforcement of sanctions or negatively impacted thereby (i.e. states, humanitarian actors, financial institutions, other relevant commercial actors). This process would facilitate a comparative perspective, and allow the elaboration of guidance and good practices in relation to key questions, including:
 - ▶ What processes should exist for elaborating or imposing autonomous sanctions and for designating persons? What issues should inter-governmental impact assessments consider and how can affected sectors, including humanitarian actors, contribute to this process? What processes exist for periodic review of sanctions?
 - ▶ What are the pros and cons of general licences as compared to exceptions? Why do some states, most notably the US, prefer resorting to General Licences rather than exceptions? What provides financial institutions the greatest reassurance – exceptions or General Licences?

- ▶ What are the processes for adopting general and specific licences? Can good practices be elaborated for approaches that balance the needs of all stakeholders – i.e. that do not undermine the effectiveness of the sanctions but safeguard humanitarian action - and expedite the process of reviewing applications for specific licences?
- ▶ In addition to the sanctions regulations themselves, what other materials should be developed to provide clarity as to the nature of the restrictions and to avoid over-compliance?
- ▶ The Security Council has called upon states to 'take into account' the potential negative impact of sanctions and counter-terrorism measures on humanitarian action, and to 'mitigate' it. Consideration should be given to elaborating a compendium of the steps that could be taken at the domestic level to do so.
- ▶ Some of the larger humanitarian actors have access to legal advice to help them understand and navigate sanctions, but most NGOs do not – even though they are just as affected by sanctions. Consideration should be given to establishing a 'help desk' to assist humanitarian actors to identify which measures they must comply with. This could also assist the sector to accurately identify which restrictions in sanctions impede their operations, and contribute to focused discussions on further refining sanctions to avoid such unintended effects.

3.6 Cross cutting issue: humanitarian negotiations

Description

We have identified frontline humanitarian negotiations with armed groups as a cross-cutting theme that influences humanitarian need, civilian harm and IHL compliance in armed conflicts. Clements defines humanitarian negotiations as follows: 'a process through which humanitarian actors seek to secure agreement from parties to a conflict for the safe and principled provision of assistance and protection for civilians facing humanitarian needs'.⁶⁰

Discussion

The UN Stay and Deliver report acknowledges the need for humanitarians to engage with relevant actors to negotiate humanitarian access. It provides: '...the greater an organisation's demonstrated capacity to communicate and negotiate with all relevant actors, the better access and security is achieved for humanitarian operations.'⁶¹ The report also emphasizes the need for a sustained engagement that attends to process: "... acceptance of humanitarian action by local authorities and communities needs to be approached as a process rather than as an event, requiring presence, time, and sustained engagement with all relevant parties, including non-State actors as well as influential political, military, or religious leaders."

In accounts about negotiations, it is important to look closely at whether the aim is humanitarian access (and the security of humanitarian actors), or the protection of civilians – with the latter implicating IHL rules on the conduct of hostilities. Much of the literature on humanitarian negotiations focuses on access, missing the civilian protection aspect. This is problematic, because accounts from the field show that we cannot assume that the two go hand in hand.⁶² In practice, humanitarians will often first engage with conflict parties in order to get access to populations in need. Conversations about the conduct of hostilities and the protection of civilians may be contentious — especially where they imply bad behaviour on the part of armed interlocutors — and humanitarians may not want these protection-oriented engagements to undermine operational access. In a zero-sum equation, humanitarian access wins might come at the expense of protection outcomes (and it will rarely be the other way around).

A further issue is IHL's role in these types of frontline negotiations. It is generally accepted that IHL is relevant to frontline humanitarian access negotiations with armed groups – at the very least as a framing device for the parameters of a negotiation, for example on the provision of humanitarian relief. Nonetheless, recent studies show that most instances of frontline humanitarian access negotiations do not involve explicit appeals to IHL.⁶³ Indeed, many frontline humanitarian negotiators propose that invoking IHL with armed groups would be counterproductive.⁶⁴

Clements articulates the limits of law in frontline negotiations as follows: IHL and the humanitarian principles do not ensure access and the safety of humanitarian workers, and at the same time they constrain what humanitarians can agree to in negotiations.⁶⁵

In addition to the notion that IHL might constrain humanitarian bargaining, humanitarians routinely expect that appeals to law will fail because their armed counterparts will lack familiarity with IHL. In one sense, it is true that IHL concepts need to be communicated carefully and in a language that resonates in the relevant local context. Experts at the 28 March consultation emphasized the importance of translating IHL principles into a local vernacular, appealing to relevant local norms and promoting local ownership of IHL's foundational rules. The Generating Respect Project run by York University and Geneva Call uncovers the important role religious actors play in this respect,⁶⁶ and evidence gathered by Sutton in the Central African Republic, Thailand and Indonesia shows that in different global sites humanitarians do this translation work to make sure their engagements are effective.⁶⁷

While this sort of contextualized engagement is essential, it is also important to track the assumptions that are being made about IHL knowledge. It is routinely assumed, for example, that armed groups will be less familiar with IHL than humanitarians – thus requiring humanitarians to take the lead on the legal piece. While Jackson finds that armed group knowledge of IHL is indeed lacking, she introduces important nuance. Her empirical investigation of ANSA attitudes to IHL reveals an incomplete understanding of IHL amongst armed groups - including the rules governing humanitarian access.⁶⁸ The study finds that larger and more established armed groups are better informed, however, especially where IHL engages a specific issue that they regularly face. While some are frustrated with international law's state-centric nature and they suspect humanitarians defer to host states, these ANSAs hold overwhelmingly positive views of IHL's importance.⁶⁹

Prevailing beliefs about the limitations of armed group knowledge overlook the fact that, in practice, humanitarians might have a poor grasp of IHL. Most humanitarian actors have little to no legal training and very limited formal legal support when developing negotiation strategies in the field. Consequently, IHL may not be playing as robust a role as it could play in framing negotiations and building momentum for outcomes that reduce humanitarian need and civilian harm. While there may be many instances in which law does not need to come into play at all — as when other strategies of persuasion, such as appeals to restraint, would be more effective⁷⁰ — the potential lack of capacity amongst humanitarians to engage with IHL merits attention. Otherwise, the power of IHL to influence behaviour in armed conflicts will lose an important vehicle.

Further questions/suggestions

- ▶ Negotiations for humanitarian access may not necessarily complement or reinforce negotiations for civilian protection. If there is a trade-off between negotiating for humanitarian access and negotiating to secure civilian protection, more nuanced advice should be given to in-country teams that support such negotiations. This presents a live question for donors as to how to address this conundrum.
- ▶ Given the importance of contextualized, country-specific information to the success of negotiations, it may be challenging to articulate more generalized guidance on IHL-relevant strategies. There may thus be value in developing case studies of good practices from different conflict settings, which links to ongoing initiatives of the Centre of Competence on Humanitarian Negotiations (CCHN) in Geneva.
- ▶ The potentially low level of legal literacy amongst humanitarian actors requires attention, suggesting that capacity development is needed — including through trainings and more robust legal supports for field-based staff. This is potentially a space that policy actors could intervene in to have a value-add.

4.0 Future research and policy directions

In addition to the specific proposals outlined here, we would highlight a key limitation of our exploratory study: it focused on international actors and did not draw extensively on the expertise of local populations living in conflict settings. It will be important for any future research initiatives to build in time and resources for this kind of local engagement, especially to better understand needs and harms that might be overlooked by outside actors.

Another overarching point is that, while we have elected to retain a narrow IHL focus for this study, future longer-term projects should direct more attention to other bodies of law that are relevant to armed conflict – especially international human rights law, refugee law, and international criminal law. National and regional legal frameworks will also be important to include for each relevant country context that is being explored.

In what follows, we consolidate the 'further questions/suggestions' passages from each of the drivers identified above, framing them as advice for future initiatives.

Conduct of hostilities

- ▶ Elaborate a compilation of precautions – in attack and defence – that addresses a broad range of adverse impacts of military operations on civilians and specifically includes wider humanitarian needs associated with the conflict.
- ▶ Elaborate a model of the measures that armed forces should implement to give effect to their obligations under the rules on conduct of hostilities, and/or support the development of model civilian casualty tracking arrangements.
- ▶ Consider what approaches or incentives could lead belligerents to restraint – going over and above the letter of IHL. Address urban warfare in particular.
- ▶ Explore further ways of enhancing internal mechanisms (by armed forces and groups) for reducing civilian harm, including mechanisms which might fall strictly outside the scope of IHL.
- ▶ Elaborate good practices on the use of explosive weapons in populated areas to support the EWIPA Declaration.

Ability of humanitarian actors to respond to people in need

- ▶ Elaborate guidance on good practices to give effect to the obligation to allow and facilitate rapid and unimpeded relief operations in armed conflicts.
- ▶ Elaborate good practices on 'humanitarian arrangements' such as humanitarian corridors, pauses and evacuations.
- ▶ Devote attention to how commercial actors can continue to operate in armed conflict. Analyse the key impediments they face, as well as the role international law could play in facilitating continuity of services.

Access to basic goods and services (including humanitarian aid)

- ▶ Support research on the legal basis of organised armed groups' positive obligations to meet the basic needs of civilians and provide them access to services; develop case studies of practical implementation.
- ▶ Elaborate a document based on IHL, IHRL and other relevant bodies of law, that identifies the rules that promote people's entitlement to reach and access goods and services in contemporary armed conflict.

Displacement

- ▶ Support advocacy efforts around displacement by developing more holistic frameworks that connect IHL protections to other bodies of law, such as IHRL, and non-binding initiatives, such as the UN Guiding Principles.
- ▶ Support IHL advocates to better address the conundrum that so much displacement happens prior to, and outside of, armed conflicts – and that some IHL-compliant activity can in fact induce displacement on a massive scale.
- ▶ Identify the barriers to high level actors grasping the significance of displacement as a form of civilian harm.

- ▶ Support 'bottom-up' approaches to forced displacement that centre the lived experiences of displaced populations, in order to identify whether international law on displacement is fit for purpose.

Conflict-induced hunger

- ▶ Elaborate a document that brings together IHL rules relevant to minimizing conflict-induced hunger, putting hunger more firmly on the agenda of IHL implementation.
- ▶ Identify examples of good practices, not addressed in the letter of the law, to guide belligerents to minimize the impact of military operations on food security. Engage here with the ongoing Interaction/CARE initiative on conflict-induced hunger, which shares similar aims.
- ▶ Develop good practices for the agreement and implementation of 'humanitarian arrangements' such as humanitarian corridors, pauses and evacuations – with a specific focus on reducing food insecurity.
- ▶ Support the Security Council to include conflict-induced hunger considerations in its country-specific work, developing a 'checklist' setting out the possible measures the Council could take in relation to food insecurity.

Sanctions

- ▶ Support a consultative process that engages with the different sectors involved in the imposition/enforcement of sanctions or negatively impacted thereby (i.e. states, humanitarian actors, financial institutions/other relevant commercial actors). This process would engage with key issues such as the periodic review of sanctions, the pros and cons of general licenses as compared to exceptions, and how to avoid over-compliance.
- ▶ Elaborate a compendium of steps to be taken at the domestic level so that states can respond to the call of The Security Council to 'take into account' and 'mitigate' the potential negative impact of sanctions and counter-terrorism measures on humanitarian action.

- ▶ Consider the establishment of a 'help desk' to assist humanitarian actors to identify which sanctions measures they must comply with, reducing the information gap between large humanitarian organizations and smaller NGOs with few supports.

Humanitarian negotiations

- ▶ Develop more nuanced advice for in-country teams to support humanitarian negotiations, acknowledging the potential trade-offs between securing humanitarian access and promoting civilian protection.
- ▶ Develop case studies of good negotiations practices from different conflict settings, profiling successful negotiations with contextualized, country-specific information.
- ▶ Address the problem of legal literacy amongst humanitarian actors, supporting capacity building around IHL rules that are most relevant to humanitarian need and civilian harm.

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- 1 IDPs are defined here as 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border' (Guiding Principles on Internal Displacement).
- 2 See the Appendix.
- 3 PAX (2021). On Civilian Harm: Examining the Complex Negative Effects of Violent Conflict on the Lives of Civilians. <https://protectionofcivilians.org/on-civilian-harm/>
- 4 Rand Corporation, Understanding Civilian Harm in Raqqa and Its Implications for Future Conflicts (2022) https://www.rand.org/pubs/research_reports/RR753-1.html
- 5 The concept of 'reverberating effects' will be further examined in Section 3.1 below.
- 6 Pax 2021. See also Orr C (2021), 'Reverberating Effects and International Law', Centre for Civilians in Conflict Blog. https://civiliansinconflict.org/blog/reverberating-effects-and-international-law/?utm_source=rss&utm_medium=rss&utm_campaign=reverberating-effects-and-international-law
- 7 Rand Corporation 2022, p.v.
- 8 See the Living Under Drones Project: peacecouncil.net/pnl/november-december-2012-pnl-819/living-under-drones-a-synopsis
- 9 Gillard E (2019). 'Joint Symposium: Chatham House Report on Proportionality in the Conduct of Hostilities-Some Key Elements', EJIL: Talk! Blog, 28 January 2019. <https://www.ejiltalk.org/joint-symposium-chatham-house-report-on-proportionality-in-the-conduct-of-hostilities-some-key-elements/>
- 10 We have scoped this study to engage mainly with international law, and we thus do not consider domestic/national laws or regional legal instruments in detail.
- 11 Following the ICRC's approach outlined in: Strengthening compliance with international humanitarian law (IHL): The work of the ICRC and the Swiss government, 2015 <https://www.icrc.org/en/doc/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm>
- 12 Gillard E (2016). Chatham House Briefing: Promoting Compliance with IHL. <https://www.chathamhouse.org/sites/default/files/publications/research/2016-10-05-promoting-compliance-ihl-gillard.pdf>
- 13 Article 1 of The First Geneva Convention (GC I), GC II, GC III and IV of 1949.
- 14 This follows the ICRC's approach, which reflects the contemporary general consensus. Also discussed in the 2016 Commentary to GC I of 1949.
- 15 ICTY, Prosecutor v. Kupreskic et al, IT-95-16-T, Judgment, 14 January 2000, para. 517.

- 16 Non-state actors might sign special agreements with state actors they are fighting under Common Article 3 if the latter agrees.
- 17 Crawford E, Part A (2020). *International Humanitarian Law*. 2nd Edition. CUP. Cambridge, UK, p. 273-275.
- 18 Gillard 2016, p.3. They also do not apply in NIACs.
- 19 Crawford and Pert 2020, p. 271.
- 20 Terry F, McQuinn B (2018). *The Roots of Restraint in War*. International Committee of the Red Cross. Geneva, Switzerland, Foreword.
- 21 Geneva Call (2021). *Deed of Commitment on the Prevention of Starvation and Addressing Conflict-Related Food Insecurity*. <https://www.genevacall.org/wp-content/uploads/2021/10/DoC-starvation-FINAL.pdf>
- 22 Slim H (2022). *Solferino 2021*. Hurst. London, UK.
- 23 See, for example, ICRC (2009). *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*; Gillard E (2018). *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House. London, UK.
- 24 Geneva Call (2020). *Conduct of Hostilities by Armed Non-State Actors: Report from the 2020 Garance Talks*. <https://www.genevacall.org/wp-content/uploads/2020/12/Garance-Series-Issue-3.pdf>, p.6 ('An Open Letter to the UNAMA about the Biased Behavior of This Organization', a Response by the Islamic Emirate of Afghanistan to 2012 UNAMA Protection of Civilians report).
- 25 Goodman R (2022). 'Clear Error in the Defence Department's Law of War Manual: On Presumption of Civilian Status'. *Just Security*. 9 February 2022. <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/>
- 26 Bagshaw S (2022). 'Committing to Civilian Casualty Tracking in the Future Political Declaration on the Use of Explosive Weapons in Populated Areas'. *Article 36*. <https://article36.org/wp-content/uploads/2022/04/Article-36-Casualty-Tracking-and-the-Political-Declaration-on-EWIPA.pdf>.
- 27 Prof Noam Lubell at the University of Essex is launching a project to consider 'cumulative civilian harm' that will explore whether and, if so how, international law regulates the civilian harms that accumulate across a war. These harms include not only direct war-related deaths but also mental harm and damage to the environmental, social, economic and cultural fabric of conflict-affected societies. The project seeks to lay out a path for the development of international law and policy to close this gap in civilian protection and better guide military and political decision-makers in how to regulate cumulative civilian harm.
- 28 Article 57(1) AP I.
- 29 Other forms of civilian harm that might arise in urban warfare come from disinformation, cyber attacks and misuse of artificial intelligence. See Centre for Civilians in Conflict (2022). *A Primer on Civilian Harm Mitigation in Urban Operations*. <https://civiliansinconflict.org/a-primer-on-civilian-harm-mitigation-in-urban-operations/>

- 30 ICRC (2022). Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas. <https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>
- 31 Elements of a declaration on the use of EWIPA: <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/>. At the final preparatory meeting on 17 June 2022 the UK and the US stated their intentions to sign the declaration. It will be adopted at an international conference to be held in Dublin in the autumn.
- 32 Geneva Call 2021.
- 33 Concept note on file with the authors.
- 34 Article 71(3) AP I; Rule 56, ICRC Customary IHL Database. The rule in NIACs does not contain a specific provision on the freedom of movement of humanitarian personnel: see Article 18(2) AP II.
- 35 Article 70(2) AP I; Rule 55, ICRC Customary IHL Database. See also Article 23 GC IV 1949, which is narrower than the AP I formulation.
- 36 There has been some work on certain aspects and types of humanitarian arrangements, but nothing comprehensive that studies all of them together. On humanitarian corridors see: CCHN (2022). Setting Up Humanitarian Corridors in Zones of Hostility – Five Essential Lessons. <https://frontline-negotiations.org/document/cchn-policy-bulletin-humanitarian-corridors-mar-2022/>
- 37 Baines E, Paddon E (2012). 'This is How We Survived: Civilian Agency and Humanitarian Protection', Security Dialogue, 43(3): 231–247; Jose B, Medie P (2015). 'Understanding Why and How Civilians Resort to Self-Protection in Armed Conflict', International Studies Review, 17(4): 515–535.
- 38 Morrison C (2018), 'Providing Basic Services Under Siege: Preliminary Insights from Interim Councils and Medical Providers in Besieged Urban Areas of Syria', Environment and Urbanization, 31(1): 309–324.
- 39 Geneva Call 2021.
- 40 This point is elaborated in Jaspers S, Murdoch C and Majid N (2022). Digital Feast and Famine: Digital Technologies and Humanitarian Law in Food Security, Starvation and Famine Risk.
- 41 The Somalia 2020/2021 Humanitarian Response Plan has 'access by populations' as a core agenda item. See Somalia 2020/2021 HRP. www.globalprotectioncluster.org/wp-content/uploads/HCT_ProStrat_Somalia_2020-2021.pdf.
- 42 IDPs are defined here as 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border' (Guiding Principles on Internal Displacement).
- 43 IHL provides that persons under the power of a party to the conflict must receive humane treatment and not be discriminated against. Article 75 AP I.

- 44 This might be legal if it meets the requirements of military necessity.
- 45 For a discussion on two further problems (the different rules in IACs and NIACs, and the limitation of the 'protected persons' concept) see Jacques M (2012). *Armed Conflict and Displacement: The Protection of Displaced Persons and Refugees under International Humanitarian Law*. CUP. Cambridge, UK.
- 46 Gillard 2018. See also the Section 2.0 discussion of 'civilian harm' above.
- 47 Article 147 GC IV; Article 85(4)(a) AP I; Article 7(1)(d), Article 8(2)(e)(viii), Article 8(2)(e)(viii) ICC Rome Statute.
- 48 There are parallel rules and exceptions in cases of natural or man-made disasters (the safety and health of those affected must require their evacuation) and also in large-scale development projects (the displacement must be justified by compelling and overriding interests).
- 49 Drawing on Article 13 of the Universal Declaration of Human Rights (UDHR); Article 12 of International Covenant on Civil and Political Rights (ICCPR). See also the right to an adequate standard of living (which includes food and housing): Article 25 UDHR; Article 11 ICESCR.
- 50 Article 4 ICCPR.
- 51 Paddon Rhoads E, Sutton R (2010). 'The (Self) Protection of Civilians in South Sudan: Popular and Community Justice Practices'. *African Affairs*, 119(476): 370-394.
- 52 Article 85(4)(a) and Article 4(3)(b) AP I; and Article 17 AP II.
- 53 While the UN Guiding Principles are not legally binding, they have been incorporated into the domestic legislation of many states and there is widespread buy-in at the international level for the Principles. The Kampala Convention, adopted in 2009 by the African Union, draws directly on the UN Guiding Principles and it is the first legally binding document for IDPs.
- 54 The 'do not or no longer participate in hostilities' aspect reflects the fact that under IHL, so long as displaced persons do not directly participate in hostilities (DPH), they will be protected as civilians.
- 55 UN Guiding Principle 9.
- 56 Article 49 GC IV Article 49; Rule 132 Customary IHL.
- 57 See also the discussions elsewhere in this study on the 2021 Geneva Call Deed of Commitment on the Prevention of Starvation and Addressing Conflict-Related Food Insecurity. Geneva Call 2021.
- 58 ICC Assembly of States Parties, Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, 6 December 2019, ICC-ASP/18/Res.5.
- 59 OCHA. 'What is the Protection of Civilians Aide Memoire?' <https://poc-aide-memoire.unocha.org/about>.

- 60 Clements A (2020). *Humanitarian Negotiations with Armed Groups: The Frontlines of Diplomacy*. Routledge. London, UK, p. 5. Drawing on the Centre for Humanitarian Dialogue 2004 Handbook and the OCHA Manual on humanitarian negotiations.
- 61 UNOCHA (2011). *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*. https://www.unocha.org/sites/unocha/files/Stay_and_Deliver.pdf
- 62 See generally Magone C, Neuman M and Weissman F (eds). *Humanitarian Negotiations Revealed: The MSF Experience*. Hurst. London, UK; Clements 2020 (discussing the trade-offs of access and protection and arguing that more attention needs to be paid to the protection aspect).
- 63 Grace R (2020). 'Humanitarian Negotiation with Parties to Armed Conflict: The Role of Laws and Principles in the Discourse'. *Journal of International Humanitarian Legal Studies*. 11(1): 68-96; Grace R, Wilkinson S (2016). *Preliminary Report on the Role of Laws and Norms in Humanitarian Negotiations*. Harvard Humanitarian Initiative. Cambridge, MA. <https://www.humanitarianoutcomes.org/publications/presence-proximity-stay-and-deliver-five-years>.
- 64 Sutton R (2019). 'Who is a Civilian? Perceptions of "Civilianness" in the Central African Republic'. *Individualization of War Policy Brief 1*.
- 65 Clements, 2020, p. 35.
- 66 See the Generating Respect Project's findings on the important role religious actors play as negotiators and intermediators in humanitarian negotiations.
- 67 Sutton R (forthcoming). 'Read the Room: Legal and Emotional Literacy in Frontline Humanitarian Negotiations'. *Yearbook of International Humanitarian Law 2022*.
- 68 Jackson 2016, p. 14. The 19 ANSAs examined for that study had prior training in IHL and an existing relationship with the organization Geneva Call. They may thus be more knowledgeable about IHL than other armed groups.
- 69 *Ibid.*, p. 12. See also the initiative theirwords.org/, which contains more than 500 written policy measures and commitments undertaken by 250 armed non-state actors on issues related to IHL and human rights.
- 70 But note Breslawski argues that too much attention has in fact been paid to IHL compliance in humanitarian negotiations; she calls for more focus on 'community acceptance'. Breslawski J (2022). *The Shortcomings of International Humanitarian Law in Access Negotiations: New Strategies and Ways Forward*. *International Studies Review*, 24 (1): 1-15.

Appendix

Expert Consultation on IHL and Humanitarian Need

On Monday 28 March 2022, we hosted a virtual expert consultation to share an early version of our analytical framework with a group of legal, operational, and policy experts. In particular, we invited contributors to reflect on the concept of 'humanitarian need'—and how it arises in armed conflicts—and on the benefits and limitations of a focus on IHL compliance. The reflections of the group are integrated into the study findings, but it should be emphasized that group members do not individually or collectively endorse the findings presented here. The views presented are ultimately those of the authors alone.

The attendees at the consultation were as follows:

- ▶ Ioana Cismas, Reader in Law at York University, Principal Investigator of 'Generating Respect Project'
- ▶ Alexandra Francis, Visiting Fellow of Practice at the Oxford Institute for Ethics, Law and Armed Conflict, University of Oxford
- ▶ Ximena Galvez, Regional Legal and Policy Coordinator, Geneva Call
- ▶ Marc Garlasco, former head of UNAMA Protection of Civilians section and war crimes investigator
- ▶ Ezequiel Heffes, Senior Policy and Legal Advisor, Geneva Call
- ▶ Miles Jackson, Associate Professor of Law, University of Oxford
- ▶ Susanne Jaspers, LSE/Tufts researcher on food insecurity and war
- ▶ Sarah Khan, LLM student Osgoode Hall/former UNHCR
- ▶ Reiseal Ni Cheilleachair, Head of International Advocacy, Concern
- ▶ Sorcha O'Callaghan, Head of Humanitarian Policy, Overseas Development Institute
- ▶ Orly Stern, IHL consultant (Gender and Countering Violent Extremism)
- ▶ Nathalie Weizmann, Senior Legal Officer, UN OCHA, New York

About Us

PeaceRep is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

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