*Proceedings of the Bruges Colloquium*

# Humanity in War: How Can IHL Keep its Promises?
## The Future after 75 Years of Geneva Conventions

**24th Bruges Colloquium**
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**ICRC Delegation to the EU, NATO and the Kingdom of Belgium**

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# PROCEEDINGS OF THE BRUGES COLLOQUIUM

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## OPENING REMARKS

**Knut Dörmann**
Head of Delegation, ICRC Delegation to the EU, NATO and the Kingdom of Belgium

Excellencies, ladies and gentlemen, distinguished experts and colleagues,

On behalf of the International Committee of the Red Cross, it is my pleasure to welcome you to the 2024 edition of the Bruges Colloquium on International Humanitarian Law. Indeed, after a short break in 2023, we are delighted to return this year to celebrate the 25th anniversary of the Bruges Colloquium.

It is a personal pleasure for me to open this year's colloquium, as it also marks the end of my 4.5-year term as the Head of Delegation in Brussels. I have held a special connection to the Bruges Colloquium since I first joined the ICRC 26 years ago. Over the years, I have participated in various roles, as a speaker, panelist, and moderator. During my time as Chief Legal Officer, I made sure that our team in Geneva was always supporting our colleagues in Brussels. It is wonderful to see so many people here, eager to engage in what I hope will be productive and insightful discussions.

Let me also express our sincere thanks to the College of Europe, our partner from the very beginning and for a quarter of a century now, for allowing us to perpetuate this tradition by hosting the Colloquium once again on their premises, in the beautiful city of Bruges. I would like to thank them for their continued cooperation and incredible support.

Some of you who are veterans of the Colloquium may have noticed that the formula has changed in recent years. From a purely face-to-face event, COVID initiated the first change in the organization of the Colloquium, which took place entirely online in 2020. The 2021 edition was the first hybrid edition. While the 2022 edition followed the same format, we had to suspend the organization of the event in 2023 due to budgetary constraints. We are very pleased that this year we are resuming the organization of the Colloquium in its original format, fully in-person, to promote the exchange of views under the Chatham House Rules.

This year again, the Colloquium and the theme chosen for this edition have generated a great deal of interest as we can tell from the large number of registrations, and we hope that participants in the audience will actively engage in the discussions. While this level of interest is certainly due to the reputation the Colloquium has gained over the years, the number and intensity of armed conflicts around the world, the human cost they cause and the issues they raise for the protection afforded by IHL in war, have certainly heightened the focus on IHL in recent months and years.

The theme of this year's Colloquium reflects these concerns. We are looking forward to the many discussions that will take place over the coming days that will explore issues related to "Humanity in War: How Can IHL Keep its Promises? The Future after 75 Years of Geneva Conventions".

Indeed, the 75th anniversary of the four Geneva Conventions of 1949 comes at a challenging time, when we are reminded daily of the importance of upholding humanity amid the horrors of war. More than ever, the rules and principles of IHL applicable in situations of armed conflict need to be properly understood, interpreted, and implemented. Knowledge of the law is therefore absolutely necessary – though not sufficient in itself – to ensure that it is respected. The aim of this edition of the Bruges Colloquium is precisely to place humanity in war at the centre of the discussion and to stimulate collective reflection.

However, the Bruges Colloquium is not a place to discuss specific contexts, but rather a forum for experts to focus on contemporary challenges to IHL. It is an opportunity to take a step back and discuss key challenges through constructive debate and exchange of information in an educational spirit. I am confident that the Colloquium will help to bring these interests together and provide a safe space to address the difficult issues related to the application of IHL in today's armed conflicts.

Ladies and gentlemen,

The original idea behind creating and organizing the Colloquium in the beautiful city of Bruges was indeed to build bridges, to promote understanding and to stimulate debate. We can count again on a great mix of highly knowledgeable experts: renowned academics, experienced practitioners, and emerging voices, who all will join us as keynote speakers and panelists. We are certain that their expert contributions will allow us to have stimulating discussions. And you also have a role to play by taking part in the discussions you will also contribute to the richness of the debates and ultimately the success of the Colloquium.

Allow me to give you a quick overview of what you can expect.

The Colloquium's overall theme will be introduced by leading lawyers from the French Ministry of Defense, NATO and the EU, who will share their thoughts on the very simple, yet provocative and crucial question in 2024: "Does Humanity in War Exist?"

The first panel will then reflect on two fundamental aspects of respect for IHL: implementation and compliance, two topics that have been recently discussed during the 34$^{th}$ International Conference of the Red Cross and Red Crescent. During the discussions, experts will present

their views on how best to translate IHL into action, monitor compliance with IHL and enforce IHL with a view to put an end to impunity.

While these aspects relate to the obligation of States to respect IHL, they are directly linked to the issues that will be discussed during the second panel, which deals with the obligation to ensure respect for IHL. As contemporary conflicts have indeed given rise to significant support from non-belligerent parties, questioning how they could and should leverage their influence to foster respect for IHL by parties to the conflict. Experts will dissect the content of this obligation enshrined in Common Article 1 of the Geneva Conventions. They will also consider the mutually reinforcing role that human rights law can play in this area and discuss the application Common Article 1 in relation to the export of arms.

The third panel, which will conclude the first day of the Colloquium, will examine the concept of humanity in an era increasingly shaped by new technologies that have the potential to worsen tendencies towards the de-humanization of both enemy fighters and civilian populations in today's armed conflicts. Panelists will discuss the principle of humanity in relation to AI-enabled systems in the military decision-making process, information and cyber operations, and autonomous weapons systems, and how to uphold humanity in their development and use.

The second day of the Colloquium will address questions related to the resurgence of international armed conflicts and large-scale military operations. We will examine the question of how humanity can be preserved during high intensity conflicts that involve States and allies and might take place on land, sea, in the air and now in the cyber and space domains, characterized with a high tempo and technological complexity and possibly resulting in great levels of violence, lethality, wide-scale destruction and humanitarian needs.

During the fourth panel, speakers will examine the concept of proportionality under IHL in the context of high-intensity armed conflicts, where its boundaries are increasingly tested through expansive interpretations of the idea of military advantage or a greater acceptance of civilian harm. The panel will explore how the interpretation and application of this principle may have evolved over time and will discuss its concrete implications for the protection of civilians.

Finally, in the fifth and final panel, the experts will examine the risks, challenges and opportunities for humanity in war in areas relating to specific categories of persons, including detainees and prisoners of wars, as well as the wounded, sick and shipwrecked in hostilities at sea, and will explore civil-military coordination and interaction under the concept of "total defence."

I would like to thank all the speakers for their support with preparing this agenda and for their willingness to make an important contribution to advancing these important legal and humanitarian debates. Please remember that this event will be conducted under the Chatham House Rule. And whilst there will be many stimulating and frank exchanges, we ask that these are not driven by political controversies. We want to look into the content of the law and its protective scope without discussing specific conflict situations or occurrences in conflict.

As we proceed, let us never forget that IHL is our shield against barbarity and an expression of our common humanity.

And now, I am glad to give the floor to M. Gilles Carbonnier, Vice-President of the ICRC, for his opening remarks, followed by Ms. Federica Mogherini, Rector of the College of Europe.

Thank you for your attention.

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Excellencies, ladies and gentlemen,

I am delighted to welcome you to the 2024 Bruges Colloquium on International Humanitarian Law, together with our Host, Madam Mogherini, Rector of the College of Europe, and Mr Dörmann, Head of the ICRC Delegation to the EU, NATO and the Kingdom of Belgium.

This year marks significant anniversaries. You cannot have missed that this is the 75th anniversary of the four Geneva Conventions, and that of the College of Europe.

This is also the 25th anniversary of our Bruges Colloquium. Thanks to the combined efforts of the College of Europe and the ICRC Brussels delegation, the Colloquium has overtime become an IHL flagship event in Europe.

As a humanitarian and an academic, I see great value in such conferences, bringing together scholars and practitioners from different sectors and disciplines, to discuss critical IHL challenges. This is all the more important today, in light of current features of warfare and of heightened geopolitical polarization.

The spiral of armed conflict and violence has intensified in most parts of the world, with dramatic humanitarian consequences for millions of people directly impacted.

The civilian population continues to bear the brunt of the suffering. The devastation caused by armed conflicts has prompted increasing numbers of people to leave their homes, with 120 million people displaced and facing the prospect of long-term exile. Hundreds of thousands of persons have gone missing. Countless people are being detained, often outside any legal framework and subject to ill-treatment or inhumane conditions of detention.

On top of some 120 ongoing armed conflicts, unremitting tensions among powerful States have triggered a burst of activity around the potential outbreak of more international armed conflicts. Armed forces are expanding their capabilities and drafting contingency plans for large-scale operations; policymakers are adjusting their national-security priorities, and responses to threats from nations they see as enemies.

All this also occurs in a volatile context where the humanitarian community is facing mounting needs and, at the same time, severe constraints regarding access, security and funding.

The ICRC and other impartial humanitarian organizations are facing humanitarian needs on an epic scale, be it in Gaza, Lebanon, Sudan, the DRC, Yemen or in the Sahel to name but a few. The gap between those needs, and the ability of humanitarian actors to meet them, risks widening further next year. Another major concern relates to hate speeches against specific

groups of people, leading to the dangerous dehumanization of entire populations. The same applies to disinformation targeting humanitarian personnel, which endangers their safety and ability to provide assistance and protection to people on the frontlines.

Ladies and gentlemen,

This bleak picture can only remind us of the utmost relevance of the Geneva Conventions of 1949 in particular, and of IHL more generally. These foundational treaties are a remarkable success in many ways: our delegates witness daily that IHL rules save lives and alleviate suffering. Over the past few years, States have increasingly reaffirmed the importance and relevance of IHL. Armed forces around the world claim that compliance with IHL is part of their core values. They work to mainstream IHL in military planning and operations.

Yet, significant gaps persist. Violations of fundamental IHL rules remain all too frequent. Unfortunately, too little is done to prevent their recurrence and hold perpetrators to account. Belligerents – States and non-state parties alike – must do more to train and discipline their own personnel, and to use their influence to push others to comply.

And even where parties contend that the ways they conduct military operations are compliant, divergent interpretations of the letter of the law can considerably erode IHL's protective power. Self-serving approaches have undermined IHL's primary purpose: to protect civilians and all those placed "hors de combat".

Some States and armed groups have adopted an increasingly lax or expansive vision of what is permissible – and a narrow notion of what is considered prohibited – disrupting the delicate balance between military necessity and humanitarian imperatives.

IHL owes its credibility to its pragmatism in striking that balance right: many of the prohibitions foresee specific exceptions that are intended to ensure that the law takes military necessity into account; that it does not confer humanitarian protection that can be exploited for military advantage. Worryingly, such exceptions are increasingly interpreted in ways that harm civilians. The latter are too easily denied protection against attack, on grounds that they are directly participating in hostilities. Hospitals are targeted, on grounds that the enemy is taking advantage of their protected status. Schools and critical civilian infrastructure dedicated to essential services are too easily stripped of their civilian character, on grounds that they are of some benefit to the adversary. Humanitarian access is impeded, on grounds that relief items could be used for non-humanitarian purposes.

Such lenient interpretations of IHL have multiplied. As a result, the notion of lawful targets is expanding. Civilian casualties become more acceptable through interpretations of the proportionality principle, which define "military advantage" with increasing generosity while

simultaneously excluding reverberating effects from the notion of “incidental harm”. Besides, the obligation to take “all feasible” precautions is considered more as an option than a legal obligation.

Such trends have devastating humanitarian impacts. They must be stopped and reversed.

The same applies to another worrying development: the idea that IHL obligations depend on reciprocity – that compliance by one party is required only if there is compliance by the adverse party.

Ladies and gentlemen, colleagues,

As IHL is under strain and threat, we need to reaffirm its relevance, to recommit to its robust, protective power. Action must be taken to put an end to this downward spiral. If this is not done now, in this moment when so much attention goes to contexts where the Geneva Conventions apply in full, then, when will it be?

We must work to preserve the hard-earned gains that the Geneva Conventions drafters made in the aftermath of World War II, ensuring that such horrors would not happen again, in a strong belief in our shared humanity.

Time has come to recommit to IHL, ensuring that standards are not lowered. This has to be a political priority among all signatory States. To this end, as you may have heard, the ICRC President gathered with six States in the margin of the UNGA to launch a high-level IHL Initiative that is gathering momentum.

It is our firm belief that the main issue remains the failure to comply with IHL norms, not the rules’ inadequacy. States must thus make respect for IHL a political and foreign policy priority.

Ladies and gentlemen,

Even if daily news from the frontlines sound quite pessimistic, such trends can be reversed. There is still a beacon of hope. For example, we just concluded a successful 34th International Conference of the Red Cross and Red Crescent. On this occasion, States parties to the Geneva Conventions gathering with all our Movement’s components have adopted five resolutions by consensus. The first one, entitled “Building a universal culture of compliance with international humanitarian law”, reaffirms States’ commitment to IHL, no matter the changing nature of warfare. The Resolution also commits States to accelerating domestic IHL implementation and promoting IHL observance by other States and non-state armed groups.

You can count on the ICRC. We will continue to do our utmost to effectively fulfil our mandate as guardian of IHL. But we cannot constrain unwilling warring parties to respect IHL. States are the very architects of IHL and must demonstrate the political will to prioritize and enforce those norms.

Excellencies, ladies and gentlemen,

In this context, let me reiterate how much we value this opportunity to engage with government representatives, militaries, international organizations, humanitarians, and academics gathering in Bruges to discuss some of the most pressing legal challenges of contemporary armed conflicts.

I wish you a stimulating and fruitful Colloquium.

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**Federica Mogherini**
Rector of the College of Europe

Good morning,

It is a pleasure to welcome you to this annual conference. Hosting the Bruges Colloquium here has become a long-standing tradition, one the College of Europe is very proud of. Personally, it is an honour to collaborate with the ICRC. In my previous role, I had the opportunity to work with the ICRC and always greatly appreciated the insights and the ability to tackle the most difficult issues, those that no one else seems to be able to address.

All the topics that will be discussed here are connected in one way or another to courses or elements of the curriculum of our students, not only those in the Department of International Relations and Diplomacy but also our Law students, who I am sure will have a strong interest in the themes of the conference.

The work being done by the ICRC – and that hopefully will continue to be done with strength, determination, and patience – is becoming even more crucial in the months and years ahead. The importance of international humanitarian law and the ICRC's field work is growing in times of crisis, conflict and war. Unfortunately, it seems we are heading toward a more polarized and dangerous world, where rules, norms and international law face increasing challenges from all sides. As the ICRC's role grows more important, we all hope for moments of relative peace in which to work, but the current reality makes the ICRC's work even more vital.

We are proud to host this conference once again and grateful for our cooperation. I wish you all a fruitful colloquium and productive exchanges. I am confident this will not only generate valuable discussions but also make an impact on the ground, which is, after all, the most important aspect of our collective work.

Thank you.

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# INTRODUCTORY SESSION

## DOES HUMANITY IN WAR EXIST?

# Keynote address

**John Swords**
Director of the Office of Legal Affairs, NATO HQ

Good morning,

Thank you very much to the ICRC and to the College of Europe for the kind invitation to speak here today. This is not my first time here – I have had the pleasure to attend the Colloquium a number of times over the years. While it is a personal pleasure to be back, it is even more important to see the conference return after a brief hiatus. I am also happy that we have reconvened to discuss such important themes at what truly feels like an important moment, as Federica and Gilles have already alluded to. I am really looking forward to hearing from everyone on the excellent panels, and from all of you in attendance as well.

This introductory session has a rather provocative title “Does humanity in war exist?”, a refrain alluding to or perhaps bemoaning a dark reality: the all-too-many humanitarian crises that we are seeing on the ground in conflicts around the world, as well as speaking to the legal principle of humanity that animates international humanitarian law, and which some believe faces a challenge to its legitimacy. My first reaction to that “provocative” question is to say very clearly and defiantly that, of course, humanity and IHL more broadly do exist and do persist as a matter of law, but also as a matter of fact. Both in war, as the question is posed, but also beyond war. There is no doubt legally that IHL binds signatories and parties to armed conflicts. Notwithstanding breaches of international humanitarian law in various crises, it continues to meaningfully contain and constrain armed conflicts, even in the most difficult circumstances, as a matter of fact. Furthermore, IHL is undiminished as a body of law, and its legitimacy is maintained even when humanitarian crises and breaches to IHL are all too apparent. Arguably, this is when it is most important.

Of course, one could also say that these crises are due to humanity in another sense of the word. As Kant put it, to the “crooked timber of humanity out of which no straight thing was ever made.” Humanity connotes that sense of imperfection. It is why there is war. It is why, unfortunately, there are crises and violations of IHL. But it is also why we have IHL. We still strive for and achieve progress notwithstanding our shortcomings, but with humility and realism as well as compassion. That realism is apparent in the approach of IHL, the way it seeks to balance the various competing interests between military necessity and humanity, notwithstanding the lawfulness or the morality of the resort to force.

However, I do not want to descend into a sterile philosophical debate. IHL is, after all, about praxis. That is to say, practice as distinguished from theory. Therefore, I would like today to outline some of the ways NATO and NATO allies use and implement IHL in their own day-to-

day work. I will use that to segway into the way allies and NATO react to third parties in their conduct of hostilities. I will finish on humanity with reference to the human-centered approach to emerging disruptive technologies.

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How does NATO use IHL in its day-to-day matters? Respect for the rule of law is fundamental to NATO and NATO allies. Alongside a commitment to individual liberty and democracy, it is one of the three founding principles stated in the preamble to the North Atlantic Treaty that was also signed 75 years ago. As far as I am aware, that is the first reference to the rule of law in an international treaty. As a military alliance more specifically, respect for international humanitarian law is a key component of that broader respect for the rule of law. Consequently, you will hear allies express their commitment to IHL in discussions at almost every North Atlantic Council meeting, in the various committee meetings, as well as in press statements of the Secretary-General or the Council, or in the Leaders Summit communiqués. At the Washington Leaders Summit this summer, you heard it again from all 32 allied leaders very clearly. To quote: "*At a time when international law and fundamental norms are challenged, we remain fully committed to international humanitarian law*." More recently, at the 34th International Conference of the Red Cross and Red Crescent, NATO reaffirmed its pledge to work with the ICRC and it restated NATO's commitment to abide by the rules and principles of international humanitarian law.

NATO "walks the walk" as well as "talks the talk". IHL is of course at the heart of NATO operationally. It is integrated fully into standing operational plans, directives, rules of engagement. It is embedded in allies' training and education and in their military justice and disciplinary systems. The commitment to having lawyers available to advise on the application of those rules is shared by all allies, not just those that are signatories to Additional Protocol I. Indeed, NATO's various human security policies, like those pertaining to the protection of civilians, reaffirm the primacy of IHL. They mainstream various soft law considerations into planning and training efforts, and they endorse various good practices over and above IHL, in a broader commitment to humanity. When events unfold, whether in real life or in regular exercises – from short notice exercises, crisis management exercises, to even nuclear exercises as we have been running this week – IHL is also considered at the strategic level with the Secretary-General and the Ambassadors at the North Atlantic Council, or the Nuclear Planning Group. Indeed, casting one's mind back to Operation Unified Protector in Libya, where the UN security authorization was to protect civilians, humanitarian considerations and IHL took on an even more central role both to the decision to use force, as well as considerations of how NATO allies should do so.

IHL is not just viewed as a legal obligation or a shared value that everyone must accommodate as a sort of "necessary constraint." For one, humanity is entirely in keeping with military doctrine. But respect for IHL is so embedded in allies that it has become a sort of "common curriculum," a *lingua franca* of international operations. At my level, when dealing with 32 nations, each with different policy and operational preferences, IHL is actually a unifying concept which can facilitate the reaching of consensus precisely because of that unique shared commitment to it. We see this vividly when my office is tasked by the allies in the Council to give legal advice, including on IHL, whenever NATO is devising strategies and policies on novel issues: the protection of critical undersea infrastructure, cyber, hybrid, outer space, or AI. Often, we convene allies' most senior lawyers to discuss the interpretation and application of the legal framework, including IHL.

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That is how NATO embraces IHL on its own day-to-day activities. What about in relation to third parties? In addition to publicly avowing our own commitment to IHL, the Secretary-General and the allies in the Council will on occasion also publicly call on others to respect international law, and may even publicly call out others for their violations of IHL – as allies have done in respect of Russia in Ukraine. The public denunciations of this nature may be viewed as acts of retorsion against those violating IHL, or indeed as part of allies' duties to respect and ensure respect for IHL. But violations of IHL may also, as a matter of policy, play into practical questions already being considered by individual allies in parallel. For example, after seeing what happened in Bucha, certain allies might have been inclined to provide more meaningful material support to Ukraine. Such events may also play into cause to support stronger accountability processes internationally to complement allies' own universal jurisdiction for war crimes. Certain individual allies may even reserve the right to resort to collective countermeasures in respect of *erga omnes* IHL violations, as well as in respect of aggression. In other words, in an attempt to bring violating States back into compliance with international law by imposing certain costs such as economic costs, I would not be surprised to see further development with the indirect enforcement of IHL and international law more broadly, through instruments of international economic law. But allies, also mindful of their obligations *vis-à-vis* partners and those closer to home, are conscious that they must not aid and assist internationally wrongful acts, including violations of IHL. They put in place measures to mitigate such risks, such as conditions and training. Concerns can also extend to export licensing considerations. But even when there are not specific concerns, the most popular part of NATO's engagement with partner countries in terms of defense capacity building is the military training that we offer. IHL forms a component of such defense capacity building packages which we insist on.

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Finally, a quick word on humanity in emerging disruptive technologies. This is a topic close to my heart, or at least my mind, since we have been working very closely with allies on the intersection between NATO's principles on responsible use of AI and international law, and also because we are in the midst of planning an international conference on international law and biotech. Suffice it to say that, in terms of humanity, allies broadly endorse a human-centered approach to technologies, whether in the field of biotechnology – which is ultimately about human enhancement, or in artificial intelligence, both with respect to the principle of responsibility (in the sense of humans needing to exercise judgement and care to act responsibly) and the principle of accountability (in terms of humans being held responsible or accountable). That is not to unduly constrain the great potential of these technologies, such as AI, but simply is a reflection that international law applies to States through State organs that are in turn comprised of natural persons, humanity. It is the actions of these natural persons, as they use AI and other technologies, that needs to be done compatibly with the obligations incumbent on them. Part of the challenge whilst taking that human-centered approach, is to mitigate the attendant limitations of humanity rather than to exacerbate them. Whether that is helping us to make sense of masses of complex data instantly, to improve decision making and to reduce human suffering, or the need to ensure harmful human biases are not replicated in training data and in algorithms.

Thank you very much for your time.

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# Keynote address

**Laurence Marion**
Director of Legal Affairs, French Ministry of Defense

Ladies and Gentlemen,

Thank you very much for this invitation. It is an honour and a pleasure to be taking part in this prestigious event, dedicated to reflection on international humanitarian law, and to be introducing the theme of “Humanity in War” 75 years after the Geneva Conventions were adopted. I understand this issue, particularly stimulating and essential, as dealing with the conciliation of the imperatives of humanity and the realities of war.

I would like to begin by quoting General François Lecointre, former Chief of Staff of the French Armed Forces. He has often observed that our Western societies, and especially European ones, have allowed themselves to be trapped by the idea that the relationship of extreme force, which goes as far as war, is now archaic. In the preface to his fine book *Entre guerres (Between Wars),* published a year ago, which I heavily recommend you read, he makes these very bright remarks: "*I want to remind you that while we should not wish for war, there are nevertheless battles that we must accept to fight. Getting ready for them and engaging in them, can be done without barbarism, at the price of productive reflection on the meaning of combat. At the price of a self-control that can be achieved through the strength of the collective* (...)".

“Does humanity exist in war?” you have asked. I could also say: how can we ensure that this humanity survives *despite* war?

The demand for humanity in war is certainly a moral imperative, but it must also be translated into a widely accepted legal framework.

Drawing on my experience as Director of Legal Affairs at the French Ministry of Defense, I would like to say a few words about how the law is fully part of the French operational matrix. And then share with you some ideas on the challenges we face in the light of current conflicts.

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When I took up my post two years ago, I was surprised by the importance of IHL for military commanders and by the complexity of the operational issues our ministry’s lawyers deal with. Unlike other legal frameworks, this body of law is not seen as a burden but as a real conceptual framework.

French military leaders now see compliance with IHL not only as a moral and legal duty, but also as a condition for operational success. Indeed, the protection of individuals and the success of military operations are not opposed; they must be considered *together*.

The Director of Legal Affairs is the Minister's special legal adviser, so our communication is direct. I am also in constant contact with the Chiefs of Staff to ensure that the legal framework of operational activity in the field is properly understood.

In the field, NATO Operational Experimentation (OPEX) commanders are assisted by 400 legal advisors (LEGADs). Their presence is praised by all. General officers often tell me that the LEGADs are the most consulted advisers. This excellence is largely due to their specific training, provided by my office and the Armed Forces Central Staff, with rigorous assessments and continuous evaluations.

The recent publication of our first Manual on the Law of Military Operations was an opportunity to reinforce our Ministry's ongoing commitment to the law and its application**.** This operational tool, that we wrote with the Armed Forces General Staff, has no academic pretention but aims to set out French *practice* of IHL. It is available on the Ministry's website, and we just finished translating it into English.[1]

However, things are not always sugar-coated. I have also spoken with officers who question the constraints of IHL and the competitive disadvantage it can represent against opponents without such scruples. In this regard, it is crucial to remember that these rules were established by governments emerging from the devastation of World War II. They had witnessed firsthand the horrors of the war, especially during high intensity conflict and occupation. Moreover, I am convinced that respecting IHL is not a disadvantage, especially when considering not just individual operations, but the broader conflict and the ultimate goal of achieving lasting peace.

Therefore, if respecting IHL is not a competitive disadvantage, the current context surely challenges our interpretation and application of positive IHL obligations.

Strikes on civilian and energy infrastructure, the use of controversial weapons such as anti-personal mines and cluster munitions, and technological advances such as autonomous weapons systems and artificial intelligence, raise specific questions about the application of the existing legal frameworks.

At the same time, the situation in Lebanon and the Gaza Strip calls into question our ability to uphold the principles of humanity, proportionality and distinction in the conduct of hostilities.

Unfortunately, I do not have enough time to discuss all these subjects in detail. Nevertheless, I would like to highlight the three that are central to our concerns.

[1] For the French version, see: Direction des affaires juridiques de l'Etat-major des armées, Manuel de droit des opérations militaires, 2022, available at: https://www.defense.gouv.fr/sites/default/files/sga/Manuel%20de%20droit%20des%20op%C3%A9rations%20militaires_%C3%A9dition%202022.pdf

First, the spread of a culture of IHL is a key issue today. The high-intensity conflicts we are currently witnessing in Ukraine and the Middle East show that the rules and spirit of IHL need to be understood and implemented by more than just professional armies. It is therefore crucial to help disseminate IHL in peacetime to the whole of civil society.

People need to know what is acceptable and what is not in times of war, regardless of the underlying reasons that led to war or who the opposite party is. The French Military Operations Manual I mentioned earlier, as well as our contribution to the development of an educational kit on IHL for secondary school teachers, contribute to educating the public.

Anticipating and preparing for tomorrow's challenges is another imperative. For example, the return of international armed conflict on the European territory requires us to anticipate and rediscover a body of rules rarely used by armed forces of our generation. This is the case, for instance, with the legal framework applicable to the management of prisoner of war camps. To this end, we must prepare ourselves to comply with the requirements of the Third Geneva Convention, including the establishment of a National Information Bureau, the preparation of procedures for the management of prisoners and the adaptation of infrastructure to the specific needs and rights of these detainees in the event of a high-intensity conflict.

The emergence of new technologies, such as artificial intelligence, also raises new questions about how to ensure compliance with IHL. France strongly defends the maintenance of human control over these systems, in order to ensure accountability and responsibility within the military chain of command and control. Human control is also essential to ensure that the development and the use of these systems are in compliance with IHL. In this sense, it is essential that legal advisers play a central role in decision-making by advising the commander on the lawful use of these new technologies.

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In conclusion, upholding the "law in war" is a duty of humanity. This requires sustained commitment, constant vigilance and constructive dialogue between the various military, legal and humanitarian actors. It requires a common language that is understood by all.

Our role as Legal Affairs Directorate is crucial in this regard. I am therefore delighted that this year we will have several opportunities to address all these issues.

Last month, France sent a large delegation to Geneva for the International Conference of the Red Cross and Red Crescent, which was another way of demonstrating our commitment and our desire to support the ICRC's resolutions, in particular those aimed at establishing a universal culture of respect for IHL.

We are also marking significant milestones this year, including the 75th anniversary of the Geneva Conventions and the 70th anniversary of the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.

The coming years promise to be particularly exciting thanks to the high-level political initiative (”Global Initiative”) launched under the auspices of the ICRC. This initiative brings France together with Brazil, China, Jordan, Kazakhstan and South Africa to promote and strengthen the fundamental principles of humanity in war. This unprecedented collective effort, fully supported by France, is remarkable for its scope and diversity. It aims to address the complex challenges of modern armed conflicts, where the rules of IHL are often put to the test, such as the definition of military objectives or naval warfare.

I am positive that the coming two days here in Bruges will help us considerably in our reflections to consolidate and encourage this positive dynamic.

Thank you for your attention.

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# Video keynote address

**Olof Skoog**
EU Special Representative for Human Rights, International Humanitarian Law and International Criminal Justice

Good morning,

I would like to thank the ICRC for inviting me to share this message with you, and I am sorry I was not able to attend in person this very timely colloquium.

“Does humanity in war exist?” Wars have been fought for centuries worldwide. Generations after generations, men, mainly men, have taken arms, albeit with evolving means and technologies, to expand territory or power or for fear, perceived or genuine. Wars, as it appears, are human, yet too often they fail to be humane. There is only one letter difference between the two, but that one letter really impacts the life, well-being and dignity of so many people around the world. That one letter is the reason why we are here today.

Modern IHL was born from the realization that humanity is oftentimes a casualty of war. We have long known that despite efforts to preserve peace and to prevent armed conflicts, wars will not always be averted. In order to minimize their impact on civilians and ensure that fundamental principles of humanity and dignity are maintained, IHL sets limits to how wars are waged. It protects civilians and ensures the unimpeded delivery of life-saving humanitarian aid.

Today, there are more than 120 conflicts worldwide. The grueling images and reports emerging from Gaza, Ukraine, Sudan, Yemen and elsewhere dramatically illustrate the continued importance of IHL rules and warrant that they be reiterated, implemented by all belligerents and enforced by all of us. Not only are civilians, including children and journalists, not protected, they are being targeted. Medical and humanitarian personnel and infrastructure, too. Civilians are being denied the goods and services that are essential to their survival, while humanitarian assistance is restricted. Lives are lost and human dignity is violated, not for lack of rules, but due to a failure to respect existing ones. But for IHL to be respected, it needs to be widely known and fully understood. Disseminating the rules of IHL is a challenging prerequisite for its implementation. The crucial role of training and education is highlighted in the Resolution recently adopted by the 34th International Conference on the Red Cross and Red Crescent.[2]

[2] 34th International Conference of the Red Cross and Red Crescent, ‘Building a universal culture of compliance with international humanitarian law’, (34IC/24/R1, October 2024), available at: https://rcrcconference.org/app/uploads/2024/11/34IC_R1-IHL-EN.pdf.

IHL must be ingrained in all segments of societies, from schools to courts, from legal advisers to the military. It is the primary responsibility of States, but the EU does contribute through funding training programs, through public diplomacy and through its civilian and military missions around the world. Once rules are known, they must be interpreted in good faith. IHL's legitimacy requires that its principles be applied *ab initio* as an “IHL reflex” in the planning and conduct of hostilities, rather than *ex post* to legitimize actions through a distorted prism. As we celebrate the 75th anniversary of the Geneva Conventions, the continued relevance of IHL rules and principles must be reiterated.

Current conflicts illustrate a growing reliance on weapon systems with varying levels of autonomy, but also on systems that integrate Al into military decision-making. The use of technologies for tasks traditionally performed by humans must not imply the dehumanization of warfare. Preserving human responsibility and accountability, ensuring appropriate human control and implementing risk mitigation measures will be essential. For the European Union, it is absolutely imperative that weapons, whether they are low-tech or high-tech, and no matter how autonomous they may be, continue to respect international law and IHL in particular. On Monday this week, the EU and its Member States adopted a declaration on a common understanding of the application of international law to cyberspace. We reiterated the view that international law, including IHL, is fit for purpose in the digital age. As many essential civilian services are increasingly reliant on outer space systems, the potential human cost of military space operations becomes increasingly worrisome. There too, the EU stresses that international law, including IHL, is fully applicable.

As IHL is being challenged both on the ground and in the face of new technologies, respect for IHL must become a political priority at a global, regional, and domestic level. The EU welcomes initiatives such as the ICRC’s Global Initiative on IHL, which precisely seeks to galvanize political commitment. To be effective, it is crucial that such commitment translates into action. Accountability is key to IHL implementation. Impunity spreads distrust and further weakens the multilateral system. It is essential that we, including the EU, hold all parties to the same standards. Since Russia's invasion of Ukraine, there has been unprecedented momentum and mobilization on accountability. The same mobilization should prevail for conflicts in other parts of the world. The credibility of the international criminal justice system depends on it. The EU is wholly committed to fighting impunity and to promoting international criminal law and justice. We firmly support the International Criminal Court and are determined to defend it. We continue to advocate for the universality of the Rome Statute.

In recent times, we have witnessed dehumanization and horrific disregard for the protection of civilians. The pain of the victims, whether it occurs in Ukraine, Israel, Gaza, Ethiopia, Sudan or elsewhere, should resonate with us, not because of our history, our culture, our traditions or our faith, but because of our shared humanity. In all conflicts and crises, I see the same pain

in all parents' eyes, the same despair on all children's faces. Human rights law and IHL apply to all, without distinction of colour, race, religion, origin, gender or otherwise.

Seventy-five years after the Geneva Conventions were adopted, examples of violations still abound. But we must remain hopeful. Compared to the centuries of conflicts that predated the adoption, 75 years is still young. Let this 75th anniversary be an opportunity to have humanity prevail.

Thank you.

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# PANEL 1

# STRONGER TOGETHER: 75 YEARS OF IHL IMPLEMENTATION

CHAIRED BY FRÉDÉRIC CASIER, LEGAL ADVISER IN INTERNATIONAL HUMANITARIAN LAW, BELGIAN RED CROSS (FR)

# Fortifying humanity: promoting respect for IHL and translating the law into action

**Anne Quintin**
Head of the Advisory Service on IHL, ICRC

**Summary**

*Dr. Quintin focused on translating IHL into action, stressing the need for domestic implementation, operationalization, and strong political commitment. Implementing IHL is not optional; it is essential to ensure that its rules have a concrete impact. National IHL committees, transnational legal processes, and voluntary reports are examples of mechanisms that can help create a "virtuous cycle" where IHL norms are reinforced, and institutions and their agents become drivers of compliance. However, adopting legislation alone is not enough; obligations must be effectively operationalized to ensure respect for IHL. Challenges persist, including a lack of political commitment at the highest leadership level, exceptionalist narratives, and overly permissive legal interpretations that undermine IHL's protective function. To address these issues, the ICRC, along with six States, launched in 2024 the Global Initiative to galvanize political commitment to IHL, aiming to strengthen political will and reaffirm the fundamental importance of respecting IHL in all circumstances.*

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This intervention focuses on translating the law into action. It examines the importance of IHL implementation, highlights good practices, and provides a critical perspective on its application. Specifically, it outlines the key elements that the ICRC Advisory Service on IHL considers necessary for implementation to effectively lead to respect for the law. Too often, there is a missing link: while IHL implementation occurs at various layers within society, violations of IHL persist on the ground.

## 1. Why invest in IHL implementation at domestic level?

Implementing IHL is not optional, it is an obligation. However, lawyers know that an obligation does not necessarily ensure action. The fundamental reason why implementation is crucial is simple: without domestic laws and structures, most rules of international law – particularly those of IHL – remain without effect. Many norms are not self-executing. Implementation also has a practical dimension: it is difficult to determine how to apply IHL rules if they are not translated into domestic legislation, policies, and practices. In other terms, clear guidance is needed on how to operationalize these rules.

Beyond being an obligation, the importance of implementation can also be explained by theories of international relations, particularly with regards to the reasons why States comply

with international law. One theory of compliance is linked to the concept of "virtuous cycle" through the institutionalization of norms: by establishing domestic institutions tasked with implementing IHL, States create a virtuous cycle in which these institutions and their agents become vectors of compliance.

A key example of this institutionalization of IHL at the domestic level is the creation of national IHL committees or similar entities. These inter-ministerial structures, established at the discretion of States (as there is no obligation to create them), often operate within the executive branch. They bring together representatives from various ministries (foreign affairs, defense, justice, and interior) to ensure that IHL is adequately implemented across legal, policy, and operational spheres. These committees train local actors on IHL and help foster a culture of respect. In the best cases, they also assess gaps in the domestic system and make recommendations. The ICRC has worked extensively with national IHL committees, with 119 currently in existence worldwide. While not all are equally effective, those with a clear plan of action and mandate do have an impact. They ensure that IHL is integrated into domestic practices, shape expectations and influence behaviors, which ultimately creates incentives for compliance. By setting standards for individuals and institutions, they create a "self-fulfilling environment" in which domestic actors (in particular civil servants, courts, parliamentarians, and the military) become agents of enforcement. Their efforts reinforce the legitimacy of norms and perpetuate the cycle.

Beyond the domestic virtuous cycle, transnational legal processes further reinforce implementation. In international relations, these processes occur when public and private actors interact in various fora – at international or regional levels – to discuss and interpret rules, thereby creating another virtuous cycle that strengthens the internalization of international norms. Peer-to-peer interactions create pressure for consistency in implementation across the globe. The more States interact and share good practices, the more behavioural patterns and norms emerge, which can then be internalized and incorporated into domestic legal systems. For this reason, the ICRC places significant emphasis on International Conferences of the Red Cross and Red Crescent. A pivotal moment in IHL implementation occurred in 1995 at the 26th International Conference, which led to the creation of the ICRC Advisory Service on IHL.[3] This marked a recognition that domestic implementation of IHL is a key condition for ensuring respect when an armed conflict erupts. Since then, every International Conference has adopted resolutions or plans of action on how to internalize IHL at the domestic level.

[3] 26th International Conference of the Red Cross and Red Crescent, 'International humanitarian law: From law to action: Report on the follow-up to the International Conference for the Protection of War Victims', (Resolution 1, December 1995), 58 et seq, available at: https://international-review.icrc.org/sites/default/files/S0020860400073381a.pdf

A related good practice is the development of voluntary reports on domestic implementation of IHL. Since the 2019 International Conference, this practice has expanded, particularly following the adoption of the Resolution "Bringing IHL Home," which encourages States to share good practices at the domestic level.[4] An open pledge was also adopted and joined by multiple States and national societies, who committed to reporting on a regular basis on domestic IHL implementation.[5] This creates a forum for dialogue, fostering both the belief in implementation but also the expectation of concrete results. States use voluntary reports to identify common good practices and address challenges. While implementation is not always easy, sharing experiences fosters a community of mutual support.

It is crucial to underline that domestic implementation of IHL is a constant effort. International law evolves, and maintaining resilient laws, policies, and practices is fundamental to ensuring respect for IHL. Any decline in investment in domestic implementation risks creating a downward spiral, breaking the virtuous cycle. Even in States where implementation appears complete, it remains essential to continuously assign responsibility to individuals and institutions to uphold these obligations.

## 2. Is domestic implementation sufficient?

Despite these efforts, the reality on the ground remains stark. The promise of IHL remains unfulfilled, with compliance with the most basic norms being alarmingly insufficient. Today's conflicts reveal that IHL faces significant challenges in providing effective protection for people affected by armed conflict. So, what are the obstacles to domestic implementation? As already mentioned, implementation is not only about the adoption of laws but also about their operationalization.

Some examples:

- *Urban warfare and passive precautionary measures*. A fundamental IHL rule in the conduct of hostilities is the requirement to take passive precautions to protect civilians against the effects of attacks. This includes avoiding locating military objectives in densely populated areas. While this rule is clear, failing to relocate military objects away from urban areas during peacetime creates a situation where, even if armed forces are trained to respect IHL, civilian harm becomes inevitable.

[4] 33rd International Conference of the Red Cross and Red Crescent, 'Bringing IHL home: A road map for better national implementation of international humanitarian law', (33IC/19/R1, December 2019), available at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf.

[5] 33rd International Conference of the Red Cross and Red Crescent, 'Open Pledge to Report on the Domestic Implementation of International Humanitarian Law', available at: https://rcrcconference.org/pledge/open-pledge-to-report-on-the-domestic-implementation-of-international-humanitarian-law; more recently: 34th International Conference of the Red Cross and Red Crescent, 'Open Pledge to Report on the Domestic Implementation of International Humanitarian Law (2024-2028), available at: https://rcrcconference.org/pledge/open-pledge-to-report-on-the-domestic-implementation-of-international-humanitarian-law-2024-2028/.

- *Accounting for people during armed conflict.* States are required to establish a National Information Bureau (NIB) to receive and forward information related to protected persons in the power of one of the parties to the armed conflict (arrested, detained, interned, but also wounded and deceased). This Bureau, which may also be established in non-international armed conflicts, is an essential institution. However, if its creation is not addressed in peacetime, coordination becomes impossible once conflict erupts. Effective implementation requires to "plant the seeds in advance."

One of the major obstacles remains the lack of political commitment to the respect of IHL at the highest leadership level. Even with the right laws and institutions in place, signals from top decision-makers matter. If political or military leaders suggest that respect for IHL is optional in certain circumstances, compliance deteriorates rapidly. This is why narratives built before and during wartime are crucial. Exceptionalist discourses, for example in the counter-terrorism framework, or discourses that frame adversaries as undeserving of legal protection, undermine IHL's fundamental principle that the dignity and humanity of all individuals must be respected. Narratives based on State survival and the idea that "the end justifies the means" are particularly dangerous. Political commitment must reinforce that IHL is designed for the worst situations (war) and is not merely an aspirational ideal.

Finally, a more insidious issue – because it disguises itself as compliance – is the reliance on overly permissive interpretations of IHL. This dynamic can lead to the opposite of a virtuous cycle, where IHL norms are internalized based on interpretations that undermine their fundamental purpose. For instance, some extend the concept of proportionality to its outermost limits, justifying excessively high numbers of civilian casualties on the basis that a military objective is of high value. When proportionality is framed in this manner, it risks distorting its intended protective function and eroding compliance with IHL. Another example arises from the nature of many IHL rules, which contain a primary obligation or prohibition with narrowly defined exceptions directly built into them. The primary prohibition must remain the guiding principle (for example, civilians and civilian objects must not be targeted, and hospitals must be protected). Exceptions, by definition, should remain limited and not be allowed to "become" the rule. If military training places disproportionate emphasis on exceptions rather than on primary obligations, it fosters a culture not of compliance, but of exceptionalism where the objective is to identify loopholes to circumvent the rule.

### 3. What more can be done?

The ICRC has drawn lessons from these challenges, which is why it has launched the Global Initiative to Galvanize Political Commitment to IHL ("Global Initiative").[6] This two-year initiative, launched in September 2024 together with six States (France, China, Kazakhstan, South

[6] For more information, visit: https://www.icrc.org/en/global-initiative-international-humanitarian-law.

Africa, Brazil, and Jordan), aims to build political commitment and generate concrete recommendations for improving respect for key humanitarian rules and to develop common understandings among parties to armed conflict. In addition, as these recommendations will primarily focus on the working level – those responsible for implementing and applying IHL – they will be reinforced by a clear and unequivocal message from global leaders affirming that IHL must be respected by all, in all circumstances.

**Conclusion**

Over the past 75 years, since the adoption of the Geneva Conventions, history has shown that when respected, IHL works. While the adoption of laws implementing IHL is essential, it is not sufficient: it must be operationalized and supported by strong political commitment. Ensuring respect for IHL is a shared responsibility, and we all have a role to play in advancing this message.

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# Yielding vigilance: monitoring compliance with IHL – A State's perspective

**Mirjam De Bruin**
Senior Advisor, Dutch Public Prosecution Service – Center of Expertise on Military Criminal Law

**Summary**

*Ms. De Bruin examined the Dutch legal and procedural framework governing criminal cases involving military personnel. In the Netherlands, armed forces are subject to both civilian and military criminal law, with the East Netherlands District Court handling such cases through a dedicated military chamber. The Dutch Public Prosecution Service plays a central role, relying on After Action Reports (AARs) to assess the legality of the use of military force. These reports are reviewed by military police and prosecutors to determine whether further investigation is warranted. If an AAR indicates unlawful use of force or severe collateral damage, a fact-finding inquiry or criminal investigation may follow. Despite challenges, such as restricted access to incident locations, the system seeks to uphold accountability when force is used while ensuring legal certainty for Dutch soldiers.*

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In the Netherlands, all of its armed forces are subject to the civilian Criminal Code. Additionally, the Dutch Military Criminal Code applies to all Dutch military personnel, although it does not function as a *lex specialis*. In principle – with specifically codified exceptions[7] – any criminal case involving a member of the Netherlands armed forces is assigned to one specific criminal court in the Netherlands, which is the East Netherlands District Court in the city of Arnhem.[8] This district court is civilian in nature, but it has a military chamber, which includes both civilian judges as well as a judge with a military background. The Netherlands Prosecution Service in the aforementioned district is entrusted with the prosecution of all criminal offences committed by Dutch armed forces. The specialized team at the Prosecution Service that prepares these cases includes a Center of Expertise on Military Criminal Law.

When the Dutch military uses force in a military operation, a so-called After Action Report ("AAR") is written. An AAR is written and signed by the operation's commander or a mandated commander, who shares it within the Dutch operational military hierarchy. It is therefore worth mentioning that an AAR is of a military character. Each AAR offers an overview of the facts and circumstances within which force was applied. It also contains an appreciation from an operational tactical point of view, and what is called the commander's assessment. The latter

[7] Article 4 paragraph 1 jo. 2 of the Dutch Military Criminal Procedural Code ('Wet militaire strafrechtspraak'), and Article 17 paragraph 1 jo. 2 of the Dutch Military Criminal Procedural Code.
[8] Article 2 paragraph 1 of the Dutch Military Criminal Procedural Code.

reviews if the use of force was lawful under the applicable rules, e.g. IHL, International Human Rights Law (IHRL), official instructions for the use of force or Rules of Engagement (RoE), etc. Also, an AAR informs about (possible) collateral damage caused by the use of force.

The Prosecutors in the East Netherlands District responsible for cases involving Dutch military personnel also have a role in this AAR procedure.[9] On the basis of the law the Public Prosecution Service is charged with "[…] the criminal enforcement of the legal order […]."[10] In light of this, internal department of Defense regulations in the Netherlands lay down that a copy of every AAR is shared with military police investigators of the Royal Netherlands Constabulary ("Koninklijke Marechaussee"). As a next step, the military police investigators will share their copy with the responsible Prosecutors in Arnhem, together with their own findings about the AAR.

Receiving an AAR is essential for the Prosecutors charged with military affairs to determine at an early stage if the described use of force requires additional information, or if an investigation into the incident is needed. Therewith, the Prosecutors contribute to the enforcement of the law applied by military personnel, which essentially means monitoring compliance with IHL. On the basis of the AAR and the military police investigators' findings, the Prosecutors will determine independently what kind of next steps – if any – may have to be taken.

If there is no report of a crime nor an indication in the commander's AAR that a use of force was unlawful, the Prosecutor will in principle not investigate the lawfulness of that use of force. Should an AAR include a commander's assessment stating that a use of force was deemed "not in accordance with the official instructions/IHL/RoE", i.e. "unlawful", the commander in question is obliged to report a crime. Any Dutch commander who is aware of a criminal act has the obligation to file a report with the military police, according to Dutch military disciplinary law.[5] The military police investigators will inform the Prosecutor of such a crime report without delay. As a next step, the Prosecutor will decide whether to initiate a so-called "orientation inquiry for more information" prior to a criminal investigation, or if a criminal investigation will commence right away. In the latter case, this means the military personnel who used force will be considered suspects, and they will be granted their rights. In such instances, the commander of the unit that used force will be interviewed as a witness.

Another scenario with an AAR may involve a commander reporting that a use of force has caused (possible) collateral damage with severe consequences, such as civilian casualties, but the commander does not report a crime. In such a scenario, the military police investigators

[9] Based on 'Instructie handelwijze bij geweldsaanwending door militairen', 01-03-2023, available at: https://www.om.nl/onderwerpen/beleidsregels/instructies/specialistisch/instructie-handelwijze-bij-geweldsaanwending-door-militairen. No English translation is currently available.

[10] The author's own translation of Article 124 Wet op de Rechterlijke Organisatie: 'Het openbaar ministerie is belast met de strafrechtelijke handhaving van de rechtsorde en met andere bij de wet vastgestelde taken.' Article 78 paragraph 1 of the Military Disciplinary Code ('Wet Militair Tuchtrecht').

will also immediately inform the Prosecutor. It is standard policy in the Netherlands that an AAR which references (possible) collateral damage with severe consequences will automatically start a fact-finding inquiry led by the aforementioned Prosecutor.[11] Such a fact-finding inquiry is distinctly different from a criminal investigation: it is aimed at gaining an independent understanding of the context and facts of the incident, rather than an investigation into the lawfulness of the incident and potential criminal liability. Without a crime being reported, there is no basis to question a commander's assessment that the use of force was applied lawfully.

In a fact-finding inquiry the Dutch military personnel involved in the use of force will not be questioned as suspects, but as witnesses. Given their knowledge of the facts on the ground, commanders will also be interviewed as witnesses. Unless the inquiry leads to information to conclude otherwise, no criminal investigation will be commenced. Obviously, if facts emerge that constitute (indications for) a criminal act, then a criminal investigation may still be launched.

It goes without saying that there are other ways – aside from taking note of an AAR – to inform the Dutch Public Prosecutor responsible for military cases of an alleged unlawful use of force by Dutch armed forces. Victims and/or their relatives/next of kin, the media or non-governmental organizations can report a crime or an incident they believe requires a fact-finding inquiry or investigation. In fact, anyone who believes that an unlawful use of force by Dutch armed forces has occurred can report a crime to military police investigators.

Additionally, under Dutch criminal law, e.g. family members of victims have the right to lodge a complaint to the appeals court[12] if they believe their family member's case should have been investigated and brought before court. Furthermore, if new information regarding a particular incident comes to light at a later stage, the Dutch department of Defense will inform the Public Prosecution Service without any delay.

As no system is perfect, challenges may also be mentioned. For all types of inquiry or investigation the facts on the ground could come with limits to investigate, simply because the location of the incident is not accessible. It is essential that the facts and circumstances within which force was applied are well documented, including when an investigation on the ground is deemed (temporarily) impossible. Such documenting can contribute to the monitoring of compliance with IHL.

[11] Dutch Public Prosecution Service, 'Instructie handelwijze bij geweldsaanwending door militairen', 1 March 2023, available at: https://www.om.nl/onderwerpen/beleidsregels/instructies/specialistisch/instructie-handelwijze-bij-geweldsaanwending-door-militairen. No English translation is currently available.
[12] Article 12 of the Dutch Criminal Procedural Code ('Wetboek van Strafvordering').

The procedure outlined above aims to contribute in such a way. Using force entails an obligation of accountability for the armed forces that apply that force. It also puts an obligation on the Dutch State to provide legal certainty for Dutch soldiers who use force in the context of their tasks and in accordance with the law.

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# Justice upheld, enforcing IHL and limiting impunity

**Jonas Périlleux**
Attaché, Belgian Ministry of Justice

**Summary**

*Mr. Périlleux examined Belgium's approach to enforcing IHL and limiting impunity for core international crimes, focusing on three key components: the adoption of appropriate legislation, the establishment of a specialized judicial body, and the creation of a dedicated IHL unit within the Ministry of Justice. Belgium's legal framework, which incorporates war crimes, genocide, and crimes against humanity into its Penal Code, aligns with international standards including the Rome Statute. The Federal Prosecutor's Office, through its IHL section, is responsible for prosecuting these crimes. Additionally, the IHL unit within the Ministry of Justice plays a vital role in coordinating international judicial cooperation, facilitating and organizing trials preparations, and supporting the prosecution process. Together, these structures have not only strengthened Belgium's capacity to implement IHL at the national level but also reinforced its commitment to international cooperation and accountability in prosecuting perpetrators of serious international crimes.*

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First of all, I would like to thank the organizers, the ICRC and the College of Europe, for having invited me to speak in this panel. It is a great pleasure and an honour to address this prestigious audience. Before starting I would also like to make a disclaimer stressing that, although I am here because I am working at the Belgian Ministry of Justice in the field of IHL implementation at national level, I will be speaking in my own capacity so the views expressed cannot be attributed to my employers.

That being said, I am pleased to give a few words about "Justice Upheld: Enforcing IHL and Limiting Impunity" from a *justice* point of view and to share the Belgian experience in that regard. Starting with a reference to the most recent Belgian case law regarding core international crimes, I will outline the legal and practical architecture put in place in Belgium to fight against impunity for such crimes, namely: the adoption of a proper legislation (1), the establishment of a specialized judicial body in charge of prosecutions for core international crimes (2), and the creation of a dedicated IHL unit within the Ministry of Justice (3).

## Introduction

A few months ago, on the 6th of June 2024, the Brussels' Court of appeal popular jury (*Cour d'assises*) found Mr. E.N., a Belgian-Rwandan man of 65, guilty of crime of genocide and war crimes committed in Rwanda in 1994 and, consequently, condemned him (on the 10th of June)

to 25 years of imprisonment. It was the seventh trial held in Belgium, since 2001, concerning the genocide committed in Rwanda in 1994[13] and the eighth on core international crimes.[14]

I would like to draw from this example to raise the following question: *what must a State do to be in a position to deliver justice for serious violations of IHL, and other core international crimes, and to meet its obligations in this regard*? As announced, I will suggest a threefold answer.

### 1. A proper legislation

There is, first, the need for each State to have proper domestic law on core international crimes. Belgium adopted its first legislation on war crimes in 1993.[15] Following the adoption of the Rome Statute of the International Criminal Court ( "the ICC"), this law was completed, in 1999, with articles on crimes against humanity and the crime of genocide.[16] Those provisions were subsequently included in the Penal Code itself, in 2003, in a Title 1*bis* on "*serious violations of IHL*" containing article 136*bis* on the crime of genocide, article 136*ter* on crimes against humanity, and article 136*quater* on war crimes.

Those articles are the basis for prosecutions of core international crimes in Belgium.[17] In my view, this piece of legislation meets the conventional and customary obligations of States to adopt legislation incorporating those crimes into domestic law. It is also in conformity with the complementarity principle enshrined in the Rome Statute according to which the ICC is a Court of last resort and the primary responsibility to prosecute core international crimes lies on the shoulders of States. The importance of adopting domestic legislation was recently repeated and underlined in the efforts of the international community, in particular in the framework of the International Conferences of the Red Cross and Red Crescent, to reinforce national appropriation of IHL.

Interestingly, since 1993, the Belgian provisions on war crimes contain only one list of crimes applicable to both international armed conflicts (IAC) and non-international armed conflicts (NIAC) in conformity with the trend in modern IHL to harmonize rules applicable to both kinds of armed conflicts, as reflected, amongst others, in the IHL customary law study of the ICRC. I would like to flag that this has an influence on Belgium's position in international fora, for instance in the framework of the Assembly of States Parties to the Rome Statute. As you all

[13] The trials took place in Brussels in 2001, 2005, 2007, 2009, 2019, 2023 and 2024.
[14] A trial related to crimes committed in Guatemala at the beginning of the eighties against 4 Belgian priests took place in Leuven in December 2023. It led to the condemnation of the accused persons to life imprisonment for crimes against humanity.
[15] Law of 6 June 1993 on the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977, additional to these Conventions.
[16] Law of 10 February 1999 on the repression of serious violations of international humanitarian law.
[17] A new Penal Code – with a new numbering of the relevant articles – was adopted on the 29th of February 2024 but is not yet in force as of 21st November 2024 (date of the 24th Bruges Colloquium).

know, there are still in article 8 of the Rome Statute two distinct lists of war crimes for IAC and NIAC. The purpose of the very first amendment to the Rome Statute, that was tabled by Belgium (and a number of co-sponsoring States) in 2009 and adopted in Kampala, in June 2010, was precisely to modify article 8 of the Rome Statute to foster harmonization by completing the rules applicable to NIAC with the prohibition of three kind of weapons that were already included in the list of war crimes for IAC, namely: poison or poisoned weapons; asphyxiating, poisonous or other gases; and all analogous liquids and bullets which expand or flatten easily in the human body (the so-called *dum-dum bullets*). This was also the rationale behind amendments 4, 5 and 6 to the Rome Statute (proposed by Belgium together with other States and adopted by the Assembly of States Parties to the Rome Statute in 2017) which, again, modify article 8 to include prohibitions on the use of certain weapons[18] in both lists of war crimes in the same manner.[19]

In addition to the articles on "material" criminal law, provisions were also incorporated into Belgian law to take into account the specificities attached to the prosecution of crimes of genocide, crimes against humanity and war crimes, in particular in relation to:

- personal liability (command responsibility, non-application of excuses, etc.);
- the non-applicability of statute of limitations (article 21*bis* of the Preliminary Title of the Code of Criminal Procedure); and
- the extended jurisdictions of national courts and tribunals. In that regard, in addition to the territorial jurisdiction principle (enshrined in article 3 of the Penal Code), the Preliminary Title of the Code of Criminal Procedure contains articles on (1) the expanded *active* personal jurisdiction (article 8, 1°), (2) the expanded *passive* personal jurisdiction (article 13) and *universal* jurisdiction (article 14/10).

As far as the legislative work on IHL is concerned, and to echo references to Resolution 1 of the 33rd International Conference of the Red Cross and Red Crescent "Bringing IHL Home"[20], I would also like to flag the central role played by the National Committee on IHL in Belgium, since virtually all pieces of legislation in this field adopted in recent years were initially drafted by the Committee (either at the request of the government or on its own initiative).

[18] Weapons which use microbial or other biological agents, or toxins; weapons the primary effect of which is to injure by fragments undetectable by x-rays in the human body and blinding laser weapons.
[19] The same rationale lies behind the 8th amendment to the Rome Statute on the war crime of starvation in NIAC, proposed by Switzerland (and co-sponsoring States) and adopted by the Assembly of States Parties to the Rome Statute in 2019.
[20] 33rd International Conference of the Red Cross and Red Crescent, 'Bringing IHL home: A road map for better national implementation of international humanitarian law', (33IC/19/R1, December 2019), available at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf

After having briefly described the Belgian legal landscape, I will now speak about the importance of establishing a specialized judicial body in charge of investigating and prosecuting core international crimes.

## 2. A specialized judicial body

At last spring's trial mentioned above, charges were brought by a magistrate of the IHL section of the Federal Prosecutor's Office, the specialized judicial body for prosecuting core international crimes in Belgium. The Federal Prosecutor's Office was created by law in 1998 and actually established in May 2002.[21] It is a unique structure with jurisdiction over the entire Belgian territory. The Office, composed of 33 magistrates, is divided into four units, one of which is the *"IHL and military affairs section"*. According to article 144*quater* of the Judicial Code, the Office has an *exclusive competence* for prosecutions of the crime of genocide, crimes against humanity, and war crimes.

Cases related to core international crimes are very challenging for various reasons, particularly due to the inherently complex nature of the situations in which those violations occur, often involving multiple international dimensions: crimes committed abroad and thus evidence located outside of the territory, often in difficult-to-access areas, perpetrators and/or victims not present on the territory, witnesses to be found around the world - whose testimonies are most of the time quintessential. In addition to that, the prosecuting authorities must take into account the specific legal aspects of those crimes: command responsibility, specific mode of liability (joint criminal enterprise), etc. Given these particularities, there is a need for specific knowledge, and this is what the IHL section within the Federal Prosecutor's Office has gained over the years. It is thanks to this expertise that eight trials relating to core international crimes were organized in Belgium to date.

Many more files are opened within the IHL section of Federal Prosecutor's Office. According to its last annual report of 2023, there were 170 ongoing cases related to core international crimes, at different stages of criminal proceedings. The expertise of the Federal Prosecutor's Office is shared with partners abroad in different fora amongst which I think useful to mention the European Genocide Network.[22] The Network is composed of practitioners and offers them a platform to exchange on specific subjects and to share experiences and good practices. Indeed, given the international dimensions of cases on core international crimes, inter-state cooperation is essential.

[21] Law of 22 December 1998 on the vertical integration of the Public Prosecutor's Office, the Federal Prosecutor's Office and the Council of the King's attorneys.
[22] Council Decision 2002/494 of 13 June 2002, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.

With this reference to international cooperation, I now come to my third point on the usefulness of having a dedicated IHL unit within the Ministry of Justice.

### 3. A specialized unit for IHL within the Ministry of Justice

A dedicated IHL unit was established within the Belgian Ministry of Justice by Royal Decree in 2005.[23] It is entrusted with multiple tasks. In addition to its leading role in adapting national law and its involvement in international negotiations on IHL in various fora, this unit plays a direct operational role in international judicial cooperation and national coordination for the organization of IHL trials. As far as international judicial cooperation is concerned, the unit is in charge of dealing with all requests for assistance sent to, or emanating from, non-EU Member States for cases relating to IHL. In that sense, it acts as a central/unique point of entry for such requests and works with all parties involved (national and foreign judicial authorities, diplomatic authorities through which the requests are transmitted, etc.) to facilitate such cooperation.

It was the experience gained in inter-state cooperation that prompted Belgium to launch, in 2011, together with the Netherlands, Slovenia, Argentina, Senegal, and Mongolia, the so-called 'MLA Initiative' that led to the adoption, in May 2023, of the Ljubljana-The Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes, and other international crimes.[24] The objective of the Convention – which is the first comprehensive mutual legal assistance treaty for core international crimes – is precisely to enhance and facilitate cooperation between States in the investigation and prosecution of such crimes.

The IHL unit is also tasked with coordinating the administrative aspects of the preparation of trials on core international crimes in Belgium once a case has been referred for trial. For this, the unit relies on a specific coordinating structure: the Belgian Task Force for International Criminal Justice (created by Royal Decree in 2014).[25] Within this structure, all national departments involved are represented (Ministry of Justice – including the service in charge of the budget, Federal Prosecutor's Office, Federal Police, Ministry of Foreign Affairs, Home Office, etc.). As a matter of fact, holding such trials requires interventions by a large number of actors, more than what is usually needed for criminal cases, mainly because of the presence of witnesses travelling from abroad and staying in Belgium for a certain period of time, which implies administrative and logistic arrangements. To meet those challenges, specific

[23] Royal Decree of 17 September 2005 on the creation of an international humanitarian law unit.
[24] The Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes (adopted 26 May 2023).
[25] Royal Decree of 23 August 2014 on the organization of the Belgian Task Force for International Criminal Justice (BTF ICJ).

coordination meetings are organized under the auspices of the IHL unit to facilitate the process leading up to the trial itself.

**Conclusion**

In conclusion, I would like to underline that our national experience has confirmed the importance of having appropriate legislation on core international crimes and a judicial authority specialized in these complex matters, as well as having structures for centralizing, coordinating and exchanging information among all the national players involved when it comes to the preparation of the trial phase. This facilitates the implementation and enforcement of IHL in domestic law and the prosecution of the perpetrators of the most serious international crimes.

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## Moderated discussion

At the end of the panel discussion, a Q&A session allowed the audience to raise several questions.

**Main gaps in domestic IHL implementation.**

One participant asked whether certain areas of IHL are less implemented than others and, more generally, which aspects of IHL should be strengthened at the national level.

A panelist confirmed that some areas of IHL require greater attention, while also emphasizing that the level of IHL implementation may vary depending on a State's capacity, political will, and administrative structure. Larger administrations often have the resources necessary to "absorb" more rules of international law, while smaller States may struggle with legislative capacity. The panelist explained that one of the most critical areas for implementation is criminal law and ensuring that all war crimes are criminalized in domestic legislation. However, many States only criminalize war crimes committed in the context of international armed conflicts (IAC), leaving a gap when it comes to non-international armed conflicts (NIAC). In such cases, these acts often fall under general criminal law, which can create issues and carry important legal consequences (for example, no recognition for victims of war crimes, no statutes of limitation attached to war crimes, etc.). Another area requiring stronger implementation is compliance with conventional weapons treaties, such as the Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions. While many States that are party to these treaties pass domestic legislation, further concrete actions – such as stockpile destruction and demining efforts – demand significant time, resources, and commitment, which are often lacking. Finally, the issue of missing persons during armed conflict needs to be better addressed in domestic law. This includes, for example, establishing legal frameworks for certificates of absence and ensuring that the spouses of missing persons can access social benefits. Addressing this issue is crucial from a humanitarian perspective.

**Domestic/international cooperation to combat impunity for IHL violations.**

One participant asked how cooperation between national and international bodies can contribute in a complementary manner to the fight against impunity for serious IHL violations.

A panelist emphasized that collaboration with international courts and tribunals is a crucial yet sometimes overlooked aspect of IHL enforcement. While States have an explicit obligation to cooperate – highlighted in the ICRC's follow-up to Resolution "Bringing IHL Home" of the 33rd International Conference of the Red Cross and Red Crescent – its practical implementation varies. National and international efforts must work in tandem, as international courts and tribunals heavily rely on States for their daily work. For example, international courts and

tribunals lack their own police force to arrest suspects, they often require States' assistance to perform certain kinds of investigative acts, and they do not have prison facilities. Cooperation is a two-way process: while international courts rely on States, States can also request assistance from these institutions. This reciprocal relationship strengthens the overall fight against impunity at both levels.

**Misapplication of IHL rules.**

One participant expressed concern about the misapplication of IHL, pointing out that some actors assert they are following IHL but do so in ways that do not support humanitarian objectives. This is not due to ignorance or disregard for the law, but rather because they justify their actions through their own broad interpretations of the rules. The participant asked how to go beyond simply promoting compliance to ensure that IHL is applied in a way that truly upholds humanitarian values.

One panelist highlighted that misapplication of the law is one of the biggest challenges to effective protection under IHL. Even with legal frameworks in place, there is a risk that the law can be manipulated, often under the guise of compliance. From a legal standpoint, the starting point is the law of treaties and the principles of treaty interpretation, particularly the obligation to interpret them in good faith. The key issue is that interpretations cannot stretch a rule so far that it reverses its original meaning, a practice that not only violates IHL but also contradicts the Vienna Convention on the Law of Treaties of 1969, which requires interpreting treaties in light of their object and purpose. IHL, at its core, is a restrictive regime aimed at limiting the actions of belligerents during armed conflict. This fundamental principle must be respected.

Another panelist further explained that one objective of the Global Initiative is precisely to address the ambiguity in rules related to the conduct of hostilities. For instance, the principle of proportionality – balancing military advantage with civilian harm – is often subject to subjective interpretation. When civilian casualties soar to massive levels, it becomes evident that the rule is being stretched beyond its intended purpose. Despite this, legal justifications are still made, arguing that a single high value military objective warranted the extensive harm. To address this issue, it is essential to develop common understandings of IHL rules to limit overly permissive interpretations. The goal is to foster good faith interpretations that ensure IHL is applied in a manner that genuinely upholds humanitarian principles, preventing it from being manipulated to justify excessive harm.

**Effective accountability mechanisms.**

One participant asked which mechanisms under international law are most effective for holding violators of IHL accountable and how States and international bodies can ensure accountability for actions that may constitute war crimes or crimes against humanity.

A panelist emphasized that accountability is critical when addressing violations of IHL and other international crimes, regardless of where they occur. Efforts at both the national and international levels are essential in ensuring justice. At the national level, having proper legal frameworks and mechanisms in place allows to effectively investigate and prosecute violations. States must be prepared in advance to address such offenses. At the international level, support for institutions such as the ICC is vital, as its work in addressing violations across different situations is an important component of global accountability efforts. There is also a need to strengthen complementarity, i.e. the principle that national jurisdictions have the primary responsibility for prosecution, with international mechanisms stepping in when national authorities are unable or unwilling to act. Ultimately, effective accountability requires a coordinated approach, ensuring that both national and international efforts are aligned and work together.

**Framing IHL as an enabler in military operations.**

One participant asked about the perception of IHL as a barrier, particularly at the tactical level where legal advisors are often seen as restricting military operations. They inquired how IHL could be presented more as an enabler and how compliance with IHL can be better communicated as supporting strategic objectives.

A panelist explained that while IHL is inherently designed to impose restrictions, it is important to recognize that these restrictions are meant to ensure military operations are conducted lawfully, balancing military necessity with humanitarian protections. Many IHL rules strike this balance by incorporating prohibitions alongside provisions that account for military necessity. However, they are not designed to broadly enable operations but to provide a legal framework ensuring the legality and legitimacy of military actions. While compliance with IHL can contribute to a mission's success and strategic objectives, framing it solely as an enabler could lead to overly permissive interpretations that could undermine its purpose. Rather, IHL should be seen as a necessary legal framework that ensures both operational effectiveness and legitimacy.

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# PANEL 2

# GIVING MEANS WITHOUT GIVING UP RESPONSIBILITIES: ENSURING RESPECT FOR IHL, FROM WORDS TO DEEDS

CHAIRED BY VAIOS KOUTROULIS, PROFESSOR, UNIVERSITÉ LIBRE DE BRUXELLES

# Ensuring respect for IHL: the ins and outs of the obligation

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**Summary**

*Prof. Zwanenburg examined the obligation to "ensure respect" under Common Article 1 of the Geneva Conventions. This obligation has sparked significant debate, particularly regarding its scope and application, including whether it extends to non-international armed conflicts (NIAC) and whether it includes an "external dimension," meaning the obligation for States to influence others to comply with IHL. The ICRC has argued that this obligation is part of customary international law and applies to all parties involved in a conflict, including non-state actors. Some States and scholars contest this interpretation. Recent case law, including ICJ rulings and national court cases, reflects growing recognition of the external dimension, but its precise content and the measures required from States remain points of contention*.

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## Introduction

Common Article 1 of the four Geneva Conventions (GC I – GC IV) provides that States Parties undertake to “respect and ensure respect” for those conventions. This obligation may seem innocuous at first sight. However, it has generated considerable debate among States and commentators since the adoption of the Conventions 75 years ago. This debate focuses on the precise scope and meaning of the undertaking, and in particular on the duty to “ensure respect”. For some, it is merely a repetition of the obligation under general international law that States must perform their treaty obligations in good faith. For others, it is an instrument that makes States their brothers’ keepers in the field of international humanitarian law (IHL). The debate has been intensified in particular by the project of the International Committee of the Red Cross (ICRC) to update the commentaries to the Geneva Conventions. Section 1 of this contribution aims to introduce the obligation to ensure respect, and to set out some of the main controversies surrounding its meaning. Section 2 introduces the obligation and situate the debate concerning its meaning. Section 3 discusses some of the main controversies surrounding “ensuring respect”. This is followed by a brief analysis of recent invocations of the obligation, in particular in cases before the International Court of Justice (ICJ) as well as before domestic courts in Section 4. The contribution concludes with some final remarks.

## 1. The obligation to ensure respect in treaty and customary law and the ICRC commentaries

The obligation to ensure respect was first introduced in Common Article 1 of the Geneva Conventions. This article provides that “[t]he High Contracting Parties undertake to respect

and to ensure respect for the present Convention in all circumstances." This text is repeated verbatim in Additional Protocols I and III (AP I and AP III), but not Additional Protocol II (AP II). According to the ICRC, the obligation also constitutes a rule of customary international law that applies outside of the treaty context. The ICRC customary law study includes rule 144, according to which:

> States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.[26]

The title of the rule as well as the commentary thereto make clear that it reflects the obligation to ensure respect.

Neither the Geneva Conventions nor the Additional Protocols elaborate on how the undertaking to respect and ensure respect must be understood. Consequently, its meaning has been debated from the start. This is especially the case for the duty to "ensure respect", which is the focus of this contribution. According to the 1958 Commentary on the Fourth Geneva Convention by Jean Pictet, this obligation entails that a State must take measures to ensure respect for the Convention not just by its armed forces, but also by "all those over whom it has authority".[27] In addition, according to Pictet, it means that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention."[28] The word "should" in this commentary introduces some ambiguity concerning the legal force of the duty. The ICRC removed any ambiguity in the updated commentaries to GC I, II and III which were published in 2016, 2017 and 2021 respectively. These provide extensive commentary on the obligation to ensure respect and are much less equivocal.[29] They provide that States "must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict."[30] The commentary refers to this as the "external dimension" of ensuring respect.

The assertion in the updated commentaries concerning the meaning of the obligation to ensure respect has led to critical reactions from certain States and commentators. They contest the interpretation offered by the ICRC, arguing that the obligation is much less far-reaching than the ICRC states.

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[26] ICRC, Customary IHL Study, Rule 144, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144.
[27] Jean Pictet (ed.), Commentary on the First Geneva Convention (ICRC 1952) 25.
[28] Ibid, 26.
[29] Lawrence Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation, 72 *International & Comparative Law Quarterly* 869 (2023) 871.
[30] ICRC, Commentary on the First Geneva Convention (Cambridge University Press 2016) 48, para. 153.

The remainder of this contribution will discuss a number of aspects of the obligation to ensure respect that are the subject of debate.

## 2. Controversies concerning the interpretation of the undertaking

### *3.1. Application of the obligation to non-international armed conflicts*

A first question that is the subject of debate is whether the obligation to ensure respect is only applicable in the case of international armed conflicts, or whether it also applies in the case of non-international armed conflicts. The updated ICRC commentaries state that the latter is the case.[31] It may be recalled that Common Article 1 refers to respect "for the present Convention". Part of each of the four Conventions is Common Article 3, which applies in non-international armed conflicts. Thus, since a rule regulating non-international armed conflicts is part of the Conventions, this is logically part of "the present Convention" and therefore would also be covered by the obligation to ensure respect.[32] This view is supported by the case law of the ICJ, which found in the Nicaragua case that the obligation to ensure respect also extended to the conflict between the Contras and Nicaragua.[33]

As was mentioned above, the obligation to ensure respect was not included in AP II. However, as this protocol "develops and supplements" Common Article 3, there is much support for the view that the obligation extends to the parties to AP II as well.[34]

However, there are also States and commentators that reject the view that the obligation to ensure respect applies in non-international armed conflicts. The national courts of Canada for example have held otherwise. In Sinappu v. Canada, the Federal Court of Canada considered that Article 1 does not impose any obligation in the context of non-international armed conflicts.[35] This holding was reiterated in the Federal Court's judgment of 2017 in the case of Daniel Turp v. the minister of Foreign Affairs.[36] Certain commentators have also argued that the obligation to ensure respect does not extend to non-international conflicts.[37]

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[31] Ibid, 38.
[32] Robin Geiss, Common Article 1 of the Geneva Conventions: Scope and content of the obligation to 'ensure respect' – 'narrow but deep' or 'wide and shallow'?, in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 417, 428.
[33] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, 27 June 1986, paras. 219 – 220.
[34] Geiss (no 32) 428; Laurence Boisson de Chazournes and Luigi Condorelli, Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests, 82 *International Review of the Red Cross* 67 (2000) 69.
[35] Federal Court of Appeal (Canada), *Sinnappu v. Canada* (Minister of Citizenship and Immigration), 1999 253 N.R. 234 (FCA), 15 September 1999.
[36] Federal Court of Canada, *Daniel Turp v. the minister of Foreign Affairs*, 2017 FC 84, 24 January 2017, para. 71.
[37] See, *inter alia*: Mike Schmitt and Sean Watts, Common Article 1 and the Duty to 'Ensure Respect', 96 *International Law Studies* 674 (2020) 700-702.

### *3.2. The scope of the treaty obligation to ensure respect*

A question concerning the interpretation of the obligation to ensure respect relates to what are called the "internal" and the "external" dimension of the obligation. The "internal" dimension refers firstly to an obligation on a State to ensure respect by its own armed forces and other persons or groups acting on its behalf. This would include the case in which a State is acting through a so-called "proxy". The internal dimension also extends to the whole population over which the State exercises authority. In other words, it also requires the State to take measures to ensure that the whole civilian population respects the Conventions and AP I. This means that the State must also ensure respect by persons whose conduct is not attributable to the State.[38] This internal dimension is relatively uncontroversial.

More controversial is whether the obligation to ensure respect also has an "external" dimension. This refers to an obligation to ensure respect by others that are party to an armed conflict, namely other States and organized armed groups. The ICRC has consistently argued that there is such a dimension. As mentioned in section 2, the Pictet commentary already referred to it. The updated Commentaries to GC I–III provide extensive and strong arguments supporting the conclusion that this external dimension exists.[39] This conclusion also finds support in the case law of the ICJ. In the Nicaragua case, the Court interpreted the obligation to mean that the United States was prohibited from encouraging the Contras to violate IHL. In its Wall Advisory Opinion, the Court held that "all the States parties to the [fourth] Geneva Convention are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law."[40] However, in their separate opinions judges Kooijmans and Higgins questioned whether this was correct as a statement of positive law.[41] In its Advisory Opinion of 19 July 2024 on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, the Court confirmed its interpretation that the obligation has an external dimension, when stating that:

> In addition, all the States parties to the Fourth Geneva Convention have the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[42]

[38] ICRC (no 30) 45-46.
[39] Editorial note: the ICRC published the updated Commentary on the Fourth Geneva Convention in 2025.
[40] ICJ, *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, para. 159.
[41] Separate opinion of Judge Kooijmans, para. 50.
[42] ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024], para. 279.

There is also state practice supporting such an interpretation, some of which I have presented elsewhere.[43] A number of States, in their written statements to the Court in the context of the Advisory Opinion of July 2024, also expressed support for an external dimension.[44] In other court cases that are ongoing, which will be discussed in more detail in section 4, Germany, the Netherlands and Nicaragua have similarly taken this position.

There is also support in the literature for this interpretation. Geiss is correct in stating that this view is the prevailing one in the literature.[45]

However, also in this respect there is no consensus. A State that has rejected such an interpretation is the United States. In 2016 the Legal Advisor of the US Department of State in remarks to the Annual Meeting of the American Society of International Law rejected the "external dimension".[46]

In the literature, there are also authors who argue against such a dimension. A notable example is Kalshoven, who wrote that there is a moral duty to ensure respect by a State's peers but that no legal liability attaches to this duty.[47] Schmitt and Watts also reject the existence of an external dimension to the obligation to ensure respect, as does Robson.[48]

### *3.3. The customary obligation to ensure respect*

A third question is whether the obligation to ensure respect is only a treaty obligation or also a rule of customary international law. As noted above, the ICRC considers that it is both. The rule in the ICRC customary law study that corresponds with Common Article 1 is said to apply in both types of armed conflicts. The updated commentaries to GC I–III reaffirm this conclusion.[49]

The ICJ in its judgment in the Nicaragua case held that it is a rule of customary international law. The Court considered that the "obligation to ensure respect flows not only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression."[50] The Court thus appeared to relate the customary law character of the obligation to the humanitarian nature of the Conventions. In its

[43] Marten Zwanenburg, The 'External Element' of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Obligation, 97 *International Law Studies* 621 (2021).
[44] See Section 4 below.
[45] Geiss (no 32) 37.
[46] Brian Egan, International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations, reproduced in 92 *International Law Studies* 235 (2016) 245.
[47] Frits Kalshoven, The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit, 2 *Yearbook of International Humanitarian Law* 3 (1999) 60.
[48] Schmitt and Watts (no 37); Verity Robson, The Common Approach to Article 1: The Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions, 25 *Journal of Conflict & Security Law* 101 (2020).
[49] ICRC (no 30), 39. Editorial note: the ICRC published the updated Commentary on the Fourth Geneva Convention in 2025.
[50] Nicaragua judgment (no 33), para. 220.

Wall Advisory Opinion of 2004, the ICJ was slightly more explicit. It held with respect to GC IV "that every State party to that Convention, *whether or not it is a party to a specific conflict*, is under an obligation to ensure that the requirements of the instruments in question are complied with".[51]

There also seems to be broad support among commentators for the view that the obligation to ensure respects is a rule of customary law. Schmitt and Watts state that the fact that "there is a customary international law obligation to ensure respect mirroring that contained in the 1949 Geneva Conventions would appear uncontroversial."[52] They do however, question whether such a customary obligation has the same scope as the one under Common Article 1. In particular, they argue that such a customary rule does not include an "external dimension". They point to state practice, which would stand in the way of concluding that there is sufficiently uniform practice for this.[53] Interestingly, the ICRC customary law study could be read as supporting this interpretation. The formulation of the rule concerned only refers to the obligation to ensure respect by "its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control."[54]

### *3.4. The content of an "external dimension" of the obligation to ensure respect*

If it is accepted that the obligation to ensure respect does have an external dimension, this raises the question of what the content of the obligation is. In other words, what does it actually require from States? In this respect, a distinction can be made between its negative and a positive aspect.

The negative aspect refers to an obligation to abstain from certain conduct, in particular not to encourage or aid or assist violations of IHL. The ICJ in its judgment in the Nicaragua case held that the obligation to ensure respect meant that the United States could not encourage the Contras to violate IHL.[55] The obligation to refrain from aiding or assisting violations of IHL has similarities with the obligation under general international law not to aid or assist an internationally wrongful act of another State. It is however submitted that the obligation under Common Article 1 goes further, among other things because it does not require intent and because it also applies in relation to non-state actors.[56]

The positive aspect of the obligation to ensure respect refers not to a duty to abstain from doing something, but to an obligation to take action. The updated ICRC Commentary to the

[51] Wall advisory opinion (no 40), para. 158.
[52] Schmitt and Watts (no 37) 703.
[53] Ibid.
[54] ICRC, Customary IHL Study, Rule 139, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule139.
[55] Nicaragua judgment (no 33), para. 220.
[56] ICRC (no 30) 50.

first three Geneva Conventions argues that this means States must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence over that Party.[57] This obligation, the ICRC argues, is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.

It is clear that a positive aspect of the external dimension, to the extent that it is accepted, is not an obligation of result but an obligation of means.[58] States must exercise due diligence in their relations with parties to an armed conflict. Because it is a due diligence obligation, what the obligation requires must be determined on a case-by-case basis, taking into account various factors. According to Geiss these factors include the kind and extent of the harm occurring, the imminence of further violations, a State's relationship with the transgressor and the strength of political links between the States concerned.[59] The latter factor means that the obligation to ensure respect will generally be more onerous when a State's partners are concerned.[60]

The precise content of the obligation is however not settled and raises many questions.[61] For example, does the obligation require reacting to each violation of IHL, or only to certain serious breaches? When exactly is the obligation to ensure triggered?[62] Does the obligation apply only to reacting to IHL violations that have already occurred, or does it also apply to the prevention of IHL violations in a prior phase?[63]

For those who accept a positive aspect of the obligation to ensure respect, it is clear that States are in principle free to decide which measures to take to fulfil this obligation.[64] This is subject to the requirement that the measures taken are aimed at stopping or preventing violations of IHL. These measures must also be in accordance with international law. This means among other things that the obligation to ensure respect cannot in itself serve as a legal basis for a "humanitarian intervention" by military means. The obligation is part of the *ius in bello* and does not affect the *ius ad bellum*.

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[57] Ibid, 52. Editorial note: the ICRC published the updated Commentary on the Fourth Geneva Convention in 2025.
[58] Knut Dörmann and Jose Serralvo, Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations, 96 International Review of the Red Cross 707 (2014), p. 724.
[59] Geiss (no 32) 435.
[60] See on this aspect: Cornelius Wiesener and Astrid Kjeldgaard-Pedersen, Ensuring Respect by Partners: Revisiting the Debate on Common Article 1, 27 *Journal of Conflict & Security Law* 135 (2022).
[61] Geiss (no 32) 429.
[62] Ibid, p. 430.
[63] See, for a discussion of this aspect, Dörmann and Serralvo (no 58) 729-732.
[64] Djamchid Momtaz, L'Engagement des Etats à 'faire respecter' le Droit International Humanitaire par les Parties aux Conflits Armés, *Proceedings of the Bruges Colloquium* No. 30 (2004) p. 27, 28.

### 3. Recent invocations of the obligation to ensure respect

The sections above have demonstrated that there are various controversies surrounding the obligation to "ensure respect" in Common Article 1 of the Geneva Conventions. Notwithstanding this, there appears to be an increasing recognition that it potentially has an important role to play in strengthening compliance with IHL. This is illustrated by recent invocations of the obligation.

First, the obligation to ensure respect played an important role in many of the written statements made by States to the ICJ in the advisory proceedings concerning the occupation of Palestinian territory. Of the 57 written statements, 18 made reference to the obligation. The obligation was also relied on extensively in oral proceedings. Palestine itself referred to it, albeit briefly, in its oral statement before the Court. It recalled the Court's reliance on the obligation in the Wall Advisory Opinion.[65] Other States recalling the obligation were Belgium, the Netherlands, Libya, Luxemburg, the Maldives, Oman and the UAE. Belgium, for example stated that the obligation to respect:

> *s'adresse aussi aux États tiers, et comprend des obligations tant négatives que positives. L'obligation de ne pas encourager, ne pas aider ou ne pas assister à la commission d'une violation constitue un exemple d'obligation négative. L'obligation d'adopter des mesures pour inciter les parties belligérantes à cesser les violations du droit international humanitaire est un exemple d'obligation positive*.[66]

Against the background of the frequent references to the obligation to ensure respect in the written and oral proceedings, the way in which the Court dealt with it in its Advisory Opinion was disappointing. At the very end of the section of the opinion dealing with the legal consequences of Israel's internationally wrongful acts in the Occupied Palestinian Territory as regards other States, the Court devoted just one sentence to the obligation which reads:

> In addition, all the States parties to the Fourth Geneva Convention have the obligation, while respecting the Charter of the United Nations and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[67]

This can be regarded as a missed opportunity for the Court to provide further clarity on the scope and content of the obligation to ensure respect.

Second, the obligation to ensure respect plays a central role in the case brought before the ICJ by Nicaragua against Germany. This case concerns aid or assistance given by Germany

[65] CR 2024/4, Pellet, p. 109
[66] CR 2024/5, Koutroulis, p. 69.
[67] Palestine Advisory Opinion (no 42), para. 279.

to Israel, which Nicaragua claims is in violation of international law including the Geneva Conventions.[68] The application by Nicaragua states inter alia that:

> as a High Contracting Party to the Geneva Conventions of 1949, Germany is bound by these Conventions as well as by the intransgressible principles of international humanitarian law regarding any armed conflict. However, Germany has failed to fulfil its obligations, in particular its obligation to ensure respect for humanitarian law as is mandated in Common Article 1 of the four Geneva Conventions of 1949, and customary rules, including the obligation not to encourage violations of international humanitarian law by parties to an armed conflict, and to exert its influence to the degree possible to stop such violations.[69]

In its written submissions to the Court, Germany has accepted that the obligation to ensure respect includes an external dimension.[70] This, it concedes, "generates so-called positive obligations to exert one's influence on parties to an armed conflict to observe international humanitarian law".[71] Germany thus recognizes that Common Article 1 has an external dimension.

In its order on Nicaragua's request for the indication of provisional measures of 30 April 2024, the Court rejected Nicaragua's request. It did however recall the obligation to ensure respect as well as its previous holdings on the meaning of this obligation in the Nicaragua case and the Wall Advisory Opinion.[72] The arguments of the parties as well as the pronouncements of the Court in this case so far therefore support the view that the obligation to respect has an external dimension. Further phases of the case may lead the Court to clarify the meaning of Common Article 1 and its external dimension.[73]

A third case in which the obligation to ensure respect has been recently invoked is a case before Dutch courts concerning the transfer of parts for F-35 jet fighters to Israel. Oxfam Novib and two other civil society organizations claim that by allowing the shipment of parts for F-35 fighter aircraft from the Netherlands to Israel, the Netherlands violates various domestic and international obligations. One of these is the obligation to ensure respect. They argue that

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[68] ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany).*

[69] Nicaragua, Application instituting proceedings, para. 17.

[70] For an analysis, see: Parisa Zangeneh, The ICJ's Insufficient Engagement with Germany's Interpretation of the External Dimension of Common Article 1 in the Nicaragua v Germany Proceedings, Opinio Iuris, 25 September 2024, available at: https://opiniojuris.org/2024/09/25/the-icjs-insufficient-engagement-with-germanys-interpretation-of-the-external-dimension-of-common-article-1-in-the-nicaragua-v-germany-proceedings/.

[71] Verbatim record, 9 April 2024, CR 2024/16, para. 24

[72] Order on request for provisional measures, 30 April 2024, para. 26.

[73] For a view that there is no such dimension, lamenting Germany's position and arguing that the Court should not base its judgment on Common Article 1, see: Mike Schmitt and Sean Watts, Common Article 1 of the 1949 Geneva Conventions, Articles of War, 12 April 2024, available at https://lieber.westpoint.edu/common-article-1-1949-geneva-conventions/.

Common Article 1 requires immediately halting the transfer of F-35 parts to Israel.[74] In his summary judgment of 15 December 2023, the preliminary injunction judge rejected the claims of the plaintiffs.[75] On appeal however, the Court of Appeals held that the Netherlands must take adequate measures within a week to stop the further shipment of F-35 parts to Israel.[76] This holding was partly based on the obligation to ensure respect. With regard to this obligation, the Court of Appeal held that:

> It is irreconcilable with Common Article 1 of the Geneva Conventions that a State that has granted an export licence for arms could shut its eyes for serious violations of IHL in the State of destination and would refuse to attach consequences for the export licence.[77]

The Court thus clearly accepted that the obligation to respect has an external dimension. The Netherlands appealed the judgment of the Court of Appeals to the Supreme Court, which is expected to render its judgment in 2025.

**Conclusion**

This contribution aimed to introduce the obligation to "ensure respect" in Common Article 1 of the Geneva Conventions. This obligation has been referred to in various ways. One commentator has called it a "soap bubble", suggesting that it has little or no independent effect.[78]

Kalshoven has referred to it as having grown from a "tiny seed" into a "ripening fruit".[79] This contribution has demonstrated that the scope and meaning of the obligation to ensure respect are contentious, with particular debate surrounding the existence of an "external dimension" of the obligation. As became clear in section 4 however, recent practice generally appears to support the conclusion that such a dimension exists. Both States and non-State actors are increasingly willing to pluck what can now be described as a mature fruit. Questions remain however concerning the precise scope of the measures required from States under this obligation. The ICJ did not seize the opportunity to provide further clarification in its Advisory

[74] See content of the pleadings of Oxfam Novib, para. 16, available at: https://rightsforum.org/wp-content/uploads/2023/12/231204-Pleidooi-Gaza-KG-def.pdf.
[75] Stichting Oxfam Novib, Stichting Vredesbeweging PAX Nederland and Stichting The RightsForum v. the State of the Netherlands, District Court of the Hague, 15 December 2023, ECLI:NL:RBDHA:2023:19744.
[76] Court of Appeal of the Hague, 12 February 2024, ECLI:NL:GHDHA:2024:191. See, for observations on the judgment, e.g. Marten Zwanenburg and Joop Voetelink, Appeals Judgment in Case concerning the Shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel, EJIL:Talk!, 16 February 2024, available at: https://www.ejiltalk.org/appeals-judgment-in-case-concerning-the-shipment-from-the-netherlands-of-parts-for-f-35-fighter-aircraft-to-israel/.
[77] Court of Appeal of the Hague, 12 February 2024, ECLI:NL:GHDHA:2024:191, para. 5.25 (translation by the author).
[78] Carlo Focarelli, Common Article 1 of the 1949 Geneva Conventions: a Soap Bubble?, 21 European Journal of International Law 125 (2010).
[79] Kalshoven (no 47) 3.

Opinion of 19 July 2024, but it will have another opportunity to do so in the case brought by Nicaragua against Germany.

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# Same obligation, same facts, different conclusions: why and how to overcome different interpretation of risks for IHL violations in arms exports?

**Johanna Trittenbach**
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**Summary**

*Ms. Trittenbach examined the obligations and challenges surrounding arms transfer assessments in relation to IHL. She explored the divergence in state practices when assessing risks of IHL violations in arms exports and highlights the applicable legal frameworks, particularly the Arms Trade Treaty (ATT) and Common Article 1 of the Geneva Conventions. She emphasized the importance of due diligence, transparency, and international cooperation in making consistent, objective and non-discriminatory arms transfer decisions. She identified key factors that influence risk assessments, such as the importer's record of IHL violations and their capacity to prevent misuse of arms. The analysis also discussed the implications of differing State interpretations, particularly in high-profile cases, and advocated for more harmonized approaches to arms export risk assessments. To address these challenges, she recommended measures like improved information-sharing, judicial cooperation, and a commitment to humanitarian principles in arms transfer decisions.*

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The international legal framework regulating transfers of conventional weapons is envisioned to have a preventative effect on violations of international humanitarian law (IHL).[80] However, a review of state practice reveals that States arrive at conflicting interpretations and assessments regarding risks for IHL violations connected to arms exports. This divergence in state practice prompts this intervention, which aims to address the guiding question "why and how can different interpretations of risks for IHL in arms exports be overcome?".

The following analysis first provides an overview of the international legal bases regulating arms transfers, highlighting the consequential obligation for States to conduct an assessment of whether a pending arms export entails the risk of ensuing IHL violations. Key indicators facilitating these assessments are discussed to approach an understanding of the factors influencing disparate conclusions drawn by States in their arms export assessments. Implications of divergent state practice are illustrated, followed by a non-exhaustive discussion of measures that could bridge interpretive differences, affirming the value of more harmonized interpretations of arms export risk assessments. The text concludes by reiterating calls for

[80] United Nations, Statement by the Secretary-General on the Adoption of the Arms Trade Treaty (2 April 2013), available at: https://www.un.org/sg/en/content/sg/speeches/2013-04-02/statement-adoption-arms-trade-treaty.

States' domestic implementation of international legal obligations in good faith. The insights derived from this analysis aim to contribute to the broader discourse on States' implementation of obligations of arms transfer control.

## 1. Legal obligations under international law

Common Article 1 to the Geneva Conventions imposes a duty on States to ensure respect for IHL.[81] This obligation of conduct, not of result, arguably extends to inducing other States to abide by IHL.[82] It requires States to take measures that are feasibly available to them to prevent IHL violations by parties to armed conflicts.[83] By transferring arms to a party in an armed conflict, exporting states are positioned to have means available to influence the conduct of importing s. Especially in light of reports of recurring IHL violations, Common Article 1 presupposes that States refrain from arms exports that could entail future IHL violations, thereby abiding by a negative obligation to omit any encouragement or support for potential IHL violations.[84] Exercising restraint in arms transfer decisions presents a critical tool for upholding the obligation to ensure respect for IHL. To effectively use this means, States need to undertake due diligence, which includes assessing arms importers' respect for IHL in the past and evaluating any risks of future IHL violations that could be facilitated by the arms export.

These aspects of the duty to ensure respect for IHL serve as foundational considerations for the Arms Trade Treaty (ATT) and are further codified in this instrument.[85] The ATT is the only internationally binding treaty that regulates the transfer of conventional weapons, their parts and components, and ammunition. 116 States are currently parties to the ATT,[86] which affords

[81] Whether or not this duty to ensure respect entails an external dimension, and especially whether or not positive obligations derive from it, has been subject of debate. See, for instance: Marten Zwanenburg, The 'External Element' of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation (2021) 97 International Law Studies 621; Maya Brehm, The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law (2008) 12(3) Journal of Conflict & Security Law 359–387; Frits Kalshoven, The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit, (1999) 2 Yearbook of International Humanitarian Law 3-61; Michael N. Schmitt, Sean Watts, Common Article 1 and the Duty to 'Ensure Respect' (2020) 96 International Law Studies 674.

[82] ICRC, Customary IHL Study, Rule 139, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule139, Rule 144, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144. For the legal nature of an obligation of conduct, see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, ICJ Reports 2007, 430.

[83] ICRC, Commentary on the Third Geneva Convention: Convention (Cambridge University Press 2021) 198.

[84] Ibid, 214.

[85] ATT, preamble, principle 5.

[86] Arms Trade Treaty Secretariat, 'Treaty Status', available at: https://thearmstradetreaty.org/treaty-status.html?templateId=209883. Editorial note: at the time of the Colloquium, 116 States were parties to the Arms Trade Treaty. As of October 2025, when these proceedings are being edited, the ATT has 117 State parties.

a central role to the risk of IHL violations in the treaty's two core obligations codified in Articles 6 and 7.

Article 6 of the ATT establishes a prohibition on any arms transfers – i.e., the export, import, transit, transshipment, and brokering – when the transferring State has knowledge, at the time of authorizing the transfer, that the arms would be used to commit grave breaches of the Geneva Conventions, carry out attacks against civilians or civilian objects, or for any other war crimes.

If not already prohibited under Article of the 6 ATT, any arms exports are subject to an export assessment pursuant to Article of the 7 ATT. Prior to authorizing an export, States must assess the potential that the items in question could facilitate or contribute to serious violations of IHL. The treaty emphasizes the importance of considering mitigating measures to reduce the risks of such violations. If the assessment reveals an overriding risk of IHL violations that cannot be mitigated, the export shall not be authorized.[87] Notably, there is no requirement for a direct causal link between the specific arms exported and a potential IHL violation; it is sufficient for the arms to facilitate or contribute to harm.[88] Moreover, an exporting state might act in violation of Article 7 of the ATT even if the potential serious violation of IHL does not materialize.[89] Article 7(7) further stipulates that if circumstances change after an authorization has been granted, States are encouraged to reassess the authorization.

To conclude, both Common Article 1 and the ATT require arms-exporting states to assess whether a risk of IHL violations exists, and if so, to refrain from the export. While Common Article 1 requires States to exercise due diligence, potentially in the form of an arms export risk assessment, the obligations pertaining to risk assessments are more clearly defined in the ATT.

### 2. Arms export risk assessment

States enjoy discretion in their implementation of arms export risk assessments. ATT States parties are required to establish a national control system, including designating competent authorities that examine arms transfer authorization requests.[90] Yet, States decide how they conduct risk assessments, the information they consider, and the factors that influence the assessment's outcome. States' information-exchange as well as research and capacity-

[87] ATT, Article 7(1)-(3); Stuart Casey-Maslen et al., Article 7. Export and Export Assessment, in Andrew Clapham et al. (eds) *The Arms Trade Treaty: A Commentary* (OUP 2016) 7.90.
[88] Ibid, 7.35; ATT Working Group on Effective Treaty Implementation, Voluntary Guide to Implementing Articles 6 & 7 of the Arms Trade Treaty, ATT/CSP10.WGETI/2024/CHAIR/799/Conf.Rep, Annex A, 19 July 2024, 13.
[89] Contrary to the law of state responsibility, a violation of the primary obligation codified in Article 7 ATT can occur irrespective of the materialization of the harm. International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Yearbook of the International Law Commission Vol. II 2001), Article 16.
[90] ATT, Article 5.

building by various actors have led to the identification of indicators that can inform such a risk assessment.[91]

Of pivotal relevance in a risk assessment is the importer's past and present record of respect for IHL. Recurring or systematic IHL violations in ongoing armed conflicts indicate a potential of future violations of the law.[92] Isolated incidents of IHL violations may not automatically lead to a negative result of the arms export assessment if importers demonstrate their ability and commitment to address any previous IHL violations.

Similarly, an importer's intentions, as expressed through formal commitments, can be taken into account in this assessment. Adherence to international treaties and the implementation of these agreements in national legislation, policies, and practice might be indicative. This commitment should also be reflected in military manuals and doctrine. Additionally, the capacity of the importing state to ensure that the arms will be used consistently with IHL, as well as established mechanisms to prevent diversion, might bear weight in the arms export assessment. This includes having an effective command structure in place and maintaining control over weapons and ammunition. These and other indicators allow States to evaluate whether there is a potential that the arms transfer may contribute to or facilitate serious violations of IHL. The ATT requires that if, even after assessing whether any measures could mitigate the potential for the arms transfer to be used in violation of IHL, an overriding risk of IHL violations still exists, States are obligated to deny export authorization.

### 3. Divergent interpretations and their implications

Since the entry into force of the ATT in December 2014, the assessment of risks of IHL violations prior to arms exports have resulted in substantially differing outcomes among exporting States. Two situations have sparked significant public debate and have prompted several legal interventions in domestic courts: arms transfers to Saudi Arabia and its coalition partners operating in the conflict in Yemen since 2015, as well as Israel's conduct in Gaza since 7 October 2023.[93] When considering supplying conventional weapons to these parties to armed conflicts, some States have identified an overriding risk of IHL violations that

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[91] See, for instance: ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – A Practical Guide* (ICRC, 2016), available at: https://www.icrc.org/en/publication/0916-arms-transfer-decisions-applying-international-humanitarian-law-criteria, 7. See also: ATT Working Group on Effective Treaty Implementation, List of Possible Documents to be Considered by States Parties in Conducting Risk Assessment under Article 7, ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep, Annex B, 26 July 2019. Note, for a distinct but similar obligation under EU law: Council of the European Union, 'User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment', 12189/19 (16 September 2019), 2.10-2.11.

[92] ICRC (no 91) 11.

[93] For a partial overview of domestic proceedings, see: Arms Trade Litigation Monitor, https://armstradelitigationmonitor.org/.

precluded any arms exports,[94] while others have not, but rather proceeded to supply arms, parts and components, and ammunition. Positive outcomes of arms export risk assessments and resulting continuous arms supplies have in some instances been challenged in domestic courts. Claimants have appealed to the judiciary to review governments' interpretations of various aspects of the risk assessment under the ATT (and, for European exporters, of the closely related EU Common Position on Arms Exports).[95]

This ongoing fragmented interpretation of international norms among States has significant implications for the effective application of arms transfer controls in pursuit of "the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms".[96] The fragmentation could arise from differing interpretations of the same norms, where various States may consider different indicators in their assessment of arms exports or assign differing weight to these indicators. It is also conceivable that interests other than the respect for IHL take a role in the export assessment, in deviation of international legal obligations. Such conduct would undermine the foundational principles guiding any arms export assessment and lead to an erosion of the humanitarian protections that arms transfer controls seek to safeguard.

Judicial review of executive arms export decisions in domestic courts can be a valuable tool to somewhat illuminate the black box that encloses the details of States' internal processes when undertaking arms export assessments. Whenever domestic proceedings moved beyond procedural hurdles, States' disclosure of information and judges' assessments presented valuable insights into intricacies of States' interpretations of their obligations.[97] Regardless, domestic proceedings bear the risk of further contributing to fragmentation, as differing interpretations serve to reinforce and solidify the inconsistencies in the application of arms

[94] For a partial overview, see: Oliver Holmes, 'Which countries have banned or restricted arms sales to Israel?' The Guardian (3 September 2024), available at: https://www.theguardian.com/world/article/2024/sep/03/which-countries-banned-or-restricted-arms-sales-to-israel-gaza-war; Dominic Dudley, 'Why More And More Countries Are Blocking Arms Sales To Saudi Arabia And The UAE' Forbes (7 September 2018) https://www.forbes.com/sites/dominicdudley/2018/09/07/why-more-and-more-countries-are-blocking-arms-sales-to-saudi-arabia-and-the-uae/.

[95] See, for example: Court of Appeal, Civil Division (UK), [2019] EWCA Civ 1020, Case no. T3/2017/2079 (20 June 2019), available at: https://www.judiciary.uk/wp-content/uploads/2019/06/CAAT-v-Secretary-of-State-and-Others-Open-12-June-2019.pdf; Conseil d'État (Wallonia), A. 232.975/XV-4690, Case no. 249.991 (5 March 2021) https://www.stradalex.com/fr/sl_src_publ_jur_be/document/consetat_249.991; Court of Appeal of The Hague (The Netherlands) ECLI:NL:GHDHA:2024:191, Case no. C/09/657026 KG ZA 23-991 (12 February 2024), available at: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:191.

[96] Pursuant to Article 1 ATT, '[e]stablish[ing] the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms' presents one aspect of the ATT's object.

[97] Jacques Hartmann, Lea Köhne and Vincent Widdig, 'Arms Exports and Access to Justice: Enforcing International Law through Domestic Courts' EJIL:Talk! (25 October 2024), available at: https://www.ejiltalk.org/arms-exports-and-access-to-justice-enforcing-international-law-through-domestic-courts/.

transfer controls. Moreover, the lack of transparency and certainty for victims and survivors of IHL violations exacerbates the dependence on domestic courts to review the implementation of legal obligations, which are at times presented to the public, including by the judiciary, as purely political considerations with no role for any judicial review.[98] Individuals seeking to bring claims domestically to challenge past or future arms export decisions find themselves navigating an uncertain landscape.[99]

Ultimately, continuous arms transfers to parties of ongoing conflicts who are alleged to repeatedly or systematically violate IHL has received considerable public attention and debate. Inconsistency in arms exporters' responses, whether founded in diverging interpretation or application of the law, contribute to a loss of credibility for international humanitarian law as a whole, and for specific instruments like the ATT in particular.[100] As divergences in interpretation proliferate and humanitarian principles erode, the integrity of the international legal framework governing arms transfers is increasingly called into question.

### 4. Measures to overcome interpretive differences

To effectively address differing interpretations of the obligation to undertake a risk assessment prior to arms transfers, several key measures can be considered. First, transparency is crucial.[101] Information-sharing among States as well as among all domestic stakeholders is invaluable, especially concerning States' domestic practices, the indicators assessed, and the processes related to the individual or accumulated evaluation of these indicators resulting in authorizations or denials of arms exports. Although arms transfer decisions can be notoriously opaque, increased transparency can contribute to a shared understanding of international legal obligations among arms exporters. Increased and substantive information-sharing can contribute to implementing consistent, objective, and non-discriminatory arms export risk assessments as required by Article 5 of the ATT.

Second, cooperation plays an essential role in adequate information-sharing to overcome interpretive differences. States, the decision-makers regarding arms transfer risk assessments, are hereby assisted by various actors, such as the ATT Secretariat, various

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[98] Conseil d'État (France), *Decision No. 436098* (27 January 2023), para 4, available at: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2023-01-27/436098; Administrative Court Frankfurt am Main (Germany), Judgement of 16 December 2024, ECLI:DE:VGFFM:2024:0911, para 32, available at: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE240001082.

[99] León Castellanos-Jankiewicz et al, Access to Justice for Gun Violence: Seeking Accountability for European Arms Exports (University of Amsterdam Law Clinics, Asser Institute for International and European Law, 2023).

[100] ICRC, 'As the Arms Trade Treaty turns ten years old, restraints on international arms transfers remain an urgent humanitarian imperative' (31 March 2023), available at: https://www.icrc.org/en/document/arms-trade-treaty-turns-ten-years-old-restraints-international-arms-transfers-remain-urgent.

[101] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Impact of arms transfers on human rights* (2024), UN Doc A/HRC/56/42, available at: https://docs.un.org/en/A/HRC/56/42, 29.

United Nations bodies, regional organizations, civil society, industry, and other actors. Analyses tailored to further understand intricacies related to obligations surrounding risk assessments, including indicative lists of indicators to consider in such assessments, should be applied in domestic systems.[102] Moreover, relevant stakeholders' calls for restraint in arms exports in relation to a specific situation need to be taken seriously.[103] Ultimately, States parties to the ATT are obliged to cooperate with one another, aimed at building confidence, and are encouraged to take various measures targeted at the effective implementation of the treaty.[104]

Third, adequate enforcement of applicable rules is essential. Especially States parties to the ATT, which are bound by tangible, primary obligations under international law, can be subjected to accountability mechanisms for conduct suspected of violating the law. However, in the absence of a compromissory clause establishing the International Court of Justice's competence to settle disputes arising from the interpretation or application of the ATT, judicial enforcement remains decentralized and largely dependent on the procedural aspects of ATT States Parties' domestic judicial systems. To address the risk of divergent interpretations of the rules applicable to arms transfer decisions by domestic courts, court documents should be made publicly available and, if possible, translated to ensure disclosure of reasoning across jurisdictions. Irrespective of domestic enforcement efforts and judicial review of arms transfer decisions, it seems valuable that States continue engaging in open discussions about their interpretations of what constitutes violations of international law, as is happening within the framework of the ATT Conference of States Parties and its Working Groups. Such exchange of information could extend beyond diplomatic exchange to also include judicial exchange.

Finally, it is imperative that States uphold humanitarian principles and adhere to their international obligations. This includes interpreting treaties in good faith while considering their object and purpose.[105] The 34th International Conference of the Red Cross and Red Crescent reiterated this call for compliance with IHL in October 2024, "*insist[ing] that* States refrain from encouraging, aiding or assisting IHL violations by other States and act to promote compliance with IHL by other States in conformity with international law and the United Nations Charter,

[102] ATT Working Group on Effective Treaty Implementation, List of Possible Documents to be Considered by States Parties in Conducting Risk Assessment under Article 7, ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep, Annex B, 26 July 2019.
[103] ICRC, 'The Arms Trade Treaty must be faithfully implemented to prevent serious violations of international humanitarian law and human rights law: ICRC President Mirjana Spoljaric addresses the Tenth Conference of State Parties to the Arms Trade Treaty on World Humanitarian Day' (ICRC, 19 August 2024), available at: https://www.icrc.org/en/news-release/arms-trade-treaty-must-be-faithfully-implemented-prevent-serious-violations.
[104] ATT, Articles 1, 5, 15, 16.
[105] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 26.

including by […] complying with their own obligations under applicable international treaties and law regulating the use and transfer of arms".[106]

**Conclusion and outlook**

This contribution first addressed the implications of differing interpretations of risks for IHL violations in arms export assessments and explains why such divergence should be overcome. It submits that all States are bound by the obligation to ensure respect for IHL. Although this obligation is somewhat intangible, it may affect arms transfer decisions as it requires States to exercise due diligence prior to any transfer. In addition, ATT States Parties are explicitly bound to undertake a risk assessment, and to review whether arms transfers might be used to commit or facilitate serious violations of IHL. The consistent, objective, and non-discriminatory application of arms transfer rules in domestic practice is essential to give effect to the humanitarian protections that the relevant international legal bases, the ATT and Common Article 1, seek to safeguard.

Subsequently, it turned to exploring how interpretive differences of risks for IHL related to arms transfers can be overcome. The analysis suggested a number of measures, including increased and consistent information-sharing and adequate international cooperation, and considered the value and challenges associated with domestic enforcement measures for internationally binding rules. The contribution illustrated various stakeholders' role in creating an increasingly detailed, shared understanding about the application of arms transfer risk assessments and highlighted a non-exhaustive list of key resources that may support States' implementation of their obligations. Taking stock of existing resources calls for a reiteration of existing recommendations to States to implement their obligations under international law in good faith. As ICRC President Mirjana Spoljaric addressed the 10th Conference of State Parties to the ATT on 19 August 2024, she appealed to States to review whether their current conduct is, in fact, in accordance with the rules set forth by the treaty:[107]

> "I urge you to take an honest look at how actions and inactions in arms transfer perpetuate suffering and to demonstrate renewed commitment to the clear humanitarian purpose of the Arms Trade Treaty. [...]

[106] 34th International Conference of the Red Cross and Red Crescent, 'Building a universal culture of compliance with international humanitarian law', (34IC/24/R1, October 2024) 10, available at: https://rcrcconference.org/app/uploads/2024/11/34IC_R1-IHL-EN.pdf.

[107] ICRC, 'The Arms Trade Treaty must be faithfully implemented to prevent serious violations of international humanitarian law and human rights law: ICRC President Mirjana Spoljaric addresses the Tenth Conference of State Parties to the Arms Trade Treaty on World Humanitarian Day' (ICRC, 19 August 2024), available at: https://www.icrc.org/en/news-release/arms-trade-treaty-must-be-faithfully-implemented-prevent-serious-violations.

> Any State as an arms supplier must apply greater diligence in assessing the risks posed by the arms they transfer, and implement timely, robust and practical measures that can realistically offset such risks.
>
> Respect for international humanitarian law in arms transfer decisions must apply at all levels of decision-making and must not be trumped by economic or political considerations."

In reiterating that humanitarian considerations are paramount in arms transfer decisions, the ICRC president called on Sates to apply stringent interpretations in arms export assessments. Giving effect to the standards for arms transfers codified in the ATT is ultimately up to States' effective implementation and application of international law.

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# Ensuring respect for IHL: a role for human rights law and the UN human rights system?

**Eric Mongelard**
Human Rights Officer, Office of the United Nations High Commissioner for Human Rights

**Summary**

*Mr. Mongelard explored the intersection between human rights law and IHL in the context of implementing the obligation to ensure respect for IHL. First, he examined how some substantive human rights norms, such as the rule of law and the principle of due diligence, can influence arms transfer decision-making, highlighting the importance of transparency and accountability in these decisions. Second, he discussed practical human rights mechanisms established or supported by the United Nations that contribute to ensuring respect for IHL, such as the Human Rights Due Diligence Policy (HRDDP), which assesses the risk of grave violations before supporting non-UN security forces. He also emphasized the significance of compliance frameworks, such as the one used with the G5 Sahel Joint Force, in preventing and addressing human rights and IHL violations through robust monitoring, training, and accountability systems.*

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This contribution is meant to examine three interconnected aspects of the relationship between human rights and the obligation to ensure respect for international humanitarian law (IHL). First, I will explore the contribution of substantive human rights norms and principles to this obligation. Second, I will look at practical mechanisms that the United Nations (UN) has established or supported that contribute to ensuring respect for IHL. Finally, I will briefly highlight the role that human rights mechanisms and the Office of the High Commissioner can play in upholding IHL.

## 1. The contribution of substantive human rights norms and principles

### *1.1. Rule of law and governance in arms transfers*

Let me begin with the importance of rule of law and governance principles in arms transfer decision-making. International human rights law (IHRL) has a close relationship with the rule of law and thereby contributes to the good faith implementation of the obligation to ensure respect for the Geneva Conventions, by placing requirements on the governance of arms transfers decision-making. This link has been underlined by the UN Secretary-General in his definition of the rule of law, which he characterizes as a “principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and

which are consistent with international human rights norms and standards."[108] One essential element of the rule of law is the limitation of arbitrary exercise of power, including the restriction of unfettered discretion within any branch of government.

As previously mentioned, some States interpret their discretion over arms transfers quite broadly. Nevertheless, under the principles of the rule of law, States are obligated to adopt measures to ensure that executive mandates are exercised in accordance with constitutionally allocated powers. This means that, while the political intention to transfer arms may fall within the executive's prerogative, the compliance with the law and the execution of the arms transfers is not.

Compliance with human rights law provides an essential safeguard against threats to the rule of law. One concrete example is the right of access to information, protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). This right entails both the proactive publication of information in the public interest and the obligation to provide access to information held by public authorities, including on arms transfers. This topic was the subject of a report by the Office of the High Commissioner for Human Rights (OHCHR) presented to the Human Rights Council in June 2024.[109] The report found that governments frequently invoke excessively broad and often vague references to national security, foreign relations, or commercial interests to withhold information. This occurs not only in responses to access-to-information requests from the general public but also in reporting to parliaments and international mechanisms. ^The report also found that reporting to parliaments often lacks substantive detail, that information on specific transfers is frequently restricted, that reports submitted to international mechanisms are often kept confidential, and that access to information request are frequently unsuccessful as far as the general public is concerned. This lack of transparency weakens the oversight capacity of parliaments and limits the ability of individuals to challenge arms export decisions before domestic courts. This is particularly concerning given the role of parliaments and courts in ensuring executive compliance with export licensing criteria and, by extension, with international law.

### *1.2. The principle of due diligence*

The second principle I would like to highlight is due diligence. In international human rights law, the term denotes a variety of specific obligations. Broadly speaking, it refers to the obligation to adopt necessary measures to prevent human rights violations by State organs. This includes passing laws, establishing procedures, and ensuring that oversight institutions –

[108] UN Security Council, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies* (2004), UN Doc S/2004/616, para. 6, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf.

[109] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Impact of arms transfers on human rights* (2024), UN Doc A/HRC/56/42, available at. https://docs.un.org/en/A/HRC/56/42.

such as national control systems for arms transfers – have adequate resources. In its more specific sense, due diligence denotes a requirement applicable in certain contexts to assess the human rights impacts of arms transfers, similar to some of the treaty obligations of the Arms Trade Treaty (ATT).

The Human Rights Committee, in its General Comment on the right to life, describes due diligence as the duty to take reasonable positive measures in response to reasonably foreseeable threats to life originating from private actors or entities whose conduct is not attributable to the State.[110] This duty applies not only to actions taking place in whole or in part within the territory of the state (or under the jurisdiction of the state), but also to conduct that has a direct and reasonably foreseeable impact on individuals outside the territory. This has clear relevance to arms transfers, as well as to the transit and transshipment of weapons.

These aspects of due diligence in IHRL intersect with two important aspects of the obligation of States under Common Article 1 of the Geneva Conventions. They support compliance with both the external dimension of the negative obligation (through general legislative, procedural, and institutional measures) and the internal dimension of the positive obligation to prevent certain conduct by non-state actors, including companies.

In this context, it is also important to mention the UN Guiding Principles on Business and Human Rights, which include a reference to the fact that, in situations of armed conflict, enterprises should respect the standards of IHL. There is a heightened human rights due diligence obligation for businesses operating in conflict areas.

These examples illustrate how compliance with the rule of law and human rights obligations is an essential tool for ensuring better compliance with States' obligations under Common Article 1.

## 2. Practical mechanisms contributing to ensuring respect for IHL

### *2.1. The UN Human Rights Due Diligence Policy*

Let me now turn to two practical mechanisms that contribute to ensuring respect for IHL. The first is the UN Human Rights Due Diligence Policy (HRDDP), adopted in 2011, which concerns UN support to non-UN security forces. Such support may include training, mentoring, advisory and programmatic support, financial support, as well as logistical, strategic, or operational support and joint operations. The HRDDP requires the UN to carry out a risk assessment as soon as possible whenever support is planned, offered, requested, or provided. The key question is: What is the risk that the unit receiving the support will commit grave violations? The policy defines "grave violations" as war crimes, crimes against humanity, gross violations

[110] Human Rights Committee, *General Comment No.36 on Article 6: right to life* (2019), UN Doc CCPR/C/GC/36, available at: https://docs.un.org/en/CCPR/C/GC/36.

of international human rights law, and patterns of repeated violations of IHL and IHRL. Based on this assessment, the HRDDP provides guidance on what to do with that support.

An illustrative example: if national security forces in a country where a UN peace operation is present request UN assistance in transporting detainees, a risk assessment must be conducted. The result of this assessment identifies one of the three levels of risks, which determines whether support can be provided:

- Low risk: support may proceed.
- Medium risk: a study of mitigation measures is required to assess their availability and effectiveness in limiting the risk of potential grave violations by the unit.
- High risk: support must be withheld or suspended.

### *2.2. Compliance Framework approach*

The second example is the Compliance Framework approach, a package of concrete measures and mechanisms aimed at preventing, mitigating, and addressing violations by security forces. It adopts a risk-reduction approach to prevent civilian harm during military operations and ensure accountability when violations occur.

A prominent example is its implementation with the G5 Sahel Joint Force. The mandate given by the UN Security Council to the G5 Sahel included an obligation to establish a robust compliance framework to prevent, investigate, address, and publicly report on human rights violations. A technical arrangement was signed in 2018 between the UN, the European Union, and the G5 Sahel countries to define this framework and assign roles and responsibilities of different stakeholders in the establishment of this compliance framework.

OHCHR played a key role in providing technical assistance to integrate human rights and civilian protection into the planning and conduct of operations. It also supported the G5 Sahel in the development of human rights compliant rules and regulations, such as standard operating procedures on detention, capture, and transfer.

The Compliance Framework rests on seven pillars:

1. Screening and selection
2. Training
3. Adoption and dissemination of rules and procedures
4. After-action reviews
5. Integration of human rights and protection of civilians' requirements
6. Monitoring and reporting on military operations
7. Accountability mechanisms and procedures

While the Compliance Framework is implemented by the force receiving the support itself, OHCHR assists in its development and implementation. This model is now being replicated in other contexts. For example, OHCHR is currently working with the EU on similar initiatives for EU peace operations.

## 3. Role of OHCHR and human rights mechanisms in upholding IHL

### *3.1. Human rights monitoring and reporting*

OHCHR's monitoring and reporting work also contributes to upholding IHL. Through its country presences, including human rights components of peace operations and special political missions, OHCHR is present in numerous contexts affected by armed conflict and monitors and reports on compliance not only with IHRL but also with IHL. OHCHR's reports are amongst the only public reports produced by an international organization that examine compliance with IHL by parties to the conflict. The independent investigative bodies of the Human Rights Council, such as Commissions of Inquiry, also examine compliance with IHL where applicable.

These public reports contribute to accountability by international judicial mechanisms for alleged violations of IHL. The International Court of Justice has indeed often referred to information found in reports by OHCHR and Human Rights Council investigative bodies to establish violations, as well as in order on provisional measures.[111]

### *3.2. Individual complaints mechanisms*

Individual complaint mechanisms of human rights treaty bodies can also play a role in upholding IHL norms through the enforcement of rights that have been violated in armed conflict settings, that would also amount to violations of IHL. It is important to note that no such mechanisms exist for violations of IHL treaties. For instance, the Human Rights Committee has received a number of complaints related to the rights of protected persons in occupied territory covering a wide range of issues that would also amount to violations of IHL, such as alleged arbitrary detention, retroactive application of criminal law, enforced disappearances and transfers of detainees to the territory of the occupying power. The views adopted by the Committee in some of these cases refer to IHL rules and, in particular, to the Fourth Geneva Convention.[112]

[111] See, for example: ICJ, *The Gambia vs. Myanmar*, Order of 23 January 2020; and *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.

[112] See, for example: Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3022/2017* (2024), UN Doc CCPR/C/140/D/3022/2017, available at: https://www.ccprcentre.org/files/decisions/G2407573.pdf.

**Conclusion**

Substantive human rights norms, particularly the principles of rule of law and due diligence, play a critical role in supporting the obligation to ensure respect for IHL. Practical mechanisms like the UN Human Rights Due Diligence Policy and the Compliance Framework further demonstrate how these norms are operationalized to prevent IHL violations and strengthen accountability in conflict settings.

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## Moderated discussion

At the end of the panel discussion, a Q&A session allowed the audience to raise several questions.

**Limits of discretion in arms transfers under international law**

One participant inquired whether the discretion given to States in making arms transfer decisions is limited by other legal factors, such as the general principle of international responsibility that prohibits States from aiding or assisting in internationally wrongful acts. The person cited advisory opinions from the International Court of Justice (ICJ) that have identified violations of international law, including IHL, as well as provisional measures issued by the ICJ that suggest a wrongful act is ongoing. The participant questioned whether these developments should limit a State's discretion in supplying arms to countries involved in such violations.

A panelist explained that while such violations by recipient States must certainly be taken into account in export assessments, they do not automatically constrain the discretion of exporting states. Instead, they serve as critical indicators in the decision-making process. The panelist distinguished between primary and secondary obligations under international law. Before the Arms Trade Treaty (ATT), responsibility for arms transfers contributing to violations of international law fell under the category of secondary responsibility – States could be held accountable for aiding or assisting another actor's primary violation. However, with the entry into force of the ATT, States now have a primary obligation to refrain from authorizing arms transfers where there is a clear risk that the weapons could be used to commit violations of IHL or other norms of international law. Importantly, under the ATT, the actual occurrence of a violation is not required: the risk alone is sufficient to trigger this obligation. In summary, while these legal frameworks do not strictly limit State discretion in a formal sense, they do impose significant obligations that must shape national assessments. The implications of international responsibility and treaty obligations must therefore be carefully considered in arms export decisions.

**Transposing arms export standards to dual-use goods**

One participant raised the question of whether the standards applied to arms exports should also apply to dual-use goods. The person observed that the main proliferation threat today often comes from dual-use goods rather than traditional arms, and pointed to the growing trade in dual-use goods and referred to various legal frameworks, such as the EU's 2021 Dual-Use Regulation and other international agreements that govern the export of such goods.

One panelist explained that, while hesitant to give a universal answer since much depends on the specific context, it is indeed the case that in the EU, dual-use items are subject to a binding regulation that mandates the consideration of humanitarian criteria – criteria that closely align with those applied to arms transfers under the EU Common Position on Arms Exports. Therefore, where violations of international law (particularly IHL) are foreseeable, those concerns should be integrated into the assessment of whether to permit the export of dual-use items. In the panelist's view, similar standards of caution and responsibility should apply.

Another panelist expanded on the discussion by bringing in two additional legal dimensions. First, they noted that Common Article 1 of the Geneva Conventions applies broadly and is not limited by the definitions found in specific arms control treaties. As such, it remains relevant to dual-use goods, even where other instruments may not apply. Second, they referred to human rights due diligence obligations, particularly the right to life. These obligations apply to all activities conducted within a State's jurisdiction, even when their effects are felt outside that territory. For example, if a corporation manufactures and exports a dual-use item that becomes an essential component of a weapon system used to deliberately target civilians in an armed conflict, the State's obligations under the right to life would be engaged. Thus, even outside the traditional arms export context, legal responsibilities under both IHL and international human rights law can be triggered.

**Comparing legal bases for denying arms transfers: ATT, EU Common Position, and Common Article 1**

One participant asked whether there is a substantive difference between the obligation to refuse an arms transfer based on Common Article 1 of the Geneva Conventions and those based on the ATT or the EU Common Position on Arms Exports.

A panelist responded affirmatively, identifying three key differences between Common Article 1 and the ATT. The first distinction lies in the scope of the obligation. Common Article 1 is not confined to arms transfers; it applies broadly to any form of assistance that might contribute to violations of IHL. Therefore, it can encompass dual-use goods and other types of aid or cooperation not covered by the ATT. Second, Common Article 1 entails a continuing obligation. It remains applicable even after the export, especially if there is evidence that the items are being used to commit violations. In contrast, the ATT focuses on whether to approve a transfer at the authorization stage. Once a transfer has occurred, the ATT's relevance to that specific export diminishes, although it may inform future authorizations. Third, there is a difference in the threshold for action. The ATT requires an "overriding risk" of serious violations, suggesting a balancing test that allows for State discretion. Common Article 1, by contrast, contains no such qualifier. It applies to any violation of the Geneva Conventions or, where applicable, Additional Protocol I – potentially even as a matter of customary international law. As a result,

Common Article 1 may impose stricter obligations than the ATT or the EU Common Position, making it a more comprehensive and stringent legal standard that States must consider alongside treaty-based obligations when making export decisions.

**Customary nature of the external aspect of Common Article 1.**

One participant asked about the customary nature of Common Article 1 of the Geneva Conventions, inquiring whether the main point of contention regarding the article lies in its external positive aspect. They also sought the panelists' thoughts on the Declaration that accompanied the recent Resolution adopted at the 34th International Conference of the Red Cross and Red Crescent.[113]

A panelist responded by confirming that the primary controversy surrounding Common Article 1 concerns the external aspect of the obligation to ensure respect for IHL. They noted that while States may not always explicitly differentiate this aspect in their statements, it is clear that the external element remains a significant point of debate. Regarding the Resolution adopted at the 34th International Conference, it reflects a broad recognition of the obligation to ensure respect, although it does not explicitly use that phrasing. However, the fact that the accompanying Declaration was supported by a large number of States underlines that there is growing acceptance of the obligation to ensure respect, including its external element.

**Reassessing arms export licenses in response to changing circumstances**

One participant asked about the process of reassessing arms export licenses after they have been granted, specifically whether States should reassess these licenses if the situation on the ground changes, and how quickly such a reassessment should take place.

A panelist explained that both the ATT and the EU Common Position contain provisions encouraging States to reassess export licenses when new information emerges or changes in the situation arise. This could include scenarios involving serious and systematic violations of IHL by the recipient State. It is important to recognize that there is often a significant time gap between the granting of an export license and the actual export. For example, military equipment such as jets, tanks, or drones typically requires a considerable amount of time to be delivered. This time lag was anticipated by the drafters of these agreements, which is why provisions were included to encourage States to reassess licenses when new information emerges. Now, ten years after the ATT's implementation, two key developments are particularly noteworthy. First, some States have adopted the practice of granting open or summary licenses, where the recipient is assessed once, and if the assessment is positive, an

[113] Joint statement of the Kingdom of Spain and the Spanish Red Cross on the 1st Resolution 'Building A Universal Culture Of Compliance With International Humanitarian Law', available at: https://cervenykriz.eu/files/files/cz/aktuality_24/998/Statement_R1.pdf. The statement was endorsed by sixty-eight States and seventy-five National Societies.

open-ended license is granted without an expiration date or limitations on the quantity of items that can be exported. In the panelist's view, this practice effectively grants blanket approval for any conduct by the recipient, which undermines the intended conduct-dependent assessments and weakens the effectiveness of arms export controls in a manner that is inconsistent with the principles of the ATT. Second, there is a growing trend of large-scale, high-tech arms projects being developed through collaborations between industries in multiple countries, including non-signatory States to the ATT. This has led to increasingly complex global supply chains. While arms transfer controls are not universally ratified, States that are party to treaties like the ATT can still have a meaningful impact on armed conflicts if they rigorously uphold their obligations. Regarding the speed at which States should react, the panelist believes they should take immediate action whenever new information emerges. If evidence indicates that serious and systematic violations are occurring, it would be inappropriate to wait until a business agreement is fulfilled and goods are ready for delivery.

**Role of human rights mechanisms in arms transfer risk assessment**

One participant asked about the role of human rights mechanisms in assessing risks associated with arms transfers, specifically whether any guidance exists on how these mechanisms can be incorporated into risk assessments.

A panelist explained that various documents, such as the EU Common Position and the ATT, identify sources of information relevant to risk assessments. Notably, reports from UN field presences and human rights components of peace operations are crucial in monitoring and reporting on violations of both IHL and international human rights law (IHRL) during armed conflicts. These reports are frequently cited by international courts, such as the International Court of Justice (ICJ), in relation to questions of international accountability, particularly regarding State responsibility. Along with information from independent investigative mandates (such as commissions of inquiry and other investigative bodies), these reports should also be considered a major source of information in arms export assessments. Additionally, human rights treaty bodies are increasingly examining violations that occur in conflict zones, such as torture or arbitrary detention, which may also constitute IHL violations. The views of human rights bodies are becoming more relevant for arms transfer assessments, and the evolving interplay between human rights law and IHL could shape future decisions.

**Common Article 1 and the failure to execute ICC arrest warrants**

One participant asked whether we might see a shift in the ICC's jurisprudence regarding State responsibility for failing to execute arrest warrants, particularly in light of recent patterns of non-enforcement. They inquired whether Common Article 1 could be used to hold States accountable for failing to fulfill their obligations, and how State responsibility might be realized outside the obligation of cooperation under the Rome Statute.

One panelist underlined the complexity of the question. The ICC's obligations regarding arrest warrants are clear, especially after its 2019 decision affirming that ICC States parties must execute arrest warrants. While the ICC has established the obligation to execute arrest warrants, some States have been hesitant due to concerns over the immunity of heads-of-State. Under the Rome Statute, there are limited avenues for holding States accountable for failing to cooperate with the ICC. The idea of using Common Article 1 to hold States accountable is intriguing, though it is important to note that the Geneva Conventions do not provide for this possibility.

Another participant emphasized that the ICC has indeed confirmed that all States parties are obligated to execute arrest warrants, even for heads of State, heads of government, or foreign ministers of States not parties to the Statute. However, the key issue lies in the lack of consequences for States that fail to comply. As for the question of whether non-State parties to the ICC could be obligated to enforce ICC arrest warrants under Common Article 1 if such warrants involve war crimes, this argument has not been previously put forward. It would represent a significant shift in legal interpretation.

**Right to access information in arms export controls**

One participant asked about the balance between national security concerns and the right to access information, particularly in the context of arms export controls, inquiring whether there is specific guidance on how to balance these competing interests, beyond the well-known tests established by the European Court of Human Rights (legitimate aim; prescribed by law; necessary and proportionate in a democratic society).

A panelist referred to a recent UN report[114] that expands on the three-requirements test. This report delves deeper into the requirements for restricting access to information and emphasizes that States bear the burden of proving that such restrictions are compatible with international law. It also highlights the positive obligation of States to proactively publish information, rather than merely responding to requests. This guidance offers further clarity on how States should approach the balance between national security concerns and the need for transparency in the context of arms exports.

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[114] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Impact of arms transfers on human rights* (2024), UN Doc A/HRC/56/42, available at. https://docs.un.org/en/A/HRC/56/42.

# PANEL 3

# HUMANITY IN THE AGE OF NEW TECHNOLOGIES

CHAIRED BY JESSICA DORSEY, ASSISTANT PROFESSOR, UTRECHT UNIVERSITY SCHOOL OF LAW

# AI-enabled decision-support systems (AI DSS) in the military decision-making process

**Merel Ekelhof**
Senior Advisor, Policy Directorate of the U.S. Department of Defense Chief Digital and Artificial Intelligence Office (CDAO)

**Summary**

*Dr. Ekelhof discussed the role of AI-enabled decision support systems (AI DSS) in the military targeting process, with a focus on their influence on decision-making and the implementation of international humanitarian law (IHL). She examined how these tools are integrated across the strategic, operational, and tactical levels from planning to execution and assessment, highlighting where and how IHL principles are translated into practice. AI DSS can enhance targeting by processing large data sets, identifying patterns, and predicting trends, but they also raise concerns related to opacity, complexity, and system integration. She emphasized that targeting is a distributed practice involving various actors, many of whom are not legal experts but still play a key role in operationalizing IHL. As AI becomes more embedded in these workflows, mapping its use across the process is essential to understanding both its benefits and its potential risks for IHL compliance.*

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This contribution focuses on the role of AI-enabled decision support systems (AI DSS) in the military targeting process. While autonomous weapons systems have received much of the international attention, AI DSS are an increasingly prominent topic, and rightly so. AI DSS are not only being developed but are also actively used in ongoing conflicts, particularly in the context of target planning. These technologies offer unique advantages: they can process large volumes of data at speed and scale, identify patterns and dependencies that humans may overlook, and even predict trends or events with greater accuracy than some existing tools. However, they also come with risks. They can be opaque, making it difficult for users to interpret or act on their outputs appropriately, and their integration into existing systems, especially legacy ones, is highly complex.

To fully understand how these systems affect military decision-making and the implementation of IHL, it is essential to examine the context in which they are being deployed. Throughout my research career, I have focused on understanding how humans make decisions about the use of force, with a specific emphasis on the targeting process across strategic, operational, and tactical levels. Today, I want to walk through this process in a condensed way, highlighting for each phase: (1) what happens, (2) how IHL principles are translated into practice, and (3) how AI-enabled decision support systems might play a role.

### 1. Strategic and political level

At this level, political and strategic leadership determine whether to authorize military intervention. If approved, a set of interrelated documents is developed to define the boundaries of the operation. These include rules of engagement (RoE), approved and restricted target sets, a no-strike list, and target engagement authorities. RoE are one example of how legal principles are operationalized. They translate legal norms, alongside political and diplomatic considerations, into operational directives. Similarly, target sets reflect the principle of military necessity and mark the start of the implementation of distinction, as certain types of targets are identified early on as being necessary to engage.

AI DSS can inform decisions at this level by analyzing data on troop movements or identifying patterns across economic, political, and military domains to assess the likelihood of military action. They can also assist in labelling entities as military objectives or protected sites.

### 2. Operational level

At the operational level, the commander translates strategic direction into concrete mission objectives and decides which targets to engage, under what circumstances, and within which parameters.

A large portion of operational planning focuses on target development. This involves a wide range of actors (targeteers, intelligence personnel, national agencies, commanders, and legal advisers) working together to determine which targets contribute to mission objectives, fall within approved target sets, and are legally permissible. This process results in the creation of target folders, which are then presented to the targeting board for final approval. In terms of IHL, target development yields understanding of which targets contribute most effectively to military action and offer the greatest military advantage when engaged, while also involving legal considerations to determine which targets should be nominated for further development, or restricted because they are not considered lawful military targets or due to high collateral damage estimations. The targeting board and target folder presentations reflect a typical legal sequence, even if they do not explicitly use legal language, allowing commanders to engage with legal advisors during the approval process.

AI DSS are particularly valuable in this phase, which is both data- and labor-intensive. They can assist in identifying relevant objects or patterns, generating no-strike lists, and continuously updating “patterns of life” assessments to better inform what is considered normal activity, thereby improving situational awareness and reducing error.

### 3. Tactical level

Following approval, tactical-level planning determines the concrete details of an attack: time and direction of the attack, munition fragmentation pattern, secondary explosions, personnel safety, contingency planning, and more. This level mirrors the operational one but in greater detail. Legal considerations remain similar but are applied more directly to execution-level decisions.

Again, this stage is extremely labor-intensive and could benefit significantly from AI DSS. These tools may support contingency planning, i.e. anticipating what happens if an asset is lost, if a target becomes inaccessible, or if ammunition runs low. They can predict trends or events and formulate alternative courses of action in these situations. They can also assist with logistics by tracking asset availability and readiness, a frequent concern of commanders.

### 4. Execution phase

Often called the “kill chain” or dynamic targeting cycle, this phase marks the moment an approved target is actually engaged. It includes steps such as positive identification (PID), collateral damage estimation, application of rules of engagement, and obtaining target engagement authority, including red card holders in coalition operations. Execution is typically distributed, involving multiple actors: targeting cells, functional experts, commanders, etc.

Procedures like PID help operationalize the principle of distinction, while collateral damage estimation informs assessments of proportionality and precautions. However, these procedures are not equivalent to compliance with legal principles; they are tools to help implement them. Possible AI tools in this phase include those used for target detection, tracking, and object classification in real time. They can also identify newly present protected objects or civilians entering a target area, which can influence the legality of a planned strike.

### 5. Assessment phase

After execution, an assessment phase evaluates whether the intended effects were achieved. Did the strike hit the correct target? Were the effects proportional? Was the objective accomplished? This step is essential not just for accountability and legal review but also to inform subsequent decisions and follow-on targeting.

In environments where access is limited, AI tools can assist with post-strike assessments by providing continuous monitoring, identifying changes to target area, and analyzing whether enemy behavior has shifted. If physical damage is not visible, AI can also help assess non-material impact through secondary indicators and multi-source data analysis.

**Conclusion**

There are many reasons to examine the targeting process comprehensively, but I will highlight two key points.

First, military targeting is a distributed practice. A wide range of individuals and institutions contribute to decision-making, not only commanders or legal advisers, but also others who apply the law indirectly through procedures, methodologies, and doctrine. These individuals play a key role in operationalizing IHL even if they are not consciously applying the law, but rather executing a process.

Second, these decision-makers are increasingly supported by AI-enabled technologies and, while these tools can enhance compliance, they also introduce risks. This is especially true if we fail to map where in the process these tools are used. While AI in weapons are often recognized as being high-risk capabilities, AI DSS are increasingly integrated and somewhat invisibly running in the background influencing critical decisions about the use of force. Beyond performance concerns (such as under-tested tools deployed in the field) a major risk is poor integration. Even well-performing tools can produce negative outcomes if users are not properly trained, or if systems are not responsibly embedded in existing workflows.

To fully grasp the opportunities and risks of AI-enabled decision support systems, we must look at the military decision-making process holistically, from start to finish.

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# Effective advance warnings in a time of information disorder

**Henning Lahmann**
Assistant Professor, Leiden Law School

**Summary**

*Dr. Lahmann discussed the growing challenge of mis- and disinformation during armed conflicts, particularly with the rise of digital communication technologies like the internet and smartphones. While information operations have long existed in warfare, the increasing complexity of these operations has raised significant concerns in terms of IHL, especially regarding whether disinformation campaigns can be considered "attacks" under IHL. While these campaigns are often diffuse and difficult to trace, the real concern lies in the use of digital platforms to issue advance warnings of attacks, a critical precaution under Article 57 of Additional Protocol I. He outlined the challenges of ensuring that such warnings are effective, citing issues like unstable communication infrastructure, widespread misinformation, and conflicting narratives, which undermine civilians' ability to trust and act on warnings. He concluded that, while digital platforms could enhance warning systems, the current digital environment is too unstable and unreliable to fulfill this crucial legal requirement effectively.*

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Thank you for the invitation to speak on this great and topical panel today. In my brief remarks, I would like to address the critical issue of the phenomenon of mis- and disinformation spread during situations of armed conflict as a distinct and growing problem for humanitarian protection.

That times of war are always accompanied by a flood of propaganda and other forms of manipulative and misleading information is, of course, anything but new. However, as we have witnessed in a number of recent armed conflicts, both between States and between States and non-State armed groups, the advent and ubiquity of digital communication technologies, including the internet and smartphones, have greatly exacerbated the issue, with often grave humanitarian consequences.

## 1. Information operations in armed conflict

Over the past few years, the growing phenomenon of information operations carried out through digital communications technologies in situations of armed conflict has slowly started to gain attention from scholars of international humanitarian law (IHL). At the same time, such conduct has mostly been scrutinized in the context of certain probative rules, such as the prohibition against encouraging violations of IHL or the prohibition against threats of violence,

the primary purpose of which is to spread terror among the civilian population.[115] Another, more pertinent strand of research has examined whether, and under what circumstances, information operations in armed conflict may even amount to "attacks" within the meaning of Article 49 Additional Protocol I when they lead to physical or other harm that renders the act to fall within the scope of "violence" – with the result that the application of the IHL rules on targeting is triggered in the context of information operations.

To this effect, even though I generally agree that we cannot *per se* rule out the possibility that a disinformation campaign directed against the adversary directly leads to effects that justify this legal qualification under IHL, for two main reasons – one normative and one descriptive – I remain skeptical as to the usefulness of such considerations. For one, the way the contemporary information environment functions, it is extremely difficult to establish, to a sufficient degree of certainty, both attribution to a particular actor and a causal nexus between a concrete instance of misleading information on the one hand and a particular harmful outcome on the other. This problem makes the application of existing laws to such kinds of operations inherently difficult. Usually, we do not see any direct and immediate effects, as most disinformation campaigns are much more diffuse and difficult to frame in terms of concrete, measurable outcomes.[116] Second, descriptively, even disregarding these principled doctrinal reservations, this scenario does not accurately reflect how most contemporary information operations during armed conflicts unfold or what they seek to achieve. Rarely, if ever, have we seen a disinformation campaign directly pursuing such violent objectives that would justify its qualification as "attacks" if only attribution and causation could be proven to a legally satisfying degree. In other words, it is usually not the aim of either States or non-State armed groups when they resort to the creation and dissemination of false or misleading information in armed conflict.

### 2. The obligation to issue effective advance warnings

Instead, what I want is to demonstrate that the most tangible – and, furthermore, the most concerning – adverse effects of mis- and disinformation in situations of armed conflict today relate to parties to the conflict using digital communication technologies to issue "effective advance warnings" of attacks, as part of their legal obligation to take precautions in attack pursuant to Article 57 of AP I. The basic principle in this regard is spelled out in the provision's first paragraph, which provides that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects". In the context of *attacks* as the more critical form of military operations, the second paragraph of Article 57 of AP I –

[115] See: Tilman Rodenhäuser, The Legal Boundaries of (Digital) Information or Psychological Operations Under International Humanitarian Law (2023) 100 International Legal Studies 541.
[116] See on this: Henning Lahmann, Infecting the Mind: Establishing Responsibility for Transboundary Disinformation (2022) 33 European Journal of International Law 411.

which is considered customary international law, binding States and non-State actors not party to the Protocol[117]– specifies that one of the precautions to be taken is to issue an "effective advance warning" whenever an attack "may affect the civilian population, unless circumstances do not permit".

These warnings primarily serve the purpose of enabling potentially affected civilians to take measures to protect themselves and their property from the effects of an attack. According to at least one author, they are also supposed to enable the belligerent party which about to be attacked to take precautions against the effects of an attack, in accordance with Article 58 of AP I – for example, by removing military objectives from the vicinity of densely populated areas.[118]

Now, to be effective, warnings are generally conceived to have to be, first, timely – meaning that they must be early enough so that potentially affected civilians do in fact have sufficient time to seek protection, depending on the given context. Second, they must be issued to those civilians who will be affected, or in any case at the very least to the authorities who control the territory and who thus bear responsibility for the safety of the civilian population, if applicable in a given case. And third, the issued warnings must make sufficiently clear what the attacking party concretely expects the affected civilians to do in order to avoid the adverse effects of the attacks – for example, either to seek shelter in place (for example, when bunkers in sufficient number are available and accessible), or to evacuate the target area in time.[119]

Traditionally, States have resorted to a variety of means to achieve this outcome, depending on the context of the armed conflict at hand and thus the feasibility of different means to issue warnings to the civilian population. For example, manuals for armed forces frequently mention the dropping of leaflets from aircraft, the use of loudspeakers or other means of direct communication, or the calling or texting of civilian individuals, families, or groups likely to be in the vicinity of a planned attack.[120] Increasingly, we also see State parties resorting to announcements through social media platforms or other digital mass communication channels, for instance, to give notice of safe routes for fleeing areas of imminent ground operations or to identify safe areas exempt from military conduct. In light of the fact that some of the traditional, analogue means of warning the civilian population have at times been criticized as too often ineffective, and given the ubiquity of electronic means of communication that can reach large audiences in an instant, in principle, resorting to such tools seems like a reasonable and practicable way to improve the practice of issuing such warnings.

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[117] ICRC, Customary IHL Study, Rule 20, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule20.
[118] Jon Griffiths, 'Warnings as a Precautionary Measure: Gaza', Articles of War, 23 June 2021, available at: https://lieber.westpoint.edu/warnings-precautionary-measure-gaza/.
[119] Ibid.
[120] ICRC, Customary IHL Study, Rule 20 (no 117).

## 3. The problem of issuing advance warnings through digital communication channels

However, I would argue that under present conditions, and also for larger structural reasons, the contemporary digital information environment cannot be considered a suitable medium for issuing *effective* advance warnings. In my opinion, therefore, relying on these channels, at least on their own, cannot discharge an armed force's positive obligations with respect to taking precautions in attack pursuant to Article 57 of AP I.

In the following, I will defend this claim by illustrating the legal conundrums through distinct yet interrelated scenarios.

### *3.1 Online warnings in an unstable communication ecosystem*

First, I submit that information disseminated with the aim of warning the civilian population cannot be considered effective if it occurs within a physically and substantially unstable communication ecosystem.

In a number of recent and current armed conflicts, we have witnessed that the digital communication channels which are supposed to carry warning messages have been rendered highly unstable and thus unreliable, often deliberately so by one or more of the parties to the conflict. This instability and unreliability can come about in different ways. For instance, parties to the armed conflict frequently resort to directly attacking the digital communication infrastructures or the electrical grid that powers them, both actions that often lead to extended communication blackouts. Apart from such physical attacks, these results may also be achieved by means of adversarial cyber operations, a tactic that has also been on the rise recently in different conflicts. At times, there have even been reports of armed forces disabling communication infrastructures just ahead of the initiation of ground operations to prevent enemy forces from communicating with one another. In all these scenarios, it is quite obvious that the party to the conflict cannot then also purport to utilize these same channels to issue warnings to the civilian population, as it is highly questionable whether these warnings can actually reach the persons who need to be informed under Article 57 of AP I. This issue concerns not only communication via online social media, but also the possibility of calling or texting potentially affected civilians in these situations.

Furthermore, an aspect that is less straightforward but by no means less worrying is that, in virtually all armed conflicts today, the digital information environment is frequently rendered unstable and unreliable in terms of its *substance*, namely as the result of an unprecedented amount of conflict-related mis- and disinformation being spread online. In such a context, it can become virtually impossible for civilians to consistently and dependably discern which information they encounter online is accurate and thus contributes to their safety, and which is

misleading and thus potentially increases the danger to their lives and limbs. In today's online communication ecosystem, all parties to a conflict compete to shape the framing and interpretation of both the conflict at large and individual incidents occurring over the course of military operations, often by deliberately disseminating untruths or at least highly misleading and ambiguous information. This circumstance greatly increases the likelihood that any conflict-related information on these platforms is perceived as untrustworthy by default, especially if it is distributed by adversarial armed forces.

### *3.2 Online warnings as pretext for displacement*

Second, information disseminated with the aim of warning the civilian population cannot be considered effective if it is distributed through the same channels that carry information, reasonably understood as being attributable to the same State actor, which leads to the reasonable conclusion that such information – for example, a demand to immediately evacuate a particular area due to imminent ground operations – is merely pretextual and in reality pursues entirely different strategic objectives. In this regard, we have seen in several recent and current armed conflicts that various actors, either in government functions or within the armed forces of one of the parties, occasionally publicly convey purported war aims on social media and other online channels that contradict officially communicated policy but that, at the same time, directly undermine effective advance warnings issued through official channels of the State or its armed forces. While such contradictory narratives are not, strictly speaking, *disinformation*, they contribute to the perception that the online communication environment is unreliable and untrustworthy. This, in turn, increases the likelihood that potentially affected civilians will disregard warnings they encounter online, fearing that following the instructions could lead not to safety from attack but instead (or at least also) to permanent displacement or other similarly grave consequences.

### *3.3 Online warnings in tension with online deception as military tactic*

Third, and finally, false or misleading information distributed through public digital communication channels for the purpose of deceiving military targets may be seen by civilians who happen to be in the vicinity of planned attacks and interpreted in surprising and unpredictable ways, which may unintentionally place those civilians in harm's way. This scenario arises because, with the ubiquity of digital communication technology, armed forces increasingly resort to online media with the explicit objective of misleading adversarial armed forces – for example, by announcing imminent military operations that never materialize, thereby causing the enemy to make certain decisions that can subsequently be exploited. Under the laws of armed conflict, such ruses are in principle permissible, as they do not qualify as prohibited perfidy under Article 37 of AP I. As clarified by the provision's second paragraph, "mock operations and disinformation" are explicitly acknowledged as lawful ruses.

Furthermore, such an information operation would not itself qualify as an “attack”; rather, any subsequent military operation using violence carried out in exploitation of the previous ruse would constitute the attack as defined by Article 49(1) of AP I, but not the misleading information by itself. However, when such deception is communicated through public online communication channels, it might be received not only by the targeted adversary but simultaneously by civilians present in the area of anticipated operations. This could prompt civilians to act in a certain way that may lead to harm – for instance, by fleeing towards places that are subsequently subject to attack according to the original plan, of which the public information operation was a part. Even if such directly harmful consequences to not materialize, such communication tactics are at least likely to undermine the decision-making capabilities of any civilians in the vicinity of the operation and to negatively affect the trustworthiness of any simultaneous or subsequent advance warnings distributed via the same channels.[121]

**Conclusion**

In conclusion, the three scenarios outlined in this brief presentation have demonstrated that for advance warnings as a precaution in attack pursuant to Article 57(2)(c) of AP I to be potentially effective, they must not only reliably reach the correct audiences – which often cannot be guaranteed due to intentional infrastructural impediments – but the target audience must also be in a position to trust the distributed information. Although, in principle, online media *could* serve as appropriate and effective means of communicating warnings to potentially affected civilians given the development and widespread adoption of digital communication technologies, the constantly contested online communication environment that we witness in contemporary armed conflicts falls short of providing the stability and reliability necessary for this end.

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[121] Center for Civilians in Conflict, ‘When Words Become Weapons: The Unprecedented Risks to Civilians from the Spread of Disinformation in Ukraine’, October 2023, p. 22.

# Autonomous weapons systems (AWS) and the principle of distinction under IHL: grounds for prohibiting antipersonnel AWS?

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**Summary**

*Mr. Gisel discussed autonomous weapons systems (AWS), defined as weapons that, once activated, select and engage targets without human intervention. He highlighted existing international humanitarian law (IHL) obligations that regulate and constrain the use of AWS during armed conflicts, in particular principles and rules governing the conduct of hostilities such as distinction and the prohibition of indiscriminate weapons by nature. He examined how AWS complicate legal assessments, given the lack of human control after activation over the specific targets being selected by the AWS, and the timing, and context of the strike after activation. The ICRC calls for prohibiting AWS whose effects cannot be understood, predicted, or explained, restricting AWS to objects that are military objectives by nature, and banning prohibiting anti-personnel AWS. He argued that prohibiting anti-personnel AWS is a sensible, risk-based approach grounded in historical humanitarian disarmament efforts, legal principles, and the disproportionate risks these weapons pose to civilians, outweighing their potential military utility. He concluded with a call for a legally binding instrument by 2026 that prohibits unacceptable AWS and strictly restricts the use of others before their use in armed conflict causes widespread suffering.*

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## 1. Autonomous weapons systems – what are we talking about?

The deployment of weapon systems with increasingly autonomous functions is a reality in contemporary armed conflicts. While autonomy in weapons is advancing rapidly, the concept of autonomous weapons systems (AWS) still lacks an internationally agreed definition. In the view of the ICRC and many States, AWS are weapon systems that, once activated, select and engage (i.e. apply force) to targets without human intervention.[122]

This presentation draws substantially from research and publications on the topic by the International Committee of the Red Cross, in particular the October 2025 position paper *Autonomous Weapon Systems and International Humanitarian Law: Selected Issues*, available at https://www.icrc.org/en/article/autonomous-weapon-systems-and-international-humanitarian-law-selected-issues. The author would like to thank in particular Georgia Hinds and Heidi Kandiel, legal advisers, for their contributions and their comments on earlier version of this presentation.

[122] ICRC, *ICRC Position and Background paper on Autonomous Weapon Systems*, ICRC, May 2021, available at: https://www.icrc.org/sites/default/files/document_new/file_list/icrc_position_on_aws_and_background_paper.pdf.

"Without human intervention" means that after initial activation by a human, the strike is triggered in response to information received from the environment through sensors that measure things like heat or speed, and on the basis of a generalized "target profile" that includes features like the shape or the radar signature of an object. This functional and technology-neutral understanding focuses on the role of humans – or lack thereof – in target selection and the application of force. This ensures that the characterization remains relevant in the face of technological developments. "Human intervention", for this purpose should be understood as excluding human inputs or actions that do not materially affect the autonomous functions of target selection or engagement.[123]

AWS as so understood include existing weapons such as active protection systems designed to select and neutralize incoming threats such as enemy missiles – for instance warships' anti-missile defense systems. It also includes "offensive" AWS such as loitering munitions that hover over, select, and explode into targets, for instance enemy military radars.

Such weapons and weapons systems entail a loss of human control and judgment and raise significant concerns from numerous perspectives. First, their use in armed conflict poses significant challenges to ensuring compliance with IHL principles and rules governing the conduct of hostilities – this presentation will focus on one cardinal aspect, compliance with the principle of distinction. They also raise ethical issues, in effect substituting human decisions about life and death with sensor, software and machine processes, diminishing human responsibility and agency.[124] Their use in law-enforcement operations – whether in conflicts such as in occupied territories or in peace-time – would create even more insurmountable issues.[125] AWS also increase risks of conflict escalation, and raise significant concerns in terms of proliferation.[126] In-depth exploration of all these aspects, while urgently needed and critical, is beyond the scope of this short presentation.

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[123] ICRC, *Submission on Autonomous Weapon Systems to the United Nations Secretary-General*, ICRC, March 2024 (ICRC Submission to UNSG), available at: https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/icrc_submission_on_autonomous_weapons_to_unsg.pdf.

[124] ICRC, *Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?*, 3 April 2018, available at: https://www.icrc.org/sites/default/files/document/file_list/icrc_ethics_and_autonomous_weapon_systems_report_3_april_2018.pdf.

[125] See, e.g., Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Christof Heyns, A/HRC/23/47, para. 94, available at https://docs.un.org/en/A/HRC/23/47; Human Rights Watch, *A Hazard to Human Rights: Autonomous Weapons Systems and Digital Decision-Making,* 2025, available at: https://www.hrw.org/report/2025/04/28/hazard-human-rights/autonomous-weapons-systems-and-digital-decision-making.

[126] See, e.g., *CARICOM Declaration on Autonomous Weapons Systems*, 6 September 2023, Section I: Fundamental Principles and Concerns, available at: https://www.caricom-aws2023.com/_files/ugd/b69acc_4d08748208734b3ba849a4cb257ae189.pdf.

### 2. AWS and the prohibition of indiscriminate weapons by nature

Of course, existing IHL regulates and constrains the use of AWS during armed conflicts.

Customary IHL prohibits weapons that are indiscriminate by nature, that is, weapons that cannot be directed at a specific military objective or the effects of which cannot be limited as required by IHL.[127] These include weapons that are not sufficiently accurate to strike a specific military objective or whose effects cannot be controlled in time or space as required to comply with IHL.

This applies to AWS as to any other weapon and weapons system. It requires the ability to understand the functioning of the AWS, including the nature and functioning of its sensors, the definition of its target profile and the potential effects in the circumstances ruling at the time of its use, including any risk of error, malfunction, or other unintended consequences. This is particularly relevant for AWS that function in opaque ways (also known as the "black box" challenge), such as AWS relying on artificial intelligence or machine learning techniques. These prevent the human user from being able to understand, predict or explain the system's output. The impossibility to control the weapon's effects renders it an indiscriminate weapon by nature.

Furthermore, the use of AWS in armed conflicts raises specific challenges due to hardware and software insecurities which may be exploited through hacking, tampering (e.g. adversarial attacks); to unforeseen interactions with other (including enemy) weapons systems and the operational environment; and to deceptive (e.g. "spoofing") and other countermeasures by the enemy designed to impede AWS operation. These factors are not present to the same degree in peacetime contexts, making the operation of AWS in armed conflict inherently less reliable than the use of autonomous systems in civilian contexts.

These considerations underpin the ICRC's call to prohibit AWS designed or used in such a manner that their effects cannot be sufficiently understood, predicted and explained.[128]

### 3. Compliance with IHL in the use of non-prohibited AWS during hostilities

During armed conflicts, the employment of AWS – even non-prohibited AWS – must comply with all the IHL principles and rules governing the conduct of hostilities. Many of these rules are formulated as regulating "attacks." This is the case, in particular, for the prohibition of attacks against civilians, civilian objects and persons *hors de combat*, the prohibitions of indiscriminate and disproportionate attacks, and many of the precautionary obligations.[129]

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[127] ICRC, Customary IHL Study, Rule 71, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1.
[128] ICRC Submission to UNSG (no 123).
[129] Articles 51, 52 and 57 of Additional Protocol I; ICRC, Customary IHL Study, Rules 1, 7, and 11 to 21.

Divergent views exist – both in general and specifically with regard to AWS – on what constitutes an "attack" within the meaning of IHL, and what are its temporal limitations.

Article 49(1) of the 1977 First Additional Protocol defines "attacks" as "acts of violence against the adversary, whether in offence or in defense." Strikes by AWS are "acts of violence", and therefore every one of them must comply with all the IHL rules governing the conduct of attacks. However, the way AWS function raises specific questions with regard to the notion of attack. For example, for an AWS capable of multiple strikes, does each strike constitute an attack or is the entire operation of the AWS after its activation a single attack? And does an "attack" using an AWS begin at the time of activation or only at the time when a specific person or object triggers the AWS to select it for a strike and engage it?

With regard to the beginning of the attack, amended Protocol II to the CCW identifies the emplacement of a mine as the trigger for the application of several rules usually applied to attacks.[130] Following this approach for AWS, it is submitted that each strike is an attack that commences at the moment of activation. This is also consistent with the requirement that IHL assessments must be made by humans: the assessment of the lawfulness of an attack employing an AWS can only be made before its activation since, by definition, AWS select and engage target without human intervention after activation.

Some proponents of AWS describe the systems as making a "decision" and discuss whether their technical features enable the system to respect IHL. This approach is fundamentally flawed. Despite the growing development of AWS and associated sensor, software and robotics technologies, it is worth emphasizing that IHL obligations regarding the conduct of hostilities require context-specific assessments and human judgement and must be fulfilled by human commanders and combatants. These humans must determine the lawfulness of the attacks that they plan, decide upon or execute, and they remain accountable for these assessments.[131] This also supports the view that an "attack" commences from the moment of activation since, by definition, AWS select and engage targets without human intervention after activation and therefore the assessment of the lawfulness of an attack employing an AWS can only be made before its activation.

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[130] See in particular: Art. 3(8) and 3(11). See also: Vincent Boulanin, Laura Bruun and Netta Goussac, Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction, SIPRI, June 2021, p. 23-24, available at: https://www.sipri.org/sites/default/files/2021-06/2106_aws_and_ihl_0.pdf

[131] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts, ICRC, September 2024, p. 61, available at: https://www.icrc.org/en/report/2024-icrc-report-ihl-challenges (2024 Challenges report). See also: ICRC, Commentary on the 'Guiding Principles' of the CCW GGE on 'Lethal Autonomous Weapons [sic] Systems, ICRC, Geneva, 2020, p. 3, available at: https://documents.unoda.org/wp-content/uploads/2020/07/20200716-ICRC.pdf; ICRC, 2019 Challenges Report, p. 30. 182; ICRC, Customary IHL Study, Rule 12.

The challenge is that human users of AWS do not choose, or even know, the specific person or object that will trigger the weapon system to strike. They do not choose precisely when and where the strike will occur. The IHL requirements are therefore actually very demanding. Commanders and AWS users must assess in advance and ensure, at the time of activation, that any and all possible strikes by the AWS will comply with IHL whoever or whatever may trigger such strikes throughout the entire area and during the whole period in which the AWS is active. When doing so, they need to account for all reasonably foreseeable and relevant changes in circumstances between the AWS' activation and the strike.[132] Such an exercise is likely to be possible only if strict constraints are imposed on the variables applying to the AWS and its operating environment in order to limit the number of potential outcomes, including constraints on the type of targets as will be discussed below.

### 4. AWS and the notion of military objective

Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time of the attack, offers a definite military advantage.[133] Civilian objects are all objects that are not military objectives.[134] Whether an object is a military objective depends on the circumstances ruling at the time, namely it is context-dependent and time-bound: if the destruction, capture or neutralization of an object does not yet or no longer offers a definite military advantage, it does not constitute a military objective and attacking it is prohibited.

The risk of an unlawful attack against a civilian object would be highest in cases where an AWS would be used to attack objects that are military objectives *by location*, *purpose* or *use*, as opposed to military objectives *by nature*. For example, a civilian vehicle that is temporarily requisitioned to transport soldiers to the front-line only makes an effective contribution to the enemy's military action when so used, and its destruction at any other time is unlikely to offer any military advantage. It can only be characterized as a military objective by use for the duration of this use. Furthermore, characterizing an object as a military objective by purpose requires ascertaining enemy intentions, the cues for which are nuanced, context-dependent and non-exhaustive, making them ill-suited to standardization in the kind of generalized target profile used by AWS. Finally, in case of doubt as to whether an object is protected, an assessment must be made of the conditions and restraints governing a particular situation as to whether there are sufficient indicators to warrant an attack.[135] This is a particularly demanding requirement for objects normally dedicated to civilian purposes – which may be

[132] ICRC, 2024 Challenges Report, (no 131) 61.
[133] ICRC, Customary IHL Study, Rule 8; Article 52(2) of Additional Protocol I.
[134] ICRC, Customary IHL Study, Rule 9; Article 52(1) of Additional Protocol I.
[135] ICRC, Customary IHL Study, Rule 10.

military objective by *use*, *purpose* or *location,* but are not military objectives *by nature* – and for which the First Additional Protocol establishes a presumption of civilian status.[136] Using an AWS that has a civilian vehicle as a target profile, as in the above example, is therefore likely to lead to a violation of IHL.

In contrast, the effective contribution made by objects that are military objects *by nature* is more stable and less context-dependent. These objects include enemy weapons and weapons systems, military radars, or typical military vehicles such as tanks, fighter jets or warships. These objects are also typically far more easily distinguishable from civilian objects than other types of military objectives in terms of features that lend themselves to being measured by sensors such as speed, shape or radar signature for instance. Using AWS against objects that are military objectives by nature thus presents a lower risk than with other types of objects that the object eventually struck by the AWS will in fact be protected as a civilian object at the time and place of the strike.

These considerations underpin the ICRC's call to restrict AWS to only targets that are military objective by nature.

### 5. Anti-personnel AWS and the principle of distinction

The concerns discussed above with regard to objects are particularly acute for attacks directed against persons.

Attacks must not be directed against civilians, unless and for such time as they take a direct part in hostilities.[137] Attacking persons – including combatants or enemy fighters – who are *hors de combat* is equally prohibited, and this includes those being wounded, sick or surrendering.[138] Determining whether a person is protected requires highly contextual legal assessments of their status, conduct, intent, and causality.

For instance, a civilian stealing weapons from a military base in an armed conflict may do so to aid the adverse belligerent or for personal gain – the latter would not constitute direct participation in hostilities (DPH) and they would remain protected against attack, but the former would constitute direct participation in hostilities, and for the duration of such participation the civilian would be targetable under IHL. In situations of doubt as to whether a person is a civilian, an assessment must be made of the conditions and restraints governing a particular situation, as to whether there are sufficient indicators to warrant an attack, and the First Additional Protocol establishes a presumption of civilian status.[139]

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[136] Article 52(3) of Additional Protocol I.
[137] ICRC, Customary IHL Study, Rule 6; Article 51(3) of Additional Protocol I; Article 13(3) of Additional Protocol II.
[138] ICRC, Customary IHL Study, Rule 47; Articles 41(1) and 85(3)(e) of Additional Protocol I; Common Article 3 to the Four Geneva Conventions.
[139] ICRC, Customary IHL Study, Rule 6; Article 51(1) of Additional Protocol I.

With regard to combatants, the key prohibition is against attacking persons *hors de combat* because of surrendering or being defenseless. There are a number of ways in which a soldier may express a desire to surrender, and the meaning of the gesture may only be comprehensible in context. Similarly, there are many ways in which a soldier may react after having been wounded in battle, from lying down unconsciously to gesturing incoherently because of unbearable pain or advancing towards enemy line to surrender and receive medical care, among others. In all these situations, the enemy fighter is *hors de combat* and must not be attacked.

As with objects that become military targets by use, a person's entitlement to protection from attack depends on highly contextual legal assessments and can change quickly during hostilities.

As noted above, commanders and AWS users must ensure, at the time of activation, that any and all possible strikes by the AWS throughout the area and duration of the AWS' operation will comply with IHL at the time and place of the strike, whoever or whatever may trigger such a strike, accounting for all reasonably foreseeable and relevant changes in circumstances between the AWS' activation and the strike.

In the ICRC's view, it is therefore difficult to envisage realistic combat situations where using AWS against persons would not pose a significant risk of IHL violations, since target selection is performed by the system, based on a generalized target profile that is unlikely to be able to account for the non-exhaustive range of contextual signals that a person is protected from attack.

Furthermore, employing an AWS that is not capable, at the time of selecting a human to strike them, of recognizing an enemy's clear expression of intent to surrender, or that an enemy is defenseless because of unconsciousness, wounds or sickness, and in such case ceasing the attack, may violate the prohibition against conducting hostilities on the basis that there shall be no survivors (denial of *quarter*).[140] This would be the case in particular if such anti-personnel AWS were used in swarms or otherwise at scale, because it could be expected to lead to multiple strikes on combatants already *hors de combat* at the time the AWS select them, leaving no survivor.

These considerations underlie the ICRC's call to prohibit AWS designed or used to attack humans directly (anti-personnel AWS).

[140] ICRC, Customary IHL Study, Rule 45; Article 40 of Additional Protocol I.

## 6. Prohibiting anti-personnel AWS – a utopian dream or a sensible, risk-based approach?

Beyond the critical arguments based on the requirement that any use of AWS complies with the principle of distinction, what lessons can we draw from past experiences and preventative efforts by States to limit weapons-induced suffering during conflicts?

Humanitarian disarmament since a century and a half shows that States have agreed to provide stronger protection against the effects of hostilities to human beings than to objects, due to concern related to the weapons' indiscriminate effects, to the prohibition of superfluous injury or unnecessary suffering, or both. Evidence of this approach include the 1868 Declaration of Saint Petersburg and the 1995 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Certain Conventional Weapons), which imposed prohibitions on exploding bullets[141] and blinding laser weapons[142] respectively, while antimaterial explosives – from heavy explosive weapons to high-explosive anti-armour piercing bullets – and anti-material lasers are not prohibited.

Most relevant for AWS is the experience with landmines. Landmines, which are rudimentary AWS when they are victim- or contact-detonated, demonstrated that weapons triggered by their environment cause indiscriminate harm to civilians, particularly when force application is triggered by a person. In response to the grave human suffering caused by anti-personnel landmines, the overwhelming majority of States has elected to comprehensively ban anti-personnel landmines whose explosions are triggered by the presence, proximity or contact of a person[143], while other landmines are subject to a number of restrictions.[144]

A prohibition on anti-personnel AWS would also be grounded in present military practice, in which AWS are used against objects rather than persons – except for landmines, as just discussed.

Proponents of AWS often argue that technology will enable addressing the challenges that these weapons system raise, and sometimes describe scenario in which they claim that anti-personnel AWS could be used in compliance with IHL. These scenarios tend to be very narrowly defined, and anti-personnel AWS are not necessarily the only weapon capable of achieving the desired military objective in these scenarios.

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[141] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Saint Petersburg, 29 November / 11 December 1868; ICRC, Customary IHL Study, Rule 78.
[142] Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995, Art. 1; ICRC, Customary IHL Study, Rule 86.
[143] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, Art. 1.
[144] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996), Arts 3 to 6.

Furthermore, in multilateral endeavours towards humanitarian disarmament, the question is not, or at least not solely, whether it is ever possible to use a weapon in compliance with IHL. It is more broadly whether the military utility is such that it outweighs the risks entailed by the development and use of a specific weapons. With regard to anti-personnel AWS, beyond the humanitarian, legal and ethical concerns already mentioned, risks to be considered include, among others, widespread and unregulated proliferation to parties to conflicts, whether States or non-State armed groups; proliferation to and use by terrorist and other criminal groups also outside of armed conflicts; and risk that AWS could be used by security forces during violent demonstrations in violation of the rights to life.

## 7. The urgency of the concern

We are currently witnessing an acceleration in the research, development and use of AWS. But history shows the value of disarmament successes agreed by the international community before the weapons of concern are developed. This is the most effective way to avoid what we have seen with nuclear weapons and anti-personnel landmines, which the international community agreed to prohibit only after unacceptable human suffering had been caused.

A legally binding instrument on AWS is an urgent priority to retain some level of humanity in the age of new technologies of warfare. Such an instrument, whether a new Protocol to the CCW or a stand-alone treaty, needs to encompass clear prohibitions and restrictions that clarify, strengthen and develop current IHL rules to respond to the specific challenges raised by AWS in the legal and other realms. The ICRC, together with the United Nations Secretary General, has urged States to take principled action now and conclude negotiations of such rules by 2026.[145]

Let us hope for the international community to learn the lessons from history by prohibiting unacceptable AWS and strictly restricting the use of others before their use in armed conflict causes widespread suffering.

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[145] Joint call by the United Nations Secretary-General and the President of the International Committee of the Red Cross for States to establish new prohibitions and restrictions on Autonomous Weapon Systems, 5 October 2023, available at: https://www.icrc.org/en/document/joint-call-un-and-icrc-establish-prohibitions-and-restrictions-autonomous-weapons-systems.

## Moderated discussion

At the end of the panel discussion, a Q&A session allowed the audience to raise several questions.

**Framing humanity in new technologies discussions**

One participant asked what panelists consider to be the most helpful terminology and framing to center humanity in discussions about new technologies in warfare.

One panelist emphasized that IHL remains the most effective framework. While acknowledging the proliferation of terms like “meaningful human control” or “trusted AI,” which are important but often unclear, the panelist argued that the key issue is not which label to adopt but how to implement human control in practice. The suggestion was made that this depends on the restrictions placed on new technologies (such as autonomous weapons) and how these are operationalized in accordance with IHL principles like distinction, proportionality, and precaution. The panelist clarified that referring to IHL as the most effective framework does not imply existing international law fully covers – and is equipped to cover – the nuances of human control, but that IHL offers a methodological framework based on restrictions and prohibitions to guide further development and regulation.

Another panelist suggested the term “true human judgment” as potentially helpful but also agreed that design and practical implementation need to be prioritized over abstract labeling.

Another panelist expressed increasing frustration with the vagueness of many terms used, especially terms like “meaningful human control” that have been prominent in autonomous weapons discussions for over a decade without consensus on a definition. It is important to understand the intended purpose behind such terms. The panelist proposed using more measurable concepts such as “justified confidence” in testing and evaluation processes. The panelist cautioned against over-reliance on terminology without contextualizing use cases and their implications.

**AI mistakes and accountability**

Noting that autonomous drones are now capable of identifying targets based on movement patterns, one participant inquired about the consequences of AI errors and the assignment of responsibility in such cases.

One panelist emphasized that AI systems do not “make mistakes” in a human sense. They can malfunction or operate in unintended ways, but accountability remains with the human operator or commander who deploys the system. The degree of responsibility depends on the adequacy of the human operator’s understanding of how the system functions and how much

they rely on it. Whether the system is used for targeting or decision support, responsibility ultimately lies with the human who authorizes or acts based on the system's outputs.

Another panelist agreed, noting that responsibility structures are already complex even without AI. Mistakes often emerge early in decision chains and persist throughout, making accountability difficult to assign. The introduction of AI does not change the fact that humans remain accountable. The panelist encouraged focusing on how mistakes propagate through processes rather than isolating AI as the problem.

**AI and targeting efficiency**

One participant asked whether there is actual evidence to support that AI technologies enhance targeting efficiency.

One panelist noted that while AI can increase efficiency, particularly by automating mundane tasks such as data transfer, formatting, and pattern recognition, this is not synonymous with reducing the value of planning. AI can, for example, offer planners alternative courses of action, aiding in efficiency without eliminating the need for human deliberation. If used appropriately, decision support systems can free up cognitive space for more nuanced human judgment.

Another panelist responded that there is indeed a vast amount of information that needs to be analyzed, and international law requires decision-makers to base their actions on information that is reasonably available. AI systems could certainly assist in this process by condensing large volumes of data and presenting it to human users, potentially aiding in the avoidance of civilian harm, provided the systems are both feasible and useful. If such systems are effective, they could become a mandatory precaution. However, autonomy, by itself, does not necessarily contribute to protection. While it may enhance speed and targeting efficiency, this primarily benefits military operations, not civilians.

**Data quality and reliability**

One participant raised concerns about how to maintain control over AI code, which could make life-or-death decisions, and ensure accurate data inputs given the risks of corruption and incorrect learning "hallucination." They also questioned whether these risks are compatible with upholding humanity in times of war.

One panelist underlined that the real challenge lies indeed in the data, not AI itself. Many organizations focus on acquiring AI without ensuring they have clean, reliable, and accessible data. Quality data is essential for any meaningful use of AI, and techniques such as supervised learning, data/model cards, and traceability tools are key. More AI does not necessarily mean less control: if designed properly, AI can actually increase control and improve the decision-making process.

Another panelist responded with a broader critique, warning against the “inevitability narrative” in military AI. Pursuing perfect data and ever-improving AI feeds into a logic where using such systems becomes morally or legally compulsory. However, there are hidden ethical costs of acquiring the necessary surveillance data, often at the expense of human rights. Surveillance required to fuel AI decision-making – especially pattern-of-life analysis – presents its own ethical challenges. Constant surveillance of civilian populations in conflict zones to gather “high-quality” data may violate fundamental rights and freedoms. In short, not all ethical or legal concerns fall under IHL and should not be overlooked in the quest for technical optimization.

**Possible avenues to ensure effective communication in conflict zone**

One participant asked whether there is any hope for improving the effectiveness of communication in conflict zones, given the challenges posed by misinformation.

One panelist replied that, in the current environment, there is little hope that communication in conflict zones to civilian populations could ever be truly effective. One idea could be to establish a platform dedicated solely to delivering reliable information to civilians, possibly run by organizations like the ICRC, to help build trust in such communications. However, as long as misinformation continues to overwhelm such platforms, it is unlikely that any warnings or critical information would be taken seriously or even noticed. Without addressing this broader issue, the effectiveness of such efforts would remain limited.

Another panelist cautioned that networks and platforms like the one suggested by the previous panelist are not immune to attacks and are regularly subjected to cyber operations. There must be realistic expectations about what can be achieved.

**AI and proportionality assessments**

One participant asked if the use of AI decision support systems risks shifting proportionality assessments away from human cognitive judgment.

One panelist acknowledged the concern but argued that AI can in fact enhance human judgment if used appropriately. By handling the quantifiable elements of proportionality assessments – such as real-time updates or collateral damage estimates – AI can allow humans to focus more effectively on qualitative aspects. However, the manner in which these tools are used is critical.

Another panelist addressed the issue from the perspective of autonomous weapons, arguing that such systems remove the proportionality assessment not from the human, but from the moment and place where force is applied. Because humans are no longer present at the moment of strike, pre-emptive assessments become more abstract and risk being invalidated

by situational changes, especially in civilian-populated areas. For this reason, the ICRC recommends restricting the use of autonomous weapons to areas without civilian presence.

**AI DSS and Article 36 reviews**

One participant asked if AI Decision Support Systems are subject to weapons reviews under Article 36 of Additional Protocol I, whether this review needs to be done by a human, and how acceptable margins of error are addressed.

A panelist argued that, if a decision support system is not considered a weapon, it does not fall under Article 36 reviews. However, they are subject to other forms of evaluation such as safety reviews and testing protocols. It is unclear whether a human is explicitly required to perform an Article 36 weapons review. Safety reviews have been in place for a long time, and historically, humans have been responsible for them. However, this does not rule out the use of technology as part of the process. When it comes to acceptable margins of error, no universal margin of error exists and acceptable thresholds vary depending on the use case, operational context, and level of human oversight. For instance, systems used in high-risk environments demand lower error margins than those used in administrative tasks.

**Prospects for international regulation of autonomous weapons systems**

One participant asked about the current status of negotiations for potential future international regulation of AWS, especially in light of recent discussions at the UN First Committee and in the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on lethal autonomous weapons systems.

A panelist gave a sober assessment of the current state of international negotiations. He noted that despite over a decade of discussions, there is still no agreement to even define autonomous weapon systems. The CCW operates on a consensus basis, which has allowed a few States to obstruct meaningful progress. Nonetheless, some positive developments have emerged, such as the use of a “rolling text” by the chair to guide more focused discussions. The panelist also emphasized the importance of inclusive dialogue beyond Geneva. Many States who would suffer from effects of the weapons system being developed do not have missions in Geneva, but they participate in consultations currently underway in New York. Finally, the panelist highlighted that while outside the CCW’s mandate, considering human rights law is also valuable when regulating new technologies. Weapons prohibited under the CCW, like blinding laser weapons, are not developed for any purpose, including law enforcement, which aligns with human rights, particularly the right to health. States should therefore consider broader implications when prohibiting weapons, even if the rationale extends beyond armed conflict.

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# PANEL 4

# UPHOLDING HUMANITY IN THE CONDUCT OF HOSTILITIES: CONTEMPORARY CHALLENGES TO THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

CHAIRED BY LAURENT GISEL, HEAD OF THE ARMS AND CONDUCT OF HOSTILITIES UNIT, ICRC

# Proportionality through an academic lens

**Gloria Gaggioli**
Professor, University of Geneva

**Summary**

*Prof. Gaggioli discussed the principle of proportionality in international humanitarian law, particularly in relation to Article 51(5)(b) of Additional Protocol I. She clarified the terminology, distinguishing the "rule" on proportionality – as a specific application within the context of hostilities – from proportionality as a general principle in IHL, which appears across various treaty provisions and manifests differently depending on the context of application. She emphasized the broad scope of this rule, suggesting that attacks should be understood not only as kinetic operations but also as actions with harmful effects. She also debated whether force protection should be factored into proportionality assessments. Additionally, she explored the concepts of overall military advantage and overall collateral damage, especially in complex conflict scenarios.*

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When discussing the principle of proportionality, most would immediately think of Article 51(5)(b) of Additional Protocol I, which has attained the status of customary law. Given the expertise of the audience, I will not recall the content of the rule itself. Instead, I would like to clarify a terminological point: some refer to it as the “principle” of proportionality, others as the “rule” on proportionality. In my view, the latter is a concrete elaboration of the broader principle of proportionality, specific to the context of the conduct of hostilities and, more specifically, in relation to attacks.

## 1. Scope of application: understanding what constitutes an “attack”

A key question concerns the scope of application of the rule, which appears to be limited to “attacks.” Under Article 49 of Additional Protocol I, attacks are defined as “acts of violence against the adversary, whether in offence or in defense.” I believe this concept should be interpreted in an evolutionary manner. We should not think of attacks as limited to kinetic operations. The decisive factor should be the effects – the consequential harm.

This interpretation is especially relevant in contexts such as biological weapons or cyber warfare. A biological attack is not kinetic, but it clearly falls within the scope of the term “attack.” The same applies to siege warfare, where a combination of bombardment and isolation techniques is used to encircle the enemy and force surrender. In my view, the isolation component can also constitute an attack, and the siege as a whole should therefore be subject to the rule on proportionality.

## 2. Force protection and military advantage

An important and much-discussed issue is what may be considered a "concrete and direct military advantage" when assessing proportionality.[146] I will focus here on one specific question: should the protection of attacking forces (so-called "force protection") be taken into account when calculating military advantage?

At first glance, one might assume it should be included. After all, protecting one's own forces arguably facilitates future military gains. However, a deeper analysis reveals this would be contrary to the object and purpose of the rule on proportionality, which is to afford at least some protection to civilians. This protection is already minimal, as the rule only prohibits collateral harm that is excessive in relation to the anticipated military advantage. We must be careful not to inflate the notion of military advantage in a fictitious manner.

The rule presumes that attacking a military objective will, by its very nature, result in a concrete and direct military advantage. It is not designed to accommodate considerations of force protection. In fact, this perspective can also be supported by reference to the principle of chivalry, which, although less frequently invoked today compared to military necessity or humanity, still influences military practice. Avoiding confrontation at the cost of exposing civilians to greater harm does not meet the standard of chivalry. From a policy perspective, too, including force protection in the military advantage calculation would only encourage greater distancing between the attacker and the target, something already visible in drone strikes and the use of new technologies of warfare. We should not create additional incentives for such practices.

Let me be clear: the lives of combatants matter, and there is a duty to protect them. However, that duty arises under international human rights law and is derived from the right to life. The European Court of Human Rights, for instance, affirmed this in the *Smith* case, where the UK was found to have a positive obligation to protect its soldiers through adequate training and equipment before deployment.[147] Nevertheless, this human rights obligation does not justify expanding the notion of military advantage under IHL.

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[146] On this topic, see also: ICRC and Université Laval, *International Expert Meeting Report: The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law,* August 2018, available at: https://www.icrc.org/sites/default/files/document/file_list/4358_002_expert_meeting_report_web_1_0.pdf; Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House Report, December 2018, available at: https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf.

[147] European Court of Human Rights, *Smith and Grady v. United Kingdom*, Judgement, 27 September 1999.

### 3. The question of overall military advantage and overall collateral damage

Another debated issue is whether the proportionality assessment should consider the overall collateral damage and the overall military advantage across the course of hostilities. The ICC Statute, in its provision on the war crime of intentionally committing an attack that is disproportionate, refers to an overall military advantage and even requires that the expected collateral damage be "clearly excessive." This formulation differs from what is provided in IHL rules. It has been criticized, as it tends to inflate the notion of military advantage. However, within the framework of international criminal law, the aim is to set a high threshold to focus prosecution on the clearest and most egregious violations. The ICC has also clarified that this does not change customary IHL in terms of the content of the rule.

That said, if we accept the notion of overall military advantage, then we must also discuss overall collateral damage. The situation in Gaza is illustrative. Evaluating each individual attack in isolation may not lead to a finding of disproportionality, but when viewed from a broader perspective – looking at the overall effects of the campaign – it becomes easier to conclude that the attacks are disproportionate. If a macro-level approach is used, it must be applied consistently to both sides of the proportionality equation.

It is essential to remind that the proportionality analysis under Article 51(5)(b) does not take into account the broader objectives of a war. The proportionality principle under IHL should not be conflated with the proportionality principle under *jus ad bellum*. In the latter context, proportionality evaluates whether the use of force is excessive in relation to the legitimate aim of self-defense. This constitutes a different legal framework.

### 4. A general principle of proportionality in IHL

There remains debate over whether a general principle of proportionality exists in IHL, beyond Article 51(5)(b). In my view, it is odd to contest this. Proportionality is a general principle of law and is embedded throughout IHL treaties. This is particularly evident in treaty provisions that prohibit certain actions unless justified by "military necessity" or "military exigencies." Necessity always invites a proportionality assessment. Consider, for example, Article 53 of the Fourth Geneva Convention, which prohibits the destruction of property in occupied territories unless "absolutely necessary for military operations." Assessing what is "absolutely required" involves evaluating both necessity and proportionality. A recent example is the destruction of the Kakhovka dam in Ukraine, located in a part of the territory under Russian occupation.

There are also subtler examples. Consider humanitarian assistance: while the consent of the belligerent party is needed to provide humanitarian assistance, the civilian population also has the right to have access to relief actions if it does not have the means essential for its survival. This creates a tension between the two concepts, which is reconciled by the requirement that

humanitarian assistance must not be arbitrarily denied, and that any refusal must be based on a valid and proportionate reason – which brings in the concept of proportionality. Similarly, the issue of aid diversion illustrates that while zero diversion is ideal, some risk must be tolerated. Proportionality helps us navigate that balance.

Another example is the loss of special protection of hospitals under IHL. If a wounded combatant in a hospital uses a phone to transmit intelligence, this may constitute an act harmful to the enemy. However, in my view, it would be inappropriate to consider the entire hospital as having lost its special protection on this basis. A reasonable commander would choose to monitor the situation or take limited action. Determining what constitutes an act “harmful” to the enemy also requires an analysis of the proportionality of the reaction.

**Conclusion**

In sum, IHL contains a broad principle of proportionality, which manifests in different ways depending on the context. Proportionality under IHL operates both as a specific rule – most clearly articulated in Article 51(5)(b) in relation to attacks – and a broader principle that permeates other rules. The rule on attacks is arguably the most flexible expression of this broad principle, as an attack against a legitimate target is permissible unless there is excessive collateral damage. Conversely, in other contexts, such as the destruction of property in occupied territories, the reverse applies in terms of rule and exception, and the principle of proportionality is applied more strictly.

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# The military (advantage) side of the proportionality equation: challenges to the application – an argument in favour of normativity

**Sigrid Redse Johansen**
Senior Public Prosecutor, Norwegian Director of Public Prosecutions' Office

**Summary**

*Dr. Johansen discussed the challenges of applying the principle of proportionality in warfare, particularly from the perspective of military commanders. She highlighted three key issues: first, that military advantage is a relative concept, depending on mission objectives and the balance between military gains and collateral damage; second, that determining a "concrete and direct" military advantage is complex, as it must be assessed within the specific context of an attack rather than the broader war effort; and third, that the subjective judgment of commanders in evaluating military advantage must be balanced with objective legal norms to avoid arbitrariness. She emphasized the importance of maintaining the distinction between* jus ad bellum *and* jus in bello*, ensuring proportionality is applied equally to all parties in conflict.*

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The principle of proportionality is more relevant than ever. So far, the ongoing wars in Ukraine, Gaza, Lebanon, and Sudan have led to an estimated 200.000 civilian casualties (both dead and wounded), raising questions about the current application of the principle.

I will present three challenges to the application of the principle of proportionality, with the military side of the equation as a point of departure. But first, a disclaimer: I am speaking in a personal capacity, and as a civilian. However, my perspective is that of a prosecutor. I am concerned with the *discretion* of military commanders and the *enforcement* – and possible criminal repression – of violations of the rules governing conduct of hostilities.

The proportionality rule, as laid down in Article 51(5)(b) of Additional Protocol I, prohibits:

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

And then to my three challenges:

## 1. An advantage is a relative concept

I am concerned with the military side of the proportionality equation and the notion of military advantage, which can be defined as a "benefit of a military nature" reasonably expected from the attack. In other words, a condition that puts one in a favourable position.

Since we are talking about war, “favourable” here means favourable to the *opposing forces.* It is an advantage to hold terrain, to have air superiority, to keep sea lines of communication open for one’s own purposes, to weaken the opposing forces, to deny them access to territory held by own forces, and, last but not least, to preserve and protect one’s own forces.

This latter point – the military advantage of preserving one’s own forces – warrants particular attention in light of the discussion in this panel. It is common sense for a military commander to avoid spilling their own forces, as failure to do so would ultimately result in losing the war. These considerations are often referred to as the “economy of force”. A number of States have also stated, for example in reservations to Additional Protocol I, that the term “military advantage” involves a variety of considerations, including the security of the attacking force. Here, as elsewhere, the decisive point is often the relative weight of the security of the attacking forces, under the concrete circumstances.[148] And here we are at the core of this first challenge.

The notion of military advantage is relative in nature – it relates to, and is in proportion to, something else. All relative notions face the inherent challenge that there is no absolute standard by which to measure or judge them. This is the first and most fundamental challenge.

The notion of military advantage is relative in at least two dimensions: in relation to the overall purpose of war, and in relation to the weight measured against collateral damage. Here, I will focus on the first dimension.

We may say that the entire enterprise of war is “a means to an end” – or, put differently, the exercise of operational art. Based on their mission, the military commanders determine a course of action and distribute tasks in their operational plan (OPLAN). The commanders designate targets and objectives they assess will provide the military advantages necessary to complete their mission. Thus, military advantage is always relative to the plan and must be assessed as an integral part of the plan.

The fundamental challenge of war may lie in its own dynamics: how to reach the end of war without being drawn into a catastrophic spiral of violence? The problem, which may have been acute for the drafters of both the Geneva Conventions and Additional Protocol I, can be framed as follows: *How can we speak about existential wars in legal terms?*

I will now address two additional challenges for military commanders with regard to the notion of military advantage.

[148] Sigrid Redse Johansen, *The Military Commander’s Necessity: The Law of Armed Conflict and Its Limits* (Cambridge University Press, 2019) 313.

### 2. The "concrete and direct advantage" from the "attack as a whole"

The second challenge may be presented as follows: how to limit the ultimate advantage of shortening the war as a whole?[149]

There are two guidelines for the commander's assessment of military advantage prior to an attack: first, the military advantage must be "concrete and direct"; second, a number of State parties to Additional Protocol I have declared that the advantage relates to the "attack as a whole".[150] What should we make of this?

A "concrete" advantage means the opposite of a hypothetical, speculative, or general advantage. For example, a concrete military advantage could be denying the adversary access to a naval port or airfield – or the manifestation of denied access, namely control and use of the naval port and airfield for own forces.

The adjective "direct" connotes a causal chain, arguably "without intervening conditions of agency".[151] As a point of departure, it suffices to say that the coinage of "concrete and direct" requires a certain degree of connection in time and space between the attack and the military advantage.

Although "concrete and direct" relates to limits in time and space, there are no clear limits for assessing "advantage", neither in time nor geographically. It may include advantages that will materialize sometime in the future, *but it does not include the future end of the war*.

The determination of military advantage thus relates to the attack as a whole – but not the war as a whole – and to the "circumstances ruling at the time".[152] These two relative aspects partly overlap. The phrase "circumstances ruling at the time" does not encapsulate the entire war.

Despite this, it is sometimes argued that "military necessity becomes most acute if there is a question of shortening the war as a whole"[153]. Between the goal of shortening the war as a whole and the attack as a whole, two questions arise: first, what does "advantage" encompass when it comes to tactical gains, operational gains, strategic gains – the entire war? Second, what are the "circumstances at the time"?

The reservations made by States regarding the "attack as a whole" have been interpreted both to "suggest that the notion of military advantage should include elements of more strategic

[149] Ibid., Chapter 14.
[150] See, among others, declarations to the Additional Protocol I, Articles 51 and 57, posited by the UK, Australia, Canada, Belgium, Germany, Italy, The Netherlands, New Zealand and Spain.
[151] Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 2nd ed* (Martinus Nijhoff Publishers, 2013) 365.
[152] Article 52(2) of Additional Protocol I.
[153] Ingrid Detter, *The Law of War 2nd ed*. (Cambridge University Press, 2000) 394.

importance to the opposing party to the conflict"[154] and to "extend the scope for the weighing of pros and cons beyond what is offered by the wording of the paragraph".[155] Where does this take us? What constitutes a military advantage beyond tactical and operational gains?

Numerous approaches are taken by experts and in States' military manuals, such as the US Department of Defense Manual, which refers to "the full context of the war strategy".[156] Other manuals refer to "the success of the overall operation"[157] and the "overarching tactical operation".[158]

Much of the apparent ambiguity seems to be buried in the lack of clarity over what "tactical", "operational" or "strategic" entails or does not entail, and this is exactly what makes the question of "strategic objectives" or "tactical operation" difficult. While there seems to be widespread acceptance of the inclusion of "tactical operation", the pending issue remains with advantages identified at the operational or strategic levels of command, as illustrated by the controversy over the Office of the Prosecutor's (issued by the ICTY prosecutor subsequent to the NATO bombing of a bridge and, unintendedly, a passenger train during operation Allied Force in Kosovo in 1999).

However, differences between "tactical" or "strategic/strategy" do not necessarily determine the scope of "concrete and direct" military advantage. A tactical advantage may be the immediate advantage of neutralizing an object, such as a pick-up truck loaded with artillery or the destruction of a number of bridges in order to prevent the advance of enemy forces through an area. A military advantage defined at the operational level (beyond the tactical operation) is for example to achieve air superiority. In order to establish air superiority, it may be necessary to attack radar stations, airfields, military headquarters, and air-defense systems. In this case the advantage of attacking one radar station or one part of a nation's air-defense system cannot be considered in isolation, but as part of the coordinated attack in order to gain air superiority. The advantage of air superiority can prove vital for the success of the whole military operation, but it is nonetheless a military advantage which, when set in a military plan, is concrete and direct to the attack.

A strategic attack can be understood as one directed at a target "specifically selected to achieve military strategic objectives".[159] This model of military planning has sprung out of an idea that it is possible to detect the enemy's "centre of gravity", and that an attack on this centre produces a strategic effect directly linked to the adversary's will or capacity to sustain the war.

[154] Richard Boothby, *The Law of Targeting*, (Oxford University Press, 2012) 501.
[155] Elmar Rauch, 'The concept of military necessity in the context of the law of war', *Military Law and the Law of War Review,* vol. 19 (1980, English version) 24.
[156] US Department of Defense, Law of War Manual (2015, updated July 2023), section 5.12.2.1, p. 272.
[157] Canadian Manual, p. 4-4, para. 415.
[158] Norwegian Manual, p. 35.
[159] NATO Standard AJP-3-3(B), April 2016, p. 1-10, para. 1.5.2.

A strategic attack may therefore be expected to produce a significant military (strategic) advantage, but it is not consonant with the "entire war strategy", despite naturally being linked to it.

The reference to "strategy" and "strategic objectives", is therefore (in my view) partly misleading. A military advantage can be identified at each level of the military chain of command: from the tactical to the military strategic level. The military advantage will often be identified at a relatively high level of command, for example at the level of the joint operational headquarters, where joint operations are planned and synchronized. Finally, whether an advantage anticipated from an attack is deemed of strategic value, as assessed by the military commander, depends on the circumstances at the time.

The requirement of "circumstances ruling at the time" naturally includes weather conditions, natural or demographic topography, the positioning of both parties' forces, the resources available, the stage of the war, the modus operandi of the belligerent parties, the available time, and certainly access to intelligence, as well as other situation-specific facts.

Thus, it is the war as it appears that determines whether the destruction of an object is expected to result in a military advantage and the relative weight attached to that advantage. It is not, as sometimes asserted, whether the war is "limited" or "total" that is decisive.[160]

Different views on the relative scope of military advantage seem to reappear in the aftermath of every armed conflict – our present time is no exception. On numerous occasions, the argumentation is tied to the "nature of war", the "character of war", and the "purpose of war", and eventually to military necessity. Although the rules of Additional Protocol I were "expected to be applicable to all these different types of warfare",[161] the character of the war as limited, total, irregular, hybrid, or conventional does not as such determine the military advantage of destroying a particular object. Having said that, we can certainly summarize different circumstances and, based on these, characterize a certain war as one type or another. The content of the law is not to be determined by political purpose, but the rules are made flexible in order to accommodate all changing circumstances. Additional Protocol I contains "abstract rules designed to cover all contingencies",[162] but the flexible notion of "circumstances ruling at the time" is meant to restrain commanders from relying on "abstract categorizations in the determination of whether specific objects constitute military objectives".[163]

[160] Johansen, *The Military Commander's Necessity* (no 148) 296.
[161] Frits Kalshoven, *Reflections on the Law of War: Collected Essays*, International Humanitarian Law Series, vol. 17 (Brill, 2007) 211.
[162] Ibid.
[163] Ibid., 213.

Finally, we reach the core of this challenge: we ought to strive to uphold normativity and avoid that the law simply fluctuates with changing circumstances yet maintain the rules flexible enough to remain relevant.

I will now turn to my third challenge: the position of the commander.

### 3. Large subjective ingredients, but an objective norm

An advantage relates to *something* that is an advantage for *someone*. The advantage, as the point of departure, relates to the attacker – the military commander. How does the commander assess the relative position of their own forces towards the enemy? This assessment includes subjective elements. A commander has no choice but to assess, as it is their duty to decide. A decision must be made, even if all alternatives are poor.

The commander is granted a margin of appreciation. This margin is what distinguishes law from the arbitrary application of force. Limitless discretion, such as the old German doctrine of *Kriegsraison*, melts down law with force, and has been repeatedly rejected by the legal community, particularly in the aftermath of World War II and the lifetime of today's Geneva Conventions and Additional Protocols.

This is well-established knowledge, so the third challenge is: How do we avoid that the norm and person melt together? How do we avoid arbitrariness in applying norms with large subjective elements?

When (and if) doing what is expected, military commanders are concerned with the theatre of war, the military plan, preserving their own forces and bringing their soldiers back home – while limiting collateral damage to a minimum. This is where the assessment of military advantage, with all its subjective and relative ingredients and dimensions, belongs. The assessment belongs in the war theatre. Therefore, I argue that one way of limiting the potential vagueness and flexibility of the norm is simply to keep the assessment where it is supposed to be – not to include the greater politics of war into the battlefield itself. This approach is also consistent with the fact that military advantages ought to be military, and not purely economic or diplomatic.

Let me also state that this has nothing to do with the requirement for civilian and democratic control over the armed forces, which ought to be upheld at all times. Rather, it has everything to do with what considerations one permits into the assessment of *military* advantage.

Today, we are witnessing gruesome wars and a current threat to the legal order as we have known it for the past 75 years. Acknowledging that history repeats itself, it is also worth recalling that the belief in military power as a tool to solve conflicts often has been exaggerated. A popular belief in how much of strategic advantages a bomb can provide, how limited

collateral damage can be, and how spectacular a military campaign can be – has, I dare say, sometimes been wildly astray.

This speech is also an argument in favour of upholding the distinction between *jus ad bellum* and *jus in bello,* and the equal application of rules to both sides of the conflict, regardless of which side is to be held responsible for starting the war. Recalling the words of my supervisor, Yoram Dinstein (who passed away in February this year): if one were to collapse the distinction between the two, it would be the same as bringing the legal order "back to Genghis Khan".[164]

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[164] This anecdote is presented in Sigrid Redse Johansen, 'Dear Yoram, in Memoriam', *Articles of War*, February 14th 2024, available at: www.Lieber.westpoint.edu/dear-yoram-in-memoriam/.

# Operational view to civilian harm

**Emily Tripp**
Executive Director, Airwars

**Summary**

*Ms. Tripp discussed the potential for accurate, incident-based casualty recording to feed into the methods for commanders to make proportionality assessments. Building on the work of civilian harm watchdog Airwars, she showcased the operational realities faced by civilians in today's modern battlefields and the "new normal" created by sustained urban warfare. She further called for investment by States and militaries in building a more robust evidence base after strikes have taken place that better captures harm to civilians; an evidence base that has potential to surface systematic errors in collateral damage estimates that cost civilians their lives. New policies and practices in the broader field of civilian protection present an opportunity to resource these capacities and, ultimately, provide a check on escalating levels of civilian harm in modern warfare.*

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## 1. Proportionality and the information landscape

Almost every major kinetic action in conflict now comes with a "digital ripple": concentric circles of information, emanating from the scene of the event, from individuals posting on Facebook calling for help to rescue family members under rubble, to relatives in diaspora communities posting about loved ones killed in a single strike, to images posted online by journalists capturing the vast destruction of urban warfare. CCTV from local shops have been uploaded to Facebook, capturing the moment airstrikes hit markets in Syria, while satellite imagery readily available on Google now captures sustained destruction of urban centers in Gaza.

Despite this wealth of information emanating from the battlefield, States and militaries often have limited capacity to meaningfully engage with these critical sources to understand civilian harm from their own actions. The limited tools available to militaries to assess the after-effects of strikes are "battle damage assessments". These assessments are not designed for assessing or quantifying civilian harm, but rather intended to review whether the intended target was successfully hit.

Meanwhile, proportionality assessments rely on an analysis of *expected* civilian harm per selected target, strike by strike, against the anticipated military advantage, ensuring the former is not excessive to achieving the latter. There are many layers of complexity to these processes, but for the purposes of this contribution, these *ex ante* assessments – also known as "collateral damage estimations" – are predominantly informed by the information known to the targeting cell about the particular persons or locations under attack, the patterns of life of

those targeted, perhaps the function of the facilities to be hit – all weighed up against the expected civilian harm from the strike. Proportionality is assessed through the perspective, judgement, and instinct of the commander under the circumstances, and should be informed by counsel from their legal advisors.

This creates a disconnect between the methodology and information required *ex ante*, as commanders judge the anticipated civilian harm through collateral damage estimates, and the methods and information collected *ex post* through battle damage assessments. Proportionality assessments themselves do not require post-strike data collection to check whether the expected collateral damage was in line with the actual collateral damage that occurred. This means that there is often no "feedback loop"; the estimated harm that feeds into the collateral damage estimation and the proportionality assessment is not subsequently checked for accuracy. Each strike is treated as if it were a unique event, entirely distinct from the potentially hundreds of strikes that came before it. That is the case even if, as we have seen in cases like the war against ISIS, the collateral damage estimates from many of those strikes were riddled with errors due to poor intelligence, available imagery, misidentification bias, or "unanticipated" effects such as secondary explosions.[165] This presents not only a limitation in the information feeding into proportionality assessments but also a risk that the proportionality assessments themselves are based on flawed assumptions and inaccurate data.

While these assessments often remain behind the closed doors of military decision-making in targeting cells, conducted in consultations with legal advisors and hidden from public view within highly classified spaces, as outlined above, the after-effects of those strikes can now be known and witnessed all over the world almost in real time. Although the intended targets and the balancing assessments of military advantage rarely make their way to public audiences, patterns of harm do emerge and can be identified by third parties, even if militaries themselves are falling short of this analytical exercise.

The organization I work for, Airwars, specializes in collecting all available online information pertaining to civilian harm from a given strike across a number of modern battlefields over the last decade – from Gaza to Syria, Yemen, Libya, and Ukraine. To date, we have digitally archived hundreds of thousands of pieces of material, including relatives' Facebook posts, witness accounts shared on X, and local media reports. We release all our information publicly, as close to real time as possible, making our work freely available to militaries, States, researchers, journalists, and local groups. Our organization has prompted more than 70% of the US military's own investigations into civilian harm during the war against ISIS, and our

[165] Oona Hathaway and Azmat Khan, 'Mistakes' in War, *University of Pennsylvania Law Review*, vol. 173, No. 1 (2024), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4799550.

findings have prompted inquiries in the Netherlands and Denmark. Since October 7th, 2023, we have been documenting harm from every strike in Gaza, now summing an archive thousands of incidents strong, where we have identified exactly where and how thousands of civilians have been killed.

## 2. The "new normal" and questions raised for proportionality assessments

My contribution to this discussion is informed by the somewhat unique positioning of Airwars: I work with militaries and States to help build better policies and practices to protect civilians; I also work with journalists to encourage responsible coverage of civilian harm events; and I work with human rights lawyers, civil society groups, researchers, and individuals pursuing accountability for harm as it has occurred. This provides a window into how norms are changing at this cross-section of society and industry on this subject: the cases that draw the attention of media organizations, the cases that make it through for litigation and human rights advocacy, and the standout examples that military personnel hold onto as they navigate this subject in training and exercises.

Events of the last two years have profoundly shifted the language, approach, and relative perspective across this ecosystem of actors. Airstrikes that once would have caused casualty numbers making headlines have now become routine. In the war against ISIS, the Netherlands conducted a strike in Iraq that killed at least 80 civilians – a strike so deadly that it prompted the launch of a major independent inquiry, the establishment of a new political process to review approaches for protecting civilians on the battlefield, and the allocation of millions of euros of public finances toward development efforts for the destroyed town.[166]

In Gaza, cases like this have taken place multiple times with little to no public response either from within Israel or among Israel's allies. Public reporting indicates that the "acceptable" level of civilian harm, when weighed against the military advantage in the Gaza war since October, has far surpassed previous thresholds set by both the Israeli military in prior campaigns and Israel's allies.[167] Otherwise known as the "non-combatant cutoff value" (NCV), investigative reporting suggests that NCVs for senior Hamas leaders could be as high as a hundred civilians – an unprecedented threshold.[168]

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[166] Saba Azeem et al., *After the strike: Exposing the civilian harm effects of the 2015 Dutch airstrike on Hawija*, available at: https://protectionofcivilians.org/report/after-the-strike/; PAX, 'Committee Sorgdrager: Strong Conclusions Hawija' (27 January 2025), available at: https://paxforpeace.nl/news/committee-sorgdrager-strong-conclusions-hawija/.

[167] The New York Times, 'Israel Loosened Its Rules to Bomb Hamas Fighters, Killing Many More Civilians' (26 December 2024), available at: https://www.nytimes.com/2024/12/26/world/middleeast/israel-hamas-gaza-bombing.html.

[168] +972 Magazine, 'Lavender: The AI machine directing Israel's bombing spree in Gaza' (3 April 2024), available at: https://www.972mag.com/lavender-ai-israeli-army-gaza/.

Meanwhile, Russia's campaign in Ukraine and the very real risks of Europe-wide escalation have pushed the conversation across these sectors toward so-called Large-Scale Combat Operations. These will be wars of such magnitude that some military experts have said they will upend the norms embedded in typical rules of engagement, making redundant previous mechanisms such as senior-level sign-off for targets with high numbers of expected civilian casualties.[169] This will leave commanders having to make what may be impossible decisions based on limited intelligence at lightning speed.

What effect might the steady normalization of mass casualty events have on future commanders? And what effect might this "new normal" have on the public citizens who give militaries their legitimacy? If militaries have no system to meaningfully calculate the accuracy of collateral damage estimations after the fact, what checks and balances can be in place internally to ensure that this "new normal" does not influence the judgement calls of commanders? Without a feedback loop – a mechanism for incorporating the real effects of a strike as it pertains to civilians over time – how can there be any meaningful oversight and assessment into what norms and rules are guiding the most lethal arm of the State, even as they ostensibly adhere to all the laws of war?

### 3. Role of policy in generating norms

There have been several major initiatives over the last few years that are worth reflecting on, which might counter a dangerous slide into high levels of "acceptable" civilian harm. The first of these was the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (the EWIPA Declaration). In November 2022, more than 80 States came together after years of pressure from groups like Human Rights Watch, Humanity and Inclusion, Every Casualty Counts, and many others.[170] Though not legally binding and intended to complement, rather than add to, existing legal obligations, there is a notable section of the declaration that states:

> *"Improved data on civilian harm would help to inform policies designed to avoid, and in an event minimise, civilian harm; aid efforts to investigate harm to civilians; support efforts to determine or establish accountability, and enhance lessons learned processes in armed forces".*[171]

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[169] Lt. Gen. Milford Beagle Jr., Lt. Gen. Joseph Berger III, Lt. Col. Jack D. Einhorn, 'Lethal Force, Risk, and LSCO: Preparing for Permissive Rules of Engagement in Large-Scale Combat Operations', *Military Review Online Exclusive* (2025), available at: https://www.armyupress.army.mil/Journals/Military-Review/Online-Exclusive/2025-OLE/Lethal-Force-Risk-and-LSCO/

[170] For an overview, see: INEW (International Network on Explosive Weapons), an international network of NGOs that calls for immediate action to prevent human suffering from the use of explosive weapons in populated areas. Website available at: https://www.inew.org/about-inew/

[171] *Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas*, 18 November 2022, available at: https://ewipa.org/the-political-declaration

If implemented by States, this would go some way toward introducing mechanisms by which States can close the feedback loop on the battlefield, improve measures to account for the after-effects of strikes, and, importantly, provide a check on whether or not the estimations that feed proportionality calculations are really fit for purpose.

The year after the EWIPA Declaration, the United Nations High Commissioner for Human Rights produced a groundbreaking report on casualty recording, calling on States to "ensure that casualty recording systems and policies are in place and report publicly on all casualties believed to have resulted from hostilities or violence and their circumstances", noting that casualty recording data "can be used to foster compliance with international law, including by changing practices and behaviour and enhancing training to this end".[172]

Alongside these international movements, there have also been notable domestic processes. In the United States, after policy efforts spanning more than a decade of advocacy both within and outside the military on this issue, the Department of Defense produced a new Department of Defense Instruction on Civilian Harm Mitigation and Response, released in December of 2023.[173] The Instruction, essentially a department-wide policy, includes a number of specific requirements for collecting information on civilian harm after the fact, and for this information to be fed back into decision-making. This is presented as part of the "strategic and moral imperative" of putting in place better mechanisms to protect civilians.[174]

In December 2024, the Netherlands opened a new reporting portal.[175] For the first time, this allows those outside the military to formally submit civilian harm claims for particular incidents conducted by Dutch forces since 2000. The portal was a key recommendation from civil society groups, including Airwars, as part of a constructive dialogue we have engaged in over the last few years to help improve Dutch practices and policies around civilian protection.

There is still a long way to go. These efforts are nascent at best, and fragile at worst. However, the recognition that it is not only worth taking the time to collect information on casualties after each strike, but also *possible* to do so, especially in today's rich information environments, might be the single most important way we can collectively push back against the normalization

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[172] Human Rights Council, *Annual Report of the Office of the United Nations High Commissioner for Human Rights: Impact of casualty recording on the promotion and protection of human rights* (2023), UN Doc A/HRC/53/48, available at: https://docs.un.org/en/A/HRC/53/48

[173] US Department of Defense, 'DOD Announces Release of Department of Defense Instruction and Website on Civilian Harm Mitigation and Response', 21 December 2023, available at: https://www.defense.gov/News/Releases/Release/Article/3624661/dod-announces-release-of-department-of-defense-instruction-and-website-on-civil/

[174] US Department of Defense, 'DOD Creates New Infrastructure Focused on Mitigating Harm to Civilians', 1 September 2022, available at: https://www.defense.gov/News/News-Stories/Article/Article/3146984/dod-creates-new-infrastructure-focused-on-mitigating-harm-to-civilians/

[175] The Netherlands' Ministry of Defence, 'Reporting Civilian Harm', available at: https://english.defensie.nl/topics/c/civilian-casualties/reporting-civilian-harm

of civilian casualties in conflict, even as wars scale up and the threats to civilians become greater than ever.

**Concluding remarks**

To make sense of any legal interpretations of the norms and rules of warfare, we must not lose sight of the operational realities for civilians. This means not just paying lip service to events as they unfold, nor being taken in by the fallacy of the “fog of war”. It is possible to understand civilian harm per strike. If a small non-profit like Airwars can do it, then militaries looking to build stronger feedback loops and put in place the appropriate checks and balances to facilitate IHL compliance can certainly do the same.

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## Moderated discussion

At the end of the panel discussion, a Q&A session allowed the audience to raise several questions.

**Scope of collateral damage: reverberating vs. spillover effects**

One participant asked about the scope of collateral damage, specifically referencing the impact of the Russia-Ukraine conflict on wheat exports to African countries and resulting food insecurity. The participant asked whether such long-distance consequences should be included in collateral damage assessments.

One panelist acknowledged the significance of this question, distinguishing between reverberating effects – which are considered in proportionality assessments – and broader spillover effects, which may extend beyond the territories of the belligerents. The panelist cautioned against stretching the rule too far, particularly in the context of cyber warfare, where global spillover could occur. While such consequences are real, realistic boundaries should be maintained when applying proportionality assessments, focusing on effects more directly linked to the battlefield or the parties involved in the conflict.

Another panelist highlighted how technological advances have influenced the law's expectations regarding the foreseeability of collateral damage. Since the Gulf War, it has become increasingly possible to foresee such damage, which carries legal implications. These developments have raised the expectations placed on military commanders in their assessments. Such changes are more impactful than abstract legal debates.

**Reassessing proportionality in the context of growing civilian harm**

One participant expressed concern over the apparent normalization of civilian harm in recent conflicts. The participant pointed out that proportionality, like other legal concepts, gains meaning through its application over time. However, if practice begins to accept higher levels of civilian harm, the legal meaning of proportionality may shift accordingly. Yet, this shift must not go unchallenged.

One panelist responded by underlining the objective nature of the proportionality rule. Although the assessment is carried out by a "reasonable military commander" who uses judgment and common sense, the rule itself is not merely subjective. If it were, there would be no point in trying to automate compliance with it, as some scholars have suggested with regard to autonomous weapons. Instead, the rule is meant to be a concrete, measurable standard – albeit one that is applied with human judgment.

Another panelist highlighted the problematic arbitrariness of current investigative thresholds, explaining that some organizations have sought to address the lack of consistent coverage

and documentation of civilian casualties by recording even single incidents, aiming to preserve the humanity behind the statistics. The panelist emphasized the need for transparency and consistency in methodology, while maintaining a strong connection to the human lives that legal rules are designed to protect.

In response to the concern about shifting standards, another panelist framed the issue as a legal dilemma: whether observed practice reflects ongoing violations of the law or signals the emergence of new legal norms. While acknowledging the difficulty of drawing a definitive line, the panelist cautioned that not all practice equates to a change in the law – some may simply represent violations that must be called out.

**Tactical vs. operational proportionality**

One participant asked whether, even if individual attacks are proportionate at the tactical level, the overall collateral damage might still be excessive when assessed from an operational perspective. The participant also inquired whether the principle of proportionality under *jus ad bellum* could provide an additional layer of protection beyond the proportionality assessment under IHL.

A panelist confirmed that the *jus ad bellum* principle of proportionality is indeed distinct from the *jus in bello* proportionality rule. As such, it is possible for a military action to be proportionate under IHL but still fail to meet the *jus ad bellum* test. Assessments may vary across levels of military command: what seems proportionate at the tactical level may be deemed excessive at the operational or strategic level. Hence, when possible, tactical-level decisions should be informed by higher-level considerations. However, it remains essential to evaluate decisions based on the information available at the time they are made.

**Force protection and proportionality**

One participant asked for clarification on how “military advantage” should be understood in proportionality assessments, noting that while some statements exclude risks to friendly forces from consideration, it remains unclear what is actually included in the calculation. The participant wondered whether elements such as expected enemy behavior or operational objectives (the “two-up intent”) should factor into the assessment.

A panelist explained that military advantage goes beyond the destruction or neutralization of a military objective. For example, gaining terrain or diverting enemy forces ahead of a major offensive could also constitute military advantage. However, the lives of one’s own soldiers should not be included. The role of combatants inherently involves risking their lives, whereas the rules on the conduct of hostilities are specifically designed to protect civilians. Including the safety of one’s own forces would therefore go too far and risk undermining this fundamental distinction.

Another participant offered a remark from a military perspective, emphasizing that the loss of military personnel is assessed not from a humanitarian angle but purely in terms of combat power. The participant explained that every military commander and legal advisor evaluates the risks to their own forces, not out of concern for the lives lost *per se*, but because a reduction in forces impacts the ability to carry out operations. Reducing risks to friendly forces is therefore seen as contributing to military advantage, as it enhances operational continuity and tactical flexibility. The participant acknowledged that terminology might play a role in the apparent disagreement but insisted that force protection is assessed strictly through the lens of combat power, not humanity.

One panelist further elaborated on the question of force protection, noting that its relevance to proportionality assessments depends heavily on the situation. The panelist drew a distinction between two scenarios. In the first scenario, when troops are under fire, attacking the enemy to halt that fire can be considered part of the proportionality assessment, as saving one's own troops in active combat is directly linked to the military advantage of the attack. In the second scenario, when choosing among different operational methods before an attack takes place (each with varying levels of risk to one's own forces) the risk to troops cannot be factored into proportionality. In that planning stage, the ability to reduce risk by simply not conducting an operation means any added risk is avoidable and thus cannot justify greater military advantage. The panelist warned that if this were allowed, it could be abused, for instance by designing high-risk operations simply to inflate the notion of military advantage. However, such considerations could rightly play a role under the principle of precautions in attack, where commanders must consider both military and humanitarian factors when selecting methods and means of warfare.

Another panelist responded by describing this position on force protection as a compromise, one that acknowledges the imperative to protect soldiers' lives when troops are in contact. However, the logic behind applying different legal standards depending on the phase of operations should be further clarified. Specifically, the panelist questioned the justification for allowing force protection to play a role in proportionality during active combat, but not when planning and selecting among operational options in advance.

**Silence, customary law, and the erosion of norms**

One participant expressed concerns over interpreting silence in the face of collateral damage, emphasizing that silence is inherently ambiguous and cannot be taken as an expression of *opinio juris* – a necessary element for establishing customary international law – without clear indications to that effect. Nevertheless, the participant pointed to the indirect legal impact of increasing tolerance for collateral damage, arguing more precisely that evolving perceptions of what is "acceptable" might shift the standard of what is expected of a "reasonable

commander," thereby influencing legal evaluations even outside the domain of customary law. The participant warned that, as public and military sensibility to civilian harm erodes, principles like humanity and the dictates of public conscience, as expressed in the Martens Clause, become less protective, potentially broadening what is considered legally permissible.

**Sieges and the principle of distinction**

One participant asked whether siege tactics are not, by definition, indiscriminate rather than merely disproportionate. If a siege qualifies as an "attack" under Article 49, then one might expect it to be assessed similarly to an attack on a building harboring both combatants and civilians (like a hospital) where the targeting must respect the distinction between military and civilian elements. In essence, the participant asked why besieging a city that contains both combatants and civilians does not inherently violate the principle of distinction under IHL.

A panelist explained that sieges are not necessarily indiscriminate attacks but may become so depending on how they are conducted. It may be helpful to view sieges as a method of warfare, a framing that seemed more intuitive to many in the audience. When a siege targets an area containing both civilians and combatants and the attacking force fails to take mitigating measures – such as permitting humanitarian relief or organizing evacuations – then the siege can indeed amount to an indiscriminate attack or an indiscriminate method of warfare. In the panelist's view, the key legal conclusion hinges on implementation: if protective measures are absent, the legal assessment shifts accordingly.

**Mental health as incidental civilian harm**

One participant asked whether the notion of incidental damage to civilians could also encompass psychological or mental health impacts when applying the principle of proportionality, and how such impacts could be assessed if they were to be considered.

One panelist responded that mental health should indeed be considered part of incidental harm, referring to the World Health Organization's definition of health, which includes not only physical but also mental well-being. The panelist referred to the example of post-traumatic stress disorder (PTSD) among civilian populations affected by certain attacks, which clearly demonstrates the need to take into account mental health impacts. This remains a controversial area, but it is slowly becoming a majority view.

Another panelist agreed that mental health, particularly in relation to children, could reasonably be considered a form of collateral damage. The panelist pointed to examples such as children attending school in bunkers or entire generations growing up in conflict settings as clear, foreseeable consequences of war. Whether such impacts are factored into assessments, the panelist noted, ultimately comes down to practical willingness.

Another panelist highlighted the psychological trauma caused by specific weapons. The panelist referred to shards that produce a terrifying sound intended to terrorize civilians. Some legal professionals are exploring the possibility of framing such use as a form of terrorism. Also, constant drone noise can have long-lasting psychological effects, especially on children. Once one begins to unpack the effects of war, mental health issues are deeply interwoven into every aspect of civilian life.

**Differentiating between immediate combat and planned attacks in assessing military advantage**

One participant asked about the justification for differing legal approaches to situations involving troops in contact versus those involving planned attacks with multiple options. The participant asked what logic underpins the divergent assessments and decision-making criteria between these contexts.

One panelist explained that in scenarios where troops are already engaged in combat (so-called “troops in contact”) the preservation of one’s own forces can constitute a direct and concrete military advantage. The panelist described a hypothetical case involving close air support near a village of 250 civilians, where a vehicle carrying sensitive crypto equipment was at risk of being captured. In such a case, the destruction of that equipment and the preservation of troops would need to be weighed against the expected civilian harm. In this context, the military advantage is derived from acting immediately, i.e. destroying enemy forces and protecting mission-essential material. By contrast, when it comes to pre-planned operations, such as high-altitude bombings, the advantage becomes more about feasibility and precaution: choosing methods that minimize collateral damage.

A third panelist echoed this distinction, highlighting that the key difference lies in the nature of the military advantage. In a troops-in-contact scenario, if no action is taken, one’s own troops may be lost. Thus, the advantage is concrete and direct. However, in planned attacks where several methods are available, choosing one approach over another does not equate to saving lives that would otherwise be lost – the attack itself does not inherently preserve anything. This hypothetical comparison lacks the direct causality found in immediate combat situations.

**Increasing tolerance for civilian harm**

One participant referred to the apparent evolution of tolerance toward collateral damage and asked whether, within military communities themselves, such growing tolerance exists, and how that might differ from media and public perceptions. The participant suggested that the threshold for acceptable civilian harm may be shifting and asked whether such developments (especially when repeated) risk changing the normative framework.

One panelist explained that during conflicts in Afghanistan, for example, political directives imposed a very low tolerance for collateral damage, a mindset shaped by zero-casualty warfare and strict rules of engagement. This strongly influenced operational behavior. Since 2014, however, military thinking has shifted, especially in northern hemisphere States, though without a growing acceptance of civilian harm. In fact, the opposite may be true. The focus on civilian protection includes one's own population as much as the enemy's. Interestingly, military personnel (particularly generals) often demonstrate a greater aversion to casualties than civilians or politicians, due to their proximity to operational consequences and the weight of responsibility.

Another panelist took the opportunity to caution against differentiating between civilians on the basis of nationality or proximity. IHL protects all civilians in one way or another, whether they are part of one's own population or that of the enemy.

A third panelist concluded by reflecting on the evolving information environment, which increasingly blurs the lines between distant and local conflict. With vast amounts of data and imagery now accessible, the ability to engage in meaningful, well-informed discussions about civilian harm is greater than ever. However, the panelist also acknowledged the challenges posed by misinformation and disinformation, especially for States and militaries trying to navigate this new reality.

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# PANEL 5

# UPHOLDING HUMANITY DURING HIGH-INTENSITY ARMED CONFLICTS: RISKS, CHALLENGES, AND OPPORTUNITIES

CHAIRED BY PAULINE WARNOTTE, SENIOR LEGAL ADVISOR, ICRC DELEGATION TO THE EU, NATO AND THE KINGDOM OF BELGIUM

# Ensuring humane detention and protection of prisoners of war during high-intensity armed conflicts

**Stéphane Lesnard**
Captain, French Navy, Head of Operational Law Branch, NATO SHAPE

Regrettably, the speaker had to cancel his participation at the last minute.

# Respecting and protecting wounded, sick, shipwrecked combatants and civilians during hostilities at sea

**Caroline Tuckett**
Commander, United Kingdom Royal Navy

**Summary**

*Commander Tuckett addressed the challenges and opportunities of upholding the provisions of the Second Geneva Convention, particularly Article 18, which requires the search and care for the wounded, sick, and shipwrecked during naval conflict. Her contribution reflected on the practical application of these rules, emphasizing the need for commanders to be well-versed in IHL in modern naval warfare. Challenges arise from the long distances between parties, especially with advanced weaponry like missiles, and the obligation to seek external help when no immediate support is available. She also highlighted potential legal conflicts between peacetime maritime law, such as the International Convention for the Safety of Life at Sea (SOLAS) and the UN Convention on the Law of the Sea (UNCLOS), and the Geneva Conventions. Additionally, she argued that advances in technology, such as uncrewed vessels and underwater robots, present opportunities to fulfil IHL obligations without risking further lives. The contribution concluded by stressing the importance of applying "all possible measures" to rescue the shipwrecked and protect the dead, urging the need for prompt, good-faith action in both wartime and post-conflict scenarios, with an emphasis on humanity at sea.*

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I am delighted to be presenting here today, and I would like to thank the ICRC for the kind invitation. I have been asked to speak to you about "Respecting and protecting wounded, sick, shipwrecked combatants and civilians during hostilities at sea". To do so, I will focus on just a couple of articles within the Second Geneva Convention. As per the title of this panel, I will try to draw out the risks, challenges, and opportunities that these provisions present in conflict at sea.

My role as a legal adviser in the Royal Navy means that I spend a lot of time effectively trying to "translate" the provisions of international humanitarian law into practical advice for commanders at sea. The need to revise and refresh our training in the law of naval warfare, including the Second Geneva Convention, was brought home to me when I was told about a conversation that took place during training back in the UK. A Commanding Officer was taking their team through a simulated battle exercise. As part of the scenario, an enemy warship was sunk, and the Commanding Officer gave the order to turn the Royal Navy warship away and get out of danger because enemy aircraft were still launching attacks from above. The

Commanding Officer was questioned by one of the junior officers, who suggested that they needed to rescue the enemy survivors and "give them lifejackets, because that is what SOLAS [International Convention for the Safety of Life at Sea] says."

This conversation demonstrated to me that, on the positive side, we have not had real cause to consider the Second Geneva Convention in recent times. The bad news is that my clients – the operators at sea – are potentially more versed in peacetime matters such as life jacket regulations than they are in the application of international humanitarian law in naval warfare. The sinking of the *Belgrano* in the 1982 Falklands Conflict had been the last time in decades that the Second Geneva Convention was applied. This all changed in April 2022 with the sinking of the Russian Federation's warship *Moskva* in the Black Sea, followed by the subsequent sinking of other Russian naval vessels. It strikes me that these recent events in the Black Sea oblige us as lawyers to consider the application of the Second Geneva Convention in the 21st century.

## 1. Article 18 – how it may work in practice

I will initially focus on the first part of Article 18 of the Second Geneva Convention, as it is the most pertinent Article from the perspective of operators at sea and will affect immediate actions after an engagement. The Article states:

> *After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded, and sick, to protect them against pillage and ill-treatment, to ensure their adequate care […].*[176]

In the aftermath of an engagement at sea, a Commanding Officer will have a significant list of things to consider: the safety of their crew, the seaworthiness of their own vessel, the actions of the enemy, the next mission to complete – the list is endless. Included in this, of course, is the possible rescue of the crew of the ship that has just been attacked. It is therefore essential that the legal obligations under the Second Geneva Convention, including those of Article 18, are made clear in a practical manner.

The first point to highlight regarding Article 18 is that the obligation is on the Parties, not just the Commanding Officer at sea. This may appear obvious, but the nature of naval warfare makes it essential because of the distances likely to be involved. Modern weapons systems are now so advanced that missiles can be fired over significant ranges. The *Moskva,* for example, was struck by long-range cruise missiles fired from land while the ship was over 80 nautical miles from the coastline.[177] In contrast, the *Belgrano* was struck by a torpedo fired

[176] The full text of the Second Geneva Convention, along with its accompanying Commentaries, can be found at https://ihl-databases.icrc.org/ihl/full/GCII-commentary.
[177] Leo Sands, 'Sunken Russian warship Moskva: What do we know?', BBC NEWS (18 April 2022), available at: https://www.bbc.co.uk/news/world-europe-61103927.

from less than one nautical mile away.[178] The practical reality, therefore, particularly in modern naval warfare, is that the officer responsible for launching the strike may well not be on the scene. In fact, there may not be any belligerents nearby at all.

How, then, can we ensure that all possible measures are taken to search for and collect the shipwrecked, if neither of the parties is in the vicinity? Article 21 of the Convention states:

> *[…] Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.*

Here, we come across a potential dissonance in interpretation. It has been proposed that the Article should be read literally – that parties "may" seek the help of others.[179] In contrast, the ICRC's view is that it should effectively be read as a "must", given the preceding obligations under both Articles 12 and 18.[180]

In my view, the ICRC's view must be correct, precisely because of the preceding obligation under Article 18 to "take all possible measures." Seeking the assistance of neutral vessels in the area may not be the final answer to the problem, but it should be considered if there is no other viable option. As the Commentary itself states, there is a risk that, following a long-range attack, a party may conclude that "*no measures whatsoever are possible". Such a trend, were it to materialize, would significantly imperil the system of protection set up by the Second Convention. A good faith duty remains."*[181]

It is worth emphasizing that this requirement rests with *all* parties – including those whose shipwrecked crews may be in the water following an attack. It is this obligation, and in particular the requirement to seek outside help if the search cannot be done by your own forces, which leads to an additional risk in the application of the Second Geneva Convention: the battle to win the narrative.

The planning of large-scale military operations now regularly includes analysis of the media, and a timely press release can be as effective as a missile. That said, for very understandable reasons, a Navy may not always want to immediately acknowledge that a warship has been sunk. There will be a host of immediate considerations to bear in mind, ranging from trying to determine the situation at sea and informing the families, to assessing the effect on the fleet's

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[178] See excerpt from Commanding Officer's Log in H.I. Sutton, 'Sinking of ARA Admiral Belgrano - 2nd May 1982', 2 May 2017, available at: http://www.hisutton.com/Belgrano_1982.html.
[179] James Kraska et al, 'The Newport Manual Manual on the Law of Naval Warfare', *Stockton Center for International Law* (2023), para 10.1.
[180] ICRC, Commentary on the Second Geneva Convention (Cambridge University Press 2017), para 1863. The Commentary also refers to the obligations stated in Article 12 as part of this rationale: 'Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances'.
[181] Ibid., para 1646.

fighting capability and the overall effect on morale. It is not difficult to see how, in weighing these considerations, there could be a delay in seeking help to search for the shipwrecked.

The interesting dynamic here is public perception, and how fast a State Party will be expected to respond. In the 21st century, modern communications mean that an enthusiast sitting at home can track ships through open sources. While they may not find warships straight away, they will not be slow. The concept of "without delay" is as likely to be judged by the watching civilian population as it is by other States. This, in turn, leads to a challenge: the ongoing necessity for operational security within military operations. Submarines, for example, by their very nature, operate in a covert manner. Should a submarine be sunk in warfare, a State faces a real challenge in balancing the requirement to rescue the crew with the possible national security objectives of not disclosing the loss.

If a request for assistance is made, what are the corresponding obligations on those who receive the request? In times of conflict, a lawyer's focus is naturally on international humanitarian law as the *lex specialis.* Increasingly, as seen in several court cases in the UK, there is also a focus on international human rights law and its applicability in conflict.[182] However, at sea, there is a third legal regime to consider: peacetime maritime law. In the Black Sea, for instance, there is an ongoing international armed conflict between Russia and Ukraine. Yet, for ships in the vicinity flying under other flags, they are operating under the peacetime law regime, as provided for by UNCLOS, as well as supporting treaties such as SOLAS.

The Geneva Conventions were drafted at a time when treaties such as UNCLOS and SOLAS did not exist in their current form. In a scenario where a party requests assistance in a rescue under Article 21 of the Second Geneva Convention, the two legal regimes come up against each other. Article 21 states that parties may "appeal to the charity" of other mariners of neutral vessels. Yet, nothing in the Second Geneva Convention states that these mariners are obliged to assist. An added nuance in the modern shipping world is that, while the flag of a vessel may be neutral, the master in command is most likely of a completely different nationality. In other words, while the flag may be neutral, the master may not feel the same way.

In contrast, peacetime law, such as UNCLOS and SOLAS, clearly imposes a positive obligation on the master to render assistance to those in distress, as far as possible under the circumstances.[183] So, while there may not be an obligation under the Second Geneva Convention, there is most likely one under peacetime law that would apply anyway. This may seem like a legal conundrum to overcome, but from the practical perspective, my experience

[182] As an example, see: European Court of Human Rights, *Smith and Grady v. United Kingdom*, Judgement, 27 September 1999.
[183] UNCLOS Article 98 (1)(b); SOLAS Convention Chapter V, Regulation 33.

is that the desire to aid the rescue of fellow sailors in distress is an intrinsic part of a mariner's psychological makeup.

I have also been asked to speak about potential opportunities, and here I think the constant improvement of technology at sea can be seen as a positive element in the application of the Second Geneva Convention. If we go back to the Commanding Officer who was training their team in a simulator, one of the many factors to consider before attempting a rescue of enemy survivors is: will this rescue action endanger my crew? In the past few years, the use of uncrewed vessels at sea has increased exponentially, not only in warfare but also in tasks such as search and rescue.[184] Why not use such vessels in this context? It would be a 21st century approach to taking "all possible measures" without putting more sailors in danger.

### 2. The search for the dead

With new technology in mind, I would like to finish by looking at the final phrase of Article 18, namely the requirement "to search for the dead and prevent their being despoiled." In my view, new technology presents a huge opportunity. For example, underwater remotely operated vehicles could be used to search for the dead trapped in wrecks on the seabed. The use of such technology is well known in the search for famous shipwrecks – so why not apply it here? The ICRC Commentary acknowledges advances in technology and notes that "possible measures" may include entering a sunken vessel to search for and collect the bodies of the dead trapped inside.[185] The Commentary also states that "as a matter of international humanitarian law, however, Article 18 does not appear to go as far as *requiring* that".[186] In my view, the key question is: if a State *does* have access to such technology, does it increase the level of due diligence that *should* be applied?

### 3. What happens next?

Finally, although we are here to discuss international humanitarian law during a conflict, I think it is important to also keep an eye on the situation *after* the conflict. The Royal Navy has 5,038 known wreck sites around the world, with a date range going back several hundred years. A significant proportion of these sites are assessed to be the final resting places of sailors. In the case of the HMS Gloucester (1682), the ship was carrying James, Duke of York, the future King of England, when it was wrecked in a storm, with many of the sailors perishing onboard (the Duke of York managed to swim ashore). The wreck was discovered roughly 10 years ago by a privately funded expedition using cutting-edge technology; technology that will, of course,

[184] See, for example: WorkBoat365, 'World's first unmanned rescue vessel launched at SMM' (5 September 2024), available at: https://workboat365.com/worlds-first-unmanned-rescue-vessel-launched-at-smm/

[185] ICRC, Commentary on the Second Geneva Convention (Cambridge University Press 2017), para 1686.

[186] Ibid., para 1688, emphasis added by the author.

only continue to improve and lead to further discoveries. It highlights the fact that respect for the dead, and their protection, is an enduring commitment that goes beyond the conflict itself.

**Conclusion**

This panel has been asked to consider the concept of upholding humanity in conflict; I consider that it is still possible at sea. As lawyers, we may discuss the juxtaposition of international humanitarian law with peacetime law, but as a matter of fact, humanity exists at sea, irrespective of that legal discussion. We saw it in the rescue of some crew members from the *Moskva* in the Black Sea, carried out by neutral shipping nearby.[187]

The overriding risk, in my view, lies in a state narrative that prevents the acknowledgement of the location of a sinking warship or merchant vessel caught up in the conflict. This narrative could be used for genuine security reasons, but it will build in delay and stop a speedy search. The challenge, therefore, is the same one faced at the time of drafting: ensuring the application of the Second Geneva Convention in good faith. In conjunction with this, there is a need to ensure the application of "all possible measures" as per Article 18. What is "possible", in my view, is not only location- or weather-specific. It is also defined by capabilities: some Navies will be able to do more than others. Opportunities present themselves in advances in technology, both for effecting a rescue and for searching for the dead. Pulled together, what does this mean? The phrase "all possible measures" cannot be bound or limited, and nor should it be.

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[187] TRT World News, 'Turkish Ship Rescues Over 50 Russian Sailors from Naval Cruiser Moskva' (15 April 2022), available at: https://www.trtworld.com/turkiye/turkish-ship-rescues-over-50-russian-sailors-from-naval-cruiser-moskva-12789946.

# “Total defence”: civilian and military coordination and cooperation during high-intensity armed conflicts

**Helené Lackenbauer**
Deputy Research Director, Swedish Defence Research Agency (FOI)

**Summary**

*Ms. Lackenbauer discussed Sweden’s recent reintroduction of the total defence strategy, a concept that integrates military and civilian efforts to protect the nation. Total defence, defined as a whole-of-government and whole-of-society approach, requires cooperation between military forces, civilian agencies, and society. With Sweden's membership in NATO since March 2024, total defence has been reaffirmed to bolster national and collective security. It includes mandatory service for citizens between 16 and 70 years old, with roles in both military and civilian duties. However, challenges to IHL arise, particularly regarding the roles of combatants and civilians, the potential impact on neutral humanitarian actors, and prioritizing resources between civilian and military needs in times of conflict. Finally, she underscored the importance Sweden places on the participation of the entire population in national defence efforts, stressing the need for comprehensive planning and clear communication of obligations.*

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This contribution draws on Sweden’s recent introduction of the concept of total defence. While civil-military coordination takes place at all levels in an armed conflict, this contribution focuses on the strategic level.

Total defence is sometimes used by some nations – such as the United States – as a concept bringing together all military assets and branches, including nuclear arms, in a defence effort. However, for the purposes of this contribution, total defence is defined as a whole-of-government approach adopted by non-nuclear States.

## 1. The concept of civil-military coordination

Civil-military coordination/cooperation (“CMC”) is a necessity for the functioning of military forces in both war and peacetime. Civilian agencies and organizations operating in the theatre of war, or in peacetime crises, also depend on functioning relations with the military forces to fulfil their purpose. As previously mentioned, CMC takes place at all levels, i.e. strategic, operational, and tactical, and between a variety of civilian actors, such as government agencies, communities, multilateral organizations, non-governmental organizations and self-appointed community representatives.

There is a wide range of civil-military concepts, including civil-military coordination, civil-military cooperation, civil-military relations, comprehensive approach, whole-of-government approach,

whole-of-society approach, and effect-based approach. CMC has been a topic of discussion for several decades. However, the discussion between civilian agencies and the military has focused very much on the use of civilian assets to achieve military objectives. A concrete example is the NATO campaign in Afghanistan, where the adopted counterinsurgency ("COIN") strategy was based on a comprehensive approach in which civilian development activities, combined with military operations, were a necessary component to win the hearts and minds of the Afghan population.

The COIN strategy has mainly been used in fragile States in the Global South. The civilian component has often consisted of international development agencies, with their own defined objectives that rarely align with those of the military forces. Humanitarian organizations have, for obvious reasons, been against the comprehensive approach, as their activities must be neutral and impartial. However, the CMC debate has taken on a whole new dimension with the deteriorating security situation in Northern Europe. NATO and its Allies have developed and adopted new concepts for both deterrence and the defence of the Alliance's territories, based on a whole-of-government approach.

## 2. The Total Defence Strategy

Given Sweden's location in the far north, its defence policy has changed rapidly since Russia's annexation of Crimea in 2014. The concept of total defence, which served as the overarching Swedish defence strategy during the Cold War, has been revived and is now being redeveloped. Total defence has been described as a security concept that calls for the entire society, integrating military and civilian responses into one single approach which is managed and organized by the government. Essentially, total defence is a civil-military concept, based not only on a whole-of-government approach but also on a whole-of-society approach, which also places demands on the private sector and civil society.

During the Cold War, the concept was mainly adopted by a few small non-aligned States, such as Sweden, Switzerland, Austria, and Singapore. With the fall of the Iron Curtain in the early 1990s, it was generally agreed that the concept was outdated and largely abandoned. However, this has been altered by the evolving security architecture of Europe. In Sweden, total defence is once again the adopted strategy for defending the territory. However, Sweden is no longer a neutral and non-aligned nation, since it joined NATO in March 2024.

## 3. The case of Sweden

The Swedish Parliament has unanimously adopted total defence as the nation's strategy, which consists of both military and civil defence. At the highest level of alert, total defence encompasses all societal activities that need and should be carried out. The Parliament recognizes civil defence as a prerequisite that enables military defence to fulfil its main task:

to defend Sweden against an armed attack. The Parliament has also stated that, in accordance with Sweden's commitments as a member of NATO, Sweden must be able to carry out total defence activities both individually and in collaboration with others, both within and outside its territory. Total defence is understood as a vital component in efforts to deter attacks from an adversary.

As mentioned above, total defence calls on the whole of society to participate in the defence of the nation. Defending Sweden and its independence, sovereignty and territorial integrity is not only a military task but a responsibility for the whole of society. This includes organizations such as the National Red Cross Society, which is an auxiliary to the government and one of the 18 appointed voluntary defence organizations.

Total defence, encompassing both military and civil defence, carries out preparations, develops plans, and acts in a state of heightened alert or war, based on legislation. The overarching objective of military defence is to defend Sweden against armed attacks and to uphold Sweden's territorial integrity. Civil defence, on the other hand, aims to uphold essential societal functions, enhance resilience to external pressure, contribute to military defence capabilities, protect the civilian population, and maintain the will to defend. Civil defence is considered to play a crucial role in military defence efforts, supporting the Swedish armed forces and NATO allies in the event of high alert or armed conflict. The ability of civilian actors to provide support in the conduct of military operations is a necessary contribution to the total defence effort and thus also to the total defence's contribution to NATO's overall deterrence capability.

Total defence calls on the entire population to engage in the defence effort. To ensure that both civil and military defence have sufficient personnel in the event of a heightened state of alert and war, obligatory total defence duty applies to individuals between the ages of 16 and 70. These obligations can be fulfilled through conscription into military service, civilian service, or general service. Military service requires the conscript to serve in the Swedish Armed Forces. A person who is called up for civilian service must perform duties determined by the government, which may include activities within the armed forces, such as health and medical care. A person liable for military service who is not called up for military or civilian service may be called up to perform general services required by society in the event of a state of high alert or armed conflict.

## 4. Challenges to IHL

The concept of total defence raises a series of challenges to international humanitarian law (IHL) that need further research and debate.

### *4.1. IHL's absence*

In Sweden, IHL is absent from the debate surrounding the Total Defence Strategy, despite its relevance in understanding the status of combatants and the protection of civilians. There is a need to further explore the unclear boundaries between combatants conscripted for military service and civilians conscripted for civilian service within the armed forces, including civilians providing services to foreign NATO troops.

IHL is also lacking in the information provided by Swedish authorities to the public regarding total defence and the population's obligations. There is a general need to disseminate IHL provisions, particularly protection of civilians, at all levels of society, including the armed forces and public authorities.

### *4.2. Humanitarian imperative is poorly understood*

The concept of total defence is comprehensive and requires the whole of society to support the military defence effort. This could be detrimental to impartial and neutral humanitarian actors if the humanitarian imperative is not properly understood. In the Swedish total defence discourse, the term "humanitarian" is poorly understood and is often used to describe services, such as welfare and healthcare, provided by the government as opposed to military activities.

### *4.3. Prioritization between civil and military needs*

A fundamental component of total defence is the expectation that civilian defence will support military efforts in times of high alert or war. This raises several questions about how resources and services essential for human survival are prioritized between civilians and the military when supplies and services are scarce. For a nation like Sweden, this could pose a major challenge, particularly given its ageing and often vulnerable population, which requires advanced care. There is a need to discuss the issue of prioritization on the basis of humanity rather than (perceived) military necessity.

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## Moderated discussion

At the end of the panel discussion, a Q&A session allowed the audience to raise several questions.

**Dissemination of total defence knowledge**

One participant asked about the practical aspects of the total defence system, specifically how knowledge of the system is disseminated within civilian society. The participant highlighted the risks civilians face, as they may be near military targets or even become legitimate targets themselves. Another participant inquired about how IHL could be better integrated into the total defence model, especially considering the potential mobilization of civilians.

A panelist replied that the concept of total defence is not widely disseminated to the general public. In Sweden, for example, while authorities have issued a brochure on how to prepare for and protect oneself in times of crisis or war, public awareness of conscription obligations is often limited. At age 18, young people receive a letter summoning them for screening to determine their fitness for military service, with only around 4,000 selected annually. There is also a broader civil defense obligation, but most of the population remains “happily unaware” that they may be obliged to serve between the ages of 16 and 70 in the event of high alert or war. The panelist noted that States like Sweden are still in the early stages of rebuilding their total defence systems, leaving room for better integration of IHL. They highlighted the role of both the ICRC and National Societies in disseminating IHL, and noted that while the military does receive training, there is still a gap in awareness and integration among civilian officials. The distinction between combatants and civilians involved in defense efforts must be clarified to ensure appropriate protections.

**Legal and tactical considerations for rescue at sea**

One participant asked about the follow-up actions after the rescue of the wounded and shipwrecked by neutral or merchant vessels, specifically whether a belligerent could demand the surrender of such individuals, and whether this could be done by diverting them to a port rather than a nearby warship.

A panelist clarified that while the Geneva Conventions allow prisoners of war (PoOWs) to be held at sea when necessary, holding them on land is always preferable, for both legal and tactical reasons. Warships become operationally limited once they take on POoWs, as they must ensure their care and legal processing. Demanding surrender only makes sense if there is access to a friendly port, since a neutral port cannot be used for this purpose, and sending rescued persons back to their home territory would be counterproductive. It also depends on geography and the location of the ships involved. While there may be military advantages to requesting the surrender of an enemy crew from a sunken warship, it may not always be

necessary. The Geneva Conventions state that if shipwrecked mariners are rescued by a neutral vessel and taken to a neutral port, they should stay in that neutral State and no longer be considered part of the conflict. In practice, this option may be preferable, as it relies on the neutral State to care for them until the conflict ends, thereby removing the need to manage PoOWs.

**Tensions between the bodies of law applicable during armed conflict at sea**

One participant inquired about the legal conflicts that emerge between different bodies of law applicable during armed conflict at sea, specifically asking whether any discrepancies can be identified, the challenges they present, and potential ways to address them.

A panelist responded that tensions do indeed exist, especially between the UN Convention on the Law of the Sea (UNCLOS) and the law of armed conflict. One key challenge arises, for example, when enforcing maritime zones at sea, particularly when balancing military effectiveness with the freedom of navigation for merchant shipping. While military forces may enforce exclusion zones, they cannot completely block access for merchant ships, as doing so would violate their shipping rights. The real difficulty lies in using military tools to control the sea and enemy actions while still allowing global merchant shipping to continue its operations. This situation underscores the practical clash between military and legal regimes.

**Submarine rescue obligations**

One participant asked about the legal obligations of a submarine regarding rescue operations and whether they differ from those of surface ships.

A panelist emphasized that submarines are not exempt from their legal responsibilities. Like any warship, they are bound by Article 18 of the Second Geneva Convention, which requires rescue efforts “by all possible means.” However, this obligation must be balanced with the need to protect the submarine and its crew, particularly given the covert nature of submarine operations. While the capacity of submarines is limited, this is changing with the development of much larger vessels. The evolving capabilities of these submarines may require the submarine community to reassess their assumptions about logistical constraints in fulfilling legal obligations to shipwrecked personnel.

**Scaling up IHL compliance during high-intensity conflict**

One participant raised a broader question about the capacity of States to uphold legal and policy standards, such as the protection of civilians and collateral damage assessments, during high-intensity conflicts with a high tempo of operations. The participant asked how States are planning to manage these demands, and whether solutions like AI or reservist mobilization are being considered.

One panelist responded by highlighting three main pillars: adherence to Additional Protocol I, mandatory annual IHL training for all service personnel, and Article 36 weapons reviews to ensure new systems comply with the law. In the event of multiple simultaneous attacks, some States would rely on their trained reserve forces, who undergo the same legal preparation as full-time personnel. Scaling up operations would present challenges, but legal compliance should remain deeply embedded in military processes.

Another panelist noted that the dismantling of both military and civil defense systems after the Cold War has left some States facing significant challenges. Once-abundant shelters have been sold or repurposed, and the military has shrunk in size and personnel. When it comes to scaling up military forces, some States now aim to reach tens of thousands of defense personnel by 2030. However, this goal is hampered by a shortage of officers, an aging cohort of military professionals, and declining enthusiasm among youth to join the armed forces.

**Humanitarian principles vs. total defence obligations**

One participant expressed concern about the expectation for civil society, including NGOs and potentially humanitarian organizations, to engage in national defense efforts as part of the total defence system. The participant questioned how this aligns with core humanitarian principles, such as independence, especially considering that NGOs are often reliant on conditional funding tied to these principles.

A panelist responded that many governments are fully committed to respecting humanitarian principles and legal frameworks, and have long supported independent humanitarian action. However, some governments had not previously considered the need to receive humanitarian assistance themselves. Following the onset of the Russia-Ukraine war, some governments began examining the legal and logistical adaptations required to accept humanitarian aid, including health services from foreign actors. Integrating humanitarian actors, particularly those outside the UN or Red Cross systems, will be complex, and national law may impose constraints on such participation. Efforts must be made to establish a functional framework to facilitate this integration.

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# CLOSING REMARKS

**Knut Dörmann**
Head of Delegation, ICRC Delegation to the EU, NATO and the Kingdom of Belgium

Ladies and Gentlemen, dear Colleagues,

We have now reached the end of the 24th Bruges Colloquium.

It has been an honour to welcome you all for these two days of thought-provoking debates. We were proud this year to introduce many new faces and emerging voices in the field of international humanitarian law, alongside the familiar people whose unwavering commitment to the Colloquium we deeply appreciate.

On a more personal note, I was once again impressed by the level of engagement from the audience in the discussions. This is really a testament to the quality and clarity of the interventions from our articulate and eloquent speakers and chairs.

It is, of course, not possible to summarize the rich discussions of these past days in just a few minutes, and, for that, you will have the proceedings that will be published on our website that I invite you to visit “www.brugescolloquium.org”.

In my very short closing remarks, I will highlight a few salient points from our discussions these past days.

Before doing so, I would like to thank you all for ensuring that this Colloquium lived up to its tradition, commitments, and promises, with a very smooth organization, a warm atmosphere, and a high level of engagement.

In my opening remarks, I shared my hope that this Colloquium would allow us to discuss IHL in a constructive and decontextualized manner. I am pleased to say that this was certainly the case. This proves that, after respectively 75 and 25 years of existence, the Geneva CConventions and the Bruges Colloquium spirit survive the current state of the world. This is an encouraging and inspiring prospect for the many years ahead.

The way the past days have unfolded has far exceeded my expectations. Firstly, as we have already noted, we had exceptional attendance from many regions around the world, representing a wide variety of backgrounds and positions. These included diplomats, students, justice professionals, representatives from international organizations, members of the military, and humanitarian actors.

Secondly, in terms of content, the speakers – even when under heavy fires – were able to share with us their theoretical and practical knowledge of the interpretation and implementation of the law, both in their presentations and responses. They illustrated their points with numerous examples drawn from practice, proving – if proof were needed – that international law provisions not only have a concrete dimension but also practical importance. Several speakers stressed this fact, and I want to echo it: the issue is not a lack of rules, but a lack of respect for them.

And thirdly, in terms of exchanges of views, these included reflections and proposals aimed at pushing further the analysis, as well as pointing out practical details that should be taken into considerations when ensuring the fulfilment of IHL obligations.

In our discussions, many questions arose related to the technicalities of some interpretations of IHL, which directly stem from the evolving nature of the battlefield and its actors. However, as ICRC Vice-President Gilles Carbonnier pointed out in his introduction, IHL – and particularly its fundamental principles – must continue to be interpreted in good faith and in a way that is compatible with the object and humanitarian purpose of this body of law.

During the **first panel**, experts emphasized that domestic implementation of IHL is an obligation, not an option. This requires enacting proper legislation and establishing dedicated institutions and processes to address violations. Speakers also highlighted the importance of international cooperation to bridge the gap between IHL principles and their practical application.

The **second panel** examined the obligation of States to ensure respect for IHL, focusing on the nuances of this obligation, particularly in the context of arms transfers. Speakers explained that States must exercise restraint in arms exports if there is a risk of IHL violations. The panel also discussed how human rights norms and mechanisms can enhance compliance with IHL.

As we moved to **panel 3**, experts addressed the impact of new technologies on IHL, including AI, information operations, and autonomous weapons systems. The panel explored how AI is used in targeting decisions and examined the challenges posed by the current digital information environment. The discussion also covered the need for regulations on AWS to ensure compliance with IHL.

Today, on the second day of our Colloquium, we shifted focus to discussions related to the conduct of hostilities. **Panel 4** explored contemporary challenges to the application of the principle of proportionality. It examined the principle from both an academic perspective and a military approach to proportionality assessments, while also discussing civilian harm from an operational viewpoint.

In the **final panel**, experts focused on upholding humanity during high-intensity armed conflicts, particularly highlighting the protection of the wounded, sick, and shipwrecked at sea. They also addressed civilian and military coordination under the concept of “total defence.”

Ladies and gentlemen,

I believe you will all agree with me that we have covered a lot of ground, from legal and operational issues to strategic, political, and even ethical points of views. Let me conclude by sincerely thanking the many people who worked extremely hard to make this series of events possible.

First and foremost, our moderators and speakers, who provided a wealth of information and reflection. I would also like to thank our friends from the College of Europe, and in particular Emelie Clauwaert, Jonas Corneille, and Claire Lawrence for their constant, efficient, and tireless support. A warm thank you as well to our colleagues from Geneva, who helped design the programme and took an active part in the discussions over the past two days. And last but certainly not least, my colleagues from the ICRC Brussels delegation – our Bruges Colloquium team – who worked with great dedication: Helena Placentino, Fatima El Kaddouri, Elisabeth Kervyn de Meerendre, Katarzyna Radwan, Janet Craven, Andrea Sciorato, and Pauline Warnotte. A huge thank you to all of you!

Traditionally, at the end of such events, we leave with more questions than answers. That may well be the case today, but I have only one question for you: Will you be back next year for our annual rendez-vous? And with that, I formally close the 24th Bruges Colloquium and wish you all a safe journey home.

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# ANNEX

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## CELEBRATION OF THE 25TH ANNIVERSARY OF THE BRUGES COLLOQUIUM ON IHL AT THE BRUGES CITY HALL, 21 NOVEMBER 2024

**Gilles Carbonnier**
Vice-President of the ICRC

Excellencies, ladies and gentlemen, dear colleagues,

It is a true honour to address you today as we gather to celebrate the 25th Anniversary of the Bruges Colloquium on International Humanitarian Law. I would like to thank the City of Bruges for hosting this special ceremony in the magnificent Gothic Room of the Bruges City Hall. I am delighted to join the Deputy Mayor, on behalf of the International Committee of the Red Cross (ICRC), as we mark this important milestone. This anniversary offers us an opportunity to look back at the significant contributions this Colloquium has made to our reflection on IHL over the years, and to look ahead.

2024 is a year marked by several relevant anniversaries. Alongside the 25th anniversary of the Bruges Colloquium, we also celebrate the 75th anniversary of both the Geneva Conventions and the College of Europe, our longstanding partner and host, established in 1949.

The College of Europe, with its commitment to academic excellence and open debates, has fostered a unique environment where complex legal questions related to armed conflict can be explored in a rigorous and engaging manner.

Our partnership began in 1999, when the ICRC Delegation in Brussels approached Professor Otto von der Gablentz, then Rector of the College, with the idea of creating a forum dedicated to IHL. The College embraced the idea, and the Colloquium was launched with success. I would like to express our sincere appreciation to the College of Europe for this longstanding and fruitful partnership. We are indeed grateful for your steadfast support, which has kept the Colloquium vibrant and strong over the years.

Today, we gather here both on the 25th anniversary and, technically, for the 24th edition of our Colloquium, due to a brief pause in 2023. We are thrilled to be fully back in person, returning to a format that has proven successful, allowing for meaningful interactions both in and outside the formal sessions.

Participants have consistently highlighted the relevance of the “Bruges formula,” appreciating its distinctive spirit – one of open and productive conversations, free from the political constraints of diplomatic fora.

In preparing this edition, we drew upon the collective insights you have shared with us over the years to shape an event that is both forward-looking and rooted in a solid tradition.

Over the past quarter of a century, the Bruges Colloquium has helped advance legal thinking and contributed to the protection of persons affected by armed conflict. Our exchanges in Bruges have undoubtedly deepened our understanding of recurrent and emerging IHL challenges. At times, it has even influenced the perspectives of States and international organizations, as well as debates among academia and NGOs active in the field.

The very name of the city hosting this event, Brugge, means “bridge”, a fitting reflection of the spirit that has long presided over the Colloquium. Interpretations of international humanitarian law may differ, and political tensions may be at their highest. But in Bruges, we bridge theory and practice. We share perspectives across professional and disciplinary boundaries, nurturing the “spirit of Bruges” – an asset that, I trust, will sustain the Colloquium for the next 25 years. Let me add that there could be no better setting for such dialogue than the College of Europe, whose mission – as Rector Mogherini reminded us – is to prepare future leaders for the immense responsibilities that await them.

Ladies and gentlemen,

Allow me now to recognize four individuals whose contributions have been instrumental to the success of the Bruges Colloquium. Whether as organizers, speakers, chairs, or regular participants, each of them has made a lasting impact and shared authoritative insights across a wide range of IHL topics.

While they have attended most – if not all– previous editions of the Colloquium, ironically, most could not join us this year due to a change in dates prompted by the 34th International Conference of the Red Cross and Red Crescent, which took place at the end of October, when the Colloquium usually takes place.

Although none of them needs an introduction, allow me to say a few words to honor their contributions.

- First, **Dr. Elzbieta Mikos-Skuza,** Senior Lecturer at the Faculty of Law and Administration of the University of Warsaw, Poland, and Visiting Professor at the College of Europe in Natolin. She also serves as the First Vice-President of the International Humanitarian Fact-Finding Commission. In addition to her contributions to the Colloquium, Elzbieta has been instrumental in organizing an IHL Seminar for students at the College of Europe in Natolin, as well as an introductory seminar on IHL for EU, NATO, and Belgian officials in Brussels, in collaboration with the ICRC Delegation. We are grateful for her many significant contributions.

- Second, **Prof. Marco Sassòli**, Professor of International Law at the University of Geneva, Commissioner of the International Commission of Jurists, and Special Advisor

on IHL to the Prosecutor of the International Criminal Court. His achievements in the field of IHL are far too numerous to list here. Suffice it to say, his inputs to the Colloquium have greatly enriched our debates through insightful lectures and thought-provoking interventions.

- Third, **Prof. Françoise Hampson,** Emeritus Professor at the Law School and Human Rights Center of the University of Essex. She has served as the UK-nominated independent expert to the UN Sub-Commission on the Promotion and Protection of Human Rights. I would particularly like to highlight her significant contribution to the discussions on the interplay between human rights law and IHL. Her participation in the Bruges Colloquium has shaped the thinking of generations of lawyers, who will remember her passionate and topical interventions.

- And last but certainly not least, our dear ICRC colleague **Stéphane Kolanowski**, who is with us today. Stéphane, you have been the initiator and driving force behind the Colloquium since its inception in 1999. For many years, you have been in charge of organizing it, ensuring that it remains relevant and sought-after. On behalf of the ICRC and the College of Europe, I thank you for your vision, your unwavering commitment, and your dedication.

May the Bruges Colloquium continue to thrive for many years to come!

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## LIST OF ABBREVIATIONS

### Acronyms in English

| | |
|---|---|
| AARs | After Action Reports |
| Additional Protocol I (AP I) | Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 |
| Additional Protocol II (AP II) | Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 |
| AI DSS | AI-enabled decision support systems |
| ATT | Arms Trade Treaty |
| AWS | Autonomous Weapons Systems |
| CCW | Convention on Certain Conventional Weapons, 10 April 1980 |
| CMC | Civil-military coordination/cooperation |
| COIN | Counterinsurgency |
| Common Article 1 | Article 1 common to the Geneva Conventions of 12 August 1949 |
| DPH | Direct Participation in Hostilities |
| EU | European Union |
| EWIPA Declaration | Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas |
| GC or Geneva Conventions | The Four Geneva Conventions of 12 August 1949 |
| First Geneva Convention (GC I), | Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 |
| Second Geneva Convention (GC II) | Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 |
| Third Geneva Convention (GC III) | Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 |
| Fourth Geneva Convention (GC IV) | Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 |
| HRDDP | Human Rights Due Diligence Policy |
| IAC | International Armed Conflict |
| ICC | International Criminal Court |

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|---|---|
| ICJ | International Court of Justice |
| ICCPR | International Covenant on Civil and Political Rights |
| ICRC | International Committee of the Red Cross |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| ILC | International Law Commission |
| LEGADs | Legal Advisors |
| OHCHR | Office of the High Commissioner for Human Rights |
| OPEX | Operational Experimentation |
| OPLAN | Operational Plan |
| NATO | North Atlantic Treaty Organization |
| NIAC | Non-International Armed Conflict |
| NIB | National Information Bureau |
| POWs | Prisoners of War |
| RoE | Rules of Engagement |
| SOLAS | International Convention for the Safety of Life at Sea, 1 November 1974 |
| UN | United Nations |
| UN Charter | Charter of the United Nations, 26 June 1945 |
| UNCLOS | United Nations Convention on the Law of the Sea, 10 December 1982 |

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**PROGRAMME**

College of Europe
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ICRC

# Humanity in War: How Can IHL Keep its Promises?

## *The Future after 75 Years of Geneva Conventions*

24th Bruges Colloquium on IHL

Bruges, 21-22 November 2024

## Day 1 – Thursday 21 November 2024, 08:45 – 17:45 (CET)

**08:45 - 09:15** **WELCOME AND REGISTRATION**

**09:15 - 09:45** **OPENING STATEMENTS**

- **Knut Dörmann**, Head of Delegation, ICRC Delegation to the EU, NATO and the Kingdom of Belgium
- **Gilles Carbonnier**, Vice-President of the ICRC
- **Federica Mogherini**, Rector of the College of Europe

**09:45 - 10:45** **INTRODUCTORY SESSION: DOES HUMANITY IN WAR EXIST?**

- **John Swords**, Director of the Office of Legal Affairs, NATO HQ
- **Laurence Marion,** Director for Legal Affairs, French Ministry of Armed Forces
- **Olof Skoog**, EU Special Representative for Human Rights, International Humanitarian Law and International Criminal Justice (video address)

**10:45 - 11:15** *Coffee break*

**11:15 - 12:45** **PANEL 1: STRONGER TOGETHER: 75 YEARS OF IHL IMPLEMENTATION**

- **Fortifying Humanity: promoting respect for IHL and translating the law into action**
  **–** Anne Quintin, Head of the Legal Advisory Service, ICRC Geneva
- **Yielding vigilance: monitoring compliance with IHL - A State's perspective**
  **–** Mirjam De Bruin, Senior Advisor, Dutch Public Prosecution Service - Center of Expertise Military Criminal Law
- **Justice upheld: enforcing IHL and limiting impunity**
  **–** Jonas Périlleux, Attaché, Belgian Ministry of Justice

Chaired by Frédéric Casier, Legal Adviser in International Humanitarian Law, Belgian Red Cross (Fr)

**12:45 - 14:15** *Lunch*

**14:15 - 15:45** **PANEL 2: GIVING MEANS WITHOUT GIVING UP RESPONSIBILITIES: ENSURING RESPECT FOR IHL, FROM WORDS TO DEEDS**

- **Ensuring respect for IHL: the ins and outs of the obligation**
  **–** Marten Zwanenburg, Professor, Netherlands Defence Academy and University of Amsterdam
- **Ensuring respect for IHL: A role for human rights law and the UN human rights system?**
  **–** Eric Mongelard, Human Rights Officer, Office of the United Nations High Commissioner for Human Rights
- **Same obligation, same facts, different conclusions: why and how to overcome different interpretation of risks for IHL in arms exports?**
  **–** Johanna Trittenbach, PhD Candidate, Leiden University

Chaired by Vaios Koutroulis, Professor, Université libre de Bruxelles

**15:45 - 16:15** *Coffee break*

**16:15 - 17:45** **PANEL 3: HUMANITY IN THE AGE OF NEW TECHNOLOGIES**

- **AI-enabled decision-support systems (AI DSS) in the military decision-making process**
  **–** Merel Ekelhof, Senior Advisor, Policy Directorate of the U.S. Department of Defense Chief Digital and Artificial Intelligence Office (CDAO)
- **Information and cyber operations**
  **–** Henning Lahmann, Assistant Professor, Leiden Law School
- **Autonomous weapons systems**
  **–** Laurent Gisel, Head of the Arms and Conduct of Hostilities Unit, ICRC Geneva

Chaired by Jessica Dorsey, Assistant Professor, Utrecht University School of Law

**18:30 - 20:30** *Ceremony & reception/walking dinner at Bruges City Hall*

## Day 2 – Friday 22 November 2024, 09:00 – 12:45 (CET)

**09:00 - 9:15** **WELCOME**

**09:15 - 10:45** **PANEL 4: UPHOLDING HUMANITY IN THE CONDUCT OF HOSTILITIES: CONTEMPORARY CHALLENGES TO THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY**

- **Proportionality through an academic lens**
  – Gloria Gaggioli, Professor, University of Geneva
- **Military perspective on the proportionality assessment**
  – Sigrid Redse Johansen, Senior Public Prosecutor, Norwegian Director of Public Prosecutions´ Office & former Judge Advocate General for the Norwegian Armed Forces
- **Operational view to civilian harm**
  – Emily Tripp, Executive Director, Airwars

Chaired by Laurent Gisel, Head of the Arms and Conduct of Hostilities Unit, ICRC Geneva

**10:45 - 11:00** *Coffee break*

**11:00 - 12:30** **PANEL 5: UPHOLDING HUMANITY DURING HIGH-INTENSITY ARMED CONFLICTS: RISKS, CHALLENGES AND OPPORTUNITIES**

- **Ensuring humane detention and protection of prisoners of war during high-intensity armed conflicts**
  – Stéphane Lesnard, Captain, FR Navy, Head of Operational Law Branch, NATO SHAPE
- **Respecting and protecting wounded, sick, shipwrecked combatants and civilians during hostilities at sea**
  – Caroline Tuckett, Commander, UK Royal Navy
- **“Total Defence”: Civilian and military coordination and cooperation during high-intensity armed conflicts**
  – Helené Lackenbauer, Deputy Research Director, Swedish Defence Research Agency (FOI)

Chaired by Pauline Warnotte, Senior Legal Advisor, ICRC Delegation to the EU, NATO and the Kingdom of Belgium

**12:30 - 12:45** **CONCLUDING REMARKS**

# Day 1: Thursday, 21 November 2024

## Welcome and Opening Addresses

**Dr. Knut Dörmann** is Head of Delegation of the ICRC Brussels delegation to the EU, NATO and the Kingdom of Belgium since June 2020. Previously he was ICRC's Head of the Legal Division and Chief Legal Officer (December 2007 - May 2020), Deputy Head of the Legal Division (June 2004 - November 2007) and Legal Adviser at the Legal Division (December 1998 - May 2004) (in charge of among others the law applicable to the conduct of hostility, cyber warfare, the protection of the environment, international criminal law). He holds a Doctor of Laws (Dr. jur.) from the University of Bochum in Germany (2001). Prior to joining the ICRC, he was Managing Editor of Humanitäres Völkerrecht - Informationsschriften (1991-1997), Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Dr. Dörmann has been a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international humanitarian law, international law of peace and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book "Elements of War Crimes under the Rome Statute of the International Criminal Court", published by Cambridge University Press.

**Dr. Gilles Carbonnier** is the Vice-President of the International Committee of the Red Cross (ICRC) (appointed in 2018). Since 2007, Dr. Carbonnier has been a professor of development economics at the Graduate Institute of International and Development Studies (Geneva), where he also served as director of studies and president of the Centre for Education and Research in Humanitarian Action. His expertise is in international cooperation, the economic dynamics of armed conflict, and the nexus between natural resources and development. His latest book, published by Hurst and Oxford University Press in 2016, is entitled Humanitarian Economics: War, Disaster and the Global Aid Market. Prior to joining the Graduate Institute, Dr. Carbonnier worked with the ICRC in Iraq, Ethiopia, El Salvador and Sri Lanka (1989–1991), and served as an economic adviser at the ICRC's headquarters (1999–2006). Between 1992 and 1996, he was in charge of international trade negotiations (GATT/WTO) and development cooperation programmes for the Swiss State Secretariat for Economic Affairs.

**Ms. Federica Mogherini** is the Rector of the College of Europe (since September 2020) and Director of the European Union Diplomatic Academy, implemented by the College of Europe (since August 2022). Previously, she has served as the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission (2014-19). Prior to joining the EU, she was Italian Minister for Foreign Affairs and International Cooperation (2014), and a Member of the Italian Chamber of Deputies (2008-14). In her parliamentary capacity, she was Head of the Italian Delegation to the NATO Parliamentary Assembly and Vice-President of its Political Committee (2013-14); member of the Italian Delegation to the Parliamentary Assembly of the Council of Europe (2008-13); Secretary of the Defence Committee (2008-13); and member of the Foreign Affairs Committee. She also coordinated the Inter-Parliamentary Group for Development Cooperation. She has co-chaired the United Nations High-Level Panel on Internal Displacement from January 2020 to September 2021. Federica Mogherini is a member of the Advisory Board on Disarmament Matters (ADBM), of the Board of Trustees of the International Crisis Group and of the

Rockefeller Brothers Fund, Fellow of the German Marshall Fund, member of the Board of Directors of the Nuclear Threat Initiative (NTI) and of the Italian Institute for Foreign Affairs (IAI) and member of the American Academy of Arts & Sciences. She was a member of the High Level Reflection Group of the Council of Europe. She has a degree in Political Science from the University of Rome “La Sapienza”.

## Introductory session: does humanity in war exist?

**Mr. John Swords** is the NATO legal adviser and director of NATO’s Office of Legal Affairs. His team advises the Secretary General, the International Staff as well as the 32 NATO Allies in committees and Council. The work touches on all areas of law and, in addition to advice, the team conducts litigation and negotiates and drafts contracts and treaties. John also chairs the Annual Meeting of Allies Legal Advisers (AMALA), when the most senior MFA and MOD lawyers from capitals convene at NATO to discuss the key strategic legal issues confronting the alliance. Before joining NATO, John led the Operational and International Humanitarian Law division in the UK’s MOD.

**Ms. Laurence Marion** has been Director for Legal Affairs at the General Secretariat for Administration (SGA) of the French Minister of the Armed Forces since October 17, 2022. She succeeds Claire Legras, who has held this position since August 2017. Laurence Marion is a Conseillère d'Etat. Since September 2019, she has been Déléguée generale of the Fondation nationale Cité internationale universitaire de Paris. From 2007 to 2009, she worked in the Prime Minister's office as technical advisor in charge of civil liberties and the 2008 constitutional revision. From 2009 to 2012, she was Directrice générale déléguée of the Etablissement français du sang (EFS). She was an assessor on the 1st chamber of the litigation section of the Conseil d'Etat (2018-2019). Between 2012 and 2018, she had several postings at the Conseil d'Etat: rapporteur at the 7th chamber (public procurement) then public rapporteur at the 5th chamber (media and hospital liability) of the litigation section. In 2015, Laurence Marion was general rapporteur for the report entrusted by the President of the Republic to Jean-Marc Sauvé and Claude Onesta "Pour que vive la fraternité, Proposition pour une réserve citoyenne" (2015) and, in 2018, for the Conseil d'Etat study submitted to the Prime Minister "Révision des lois de bioéthique: quelles options pour demain" (2018). She also chairs the Commission de surveillance et de contrôle des publications destinées à la jeunesse until September 2019. She is a regular contributor to l'Actualité juridique du droit administratif (AJDA), Revue française de droit administratif (RFDA), la Semaine juridique. Laurence Marion is a chevalier of the Ordre national du mérite.

**Mr. Olof Skoog** is the EU Special Representative (EUSR) for Human Rights, International Humanitarian Law and International Criminal Justice. Mr Skoog took up his duties on 1 March 2024. He is a Swedish diplomat with extensive national and EU experience across a wide range of positions. Most recently, he was Head of the Delegation of the European Union to the United Nations from December 2019 until August 2023. Previously, he was Director-General for Political Affairs in the Swedish Ministry of Foreign Affairs, represented Sweden at the European Union and at the OSCE, and served as Swedish Ambassador to Colombia, Venezuela, Ecuador and Panama. Through his work, the EU Special Representative contributes to the implementation of the EU’s policy on human rights, EU’s positions on promoting compliance with international humanitarian law and support for international criminal justice. Furthermore, the EU Special Representative works to establish a stronger European voice through dialogues on human rights with governments in third countries and international

and regional organisations, as well as with civil society organisations and other relevant actors. The Special Representative works closely with the European External Action Service and EU institutions to ensure the effectiveness and visibility of EU human rights policy in external actions.

## Panel 1: Stronger together: 75 years of IHL implementation

**Dr. Anne Quintin** is the head of the Advisory Service on International Humanitarian Law (IHL) at the ICRC. Since 2008 when she first joined the ICRC, she has held various positions, both at headquarters in Geneva and in the Washington DC delegation, working on the dissemination and implementation of IHL with various audiences. Before joining the ICRC, Dr Quintin worked for the Geneva Academy of International Humanitarian Law and Human Rights and for the San Remo Institute. She has also held academic positions, including as a visiting lecturer at the Paris School of International Affairs (Sciences Po Paris) and at the Elliott School of International Affairs at George Washington University, and as a visiting scholar at the Asia Pacific Centre for Military Law at the University of Melbourne. Anne is the author of The Nature of International Humanitarian Law (Elgar, 2020) and of numerous articles, and is the co-author of the online casebook How Does Law Protect in War, alongside Marco Sassòli, Antoine Bouvier and Julia Grignon. Dr Quintin holds a PhD in IHL from the University of Geneva, a degree in politics, philosophy and economics from the University of Kent, England, a master's degree from the Institut d'Études Politiques in Lille, France, and an LLM in international humanitarian law from the Geneva Academy of International Humanitarian Law and Human Rights.

**Ms. Mirjam de Bruin**, LLM, is an expert in international humanitarian law. She currently works as a senior advisor at the Center of Expertise on Military Criminal Law (EMSOM) of the Public Prosecution Service at the East Netherlands District Court. Previously, she held several positions within the Red Cross and Red Crescent Movement, including Regional Advisor for EURASIA on counter-terrorism measures and sanctions with the ICRC's Brussels Delegation, Delegate/Country Manager in the Palestinian Occupied Territory, and senior legal advisor IHL with the Netherlands Red Cross. Prior to that she worked in academia, teaching international law and intelligence studies. De Bruin holds Master's degrees in Law and Politics of International Security (Free University Amsterdam) and Military Law (University of Amsterdam). She co-authored a Dutch handbook on IHL.

**Mr. Jonas Périlleux** is working as a legal adviser at the Belgian Federal Public Service (FPS) Justice. He studied law and international law at the Brussels Free University before joining the International Humanitarian Law Unit of the FPS Justice in 2009. In this Unit he is mainly in charge of drafting legislation in the field of IHL, dealing with inter-States request for legal assistance and request for cooperation with international tribunals and mechanisms on IHL matters, and representing the Ministry of justice in negotiations in international fora. In this framework he was part of the Belgian delegation to numerous annual meetings of the Assembly of States Parties to the ICC, to all Red-Cross and Red-Crescent International Conferences since 2011 and to meetings dedicated to international criminal justice at the EU and the UN.

**Mr. Frédéric Casier** holds a Master's degree in Law from the Catholic University of Louvain (2001) and a Postgraduate degree diploma – Master in Public International Law from the University of Brussels (2003). From 2003 to 2004, he worked for Avocats Sans Frontières -

Belgique as project manager in Brussels and in Kigali where he participated to the coordination of the training programs in international humanitarian law and International Human Rights Law for the judicial actors and the Gacaca Judges (traditional justice) in charge of the genocide litigation in Rwanda. From 2005 to 2010, he coordinated the dissemination activities of International Humanitarian Law at the International Department/International Humanitarian Law Unit of the Belgian Red Cross (French-speaking Community). Since 2011, he has worked as Senior Legal Adviser in International Humanitarian Law and as responsible for the relations with the International Movement of the Red Cross and Red Crescent at the Directorate-General of the National Society (French-speaking Community). He is still involved in IHL dissemination activities. He also works with the Belgian Authorities to assist them in the adoption of national measures of implementation of IHL in Belgium. For that purpose, he participates in the work of the Belgian National Committee of IHL and co-chairs the working groups on IHL Dissemination and on the International Conferences of the Red Cross and Red Crescent. From 2020-2022, he co-chaired the European network of the National Red Cross Societies' legal advisers. He is also member of the Scientific Committee of the Belgian Group of the International Society for Military Law and Law of War since 2006 and member of its Governing Board since 2014.

## Panel 2: Giving means without giving up responsibilities: ensuring respect for IHL, from words to deeds

**Prof. Marten Zwanenburg** is a Professor of Military Law at the University of Amsterdam and at the Faculty of Military Sciences of the Netherlands Defence Academy. Professor Zwanenburg's research centers on international conflict and security law. He has published widely on military operations, the law of armed conflict, the law of occupation, international human rights law, and international responsibility. His current research interests include the use of data in military operations, space and military operations, and topical issues in IHL. He holds an LL.M. and a PhD from Leiden University. Professor Zwanenburg is a member of the editorial boards of the Military Law and the Law of War Review and the Militair Rechtelijk Tijdschrift (Netherlands Review of Military Law).

**Mr. Eric Mongelard** leads the Armed Conflict and Insecurity Team within the Rule of Law Section of the Office of the High Commissioner for Human Rights. Prior to his current position, he worked in numerous posts with OHCHR, including as legal advisor to OHCHR's G5-Sahel project and to the Commission of Inquiry on the 2014 Gaza Conflict, with OHCHR's office in the Occupied Palestinian Territory and with Special Procedures. Prior to joining OHCHR, he worked in the legal division of the ICRC and at the International Criminal Tribunal for the former Yugoslavia (ICTY). He holds an LLM from the CUDIH (known today as the Geneva Academy**).**

**Ms. Johanna Trittenbach** is a doctoral researcher at the Grotius Centre for International Legal Studies at Leiden University. Her PhD research examines arms transfer controls under international law. She is also a supervisor at the Leiden IHL Clinic, where she manages LL.M. students' impact-oriented research, among others on access to justice for victims of international crimes. Johanna has previously worked on issues of disarmament and arms control in civil society organizations, and has interned in think tanks, the UN, and government. Johanna is a co-founder and board member of the Fénix Foundation, an NGO aimed at leveraging technology for the benefit of international criminal justice, and focused on training various stakeholders on the use of digital evidence for the prosecutions of international crimes.

**Prof. Vaios Koutroulis** is a professor of public international law at the Faculty of Law and Criminology of the Université libre de Bruxelles (ULB). He has given numerous lectures, including in training courses for members of the armed forces, humanitarian aid workers and other professionals, on issues relating to international humanitarian law and international criminal law. He has several publications to his credit on international humanitarian law, international criminal law and jus contra bellum. Vaios Koutroulis is a member of the International Humanitarian Fact-Finding Commission, the only permanent treaty-based body dealing with compliance with the 1949 Geneva Conventions and their First Additional Protocol. As a practitioner, he was a member of Belgium's legal team in the case of Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) in 2012 and counsel for Belgium in the recent (2024) Advisory Proceedings on the Occupied Palestinian Territory, both before the International Court of Justice. He has also consulted the Belgian Ministry of Foreign Affairs on international criminal law issues relating to the Ljubljana - The Hague Convention on International Cooperation in the Investigation and Prosecution of Crimes of Genocide, Crimes against Humanity, War Crimes and Other International Crimes. He participated in the negotiation of the Convention, as chairman of one of the three main working groups of the Ljubljana Diplomatic Conference.

## Panel 3: Humanity in the age of new technologies

**Dr. Merel Ekelhof** is a Senior Advisor with the Policy Directorate of the U.S. DoD Chief Digital and Artificial Intelligence Office (CDAO), where she deals with topics related to strategic and international partnerships, autonomous weapons, and responsible AI. She has been seconded by the Netherlands Ministry of Defence, where she held a position as AI innovation manager at the Defence Materiel Organization. Before joining the Defense Department, Dr. Ekelhof was the lead researcher on Artificial Intelligence and Autonomy at UNIDIR's Security and Technology Programme, a government adviser on issues related to autonomous weapons, and a visiting researcher at the Harvard Law School. Dr. Ekelhof serves on NATO's Maritime Unmanned Systems Innovation Advisory Board and the UK Ministry of Defence AI Ethics Advisory Panel. She is a NATO JFAC certified targeteer and holds a Ph.D in Law and an LL.M in Law and Politics of International Security from the VU University Amsterdam, Netherlands. Her doctoral research is titled "The Distributed Conduct of War: Reframing Debates on Autonomous Weapons, Human Control and Legal Compliance in Targeting".

**Dr. Henning Lahmann** is Assistant Professor at eLaw – Center for Law and Digital Technologies at Leiden University Law School. His focuses on the intersection of digital technologies and international law, especially the use of digital open-source information by civil society actors, disinformation, the legal, political, and ethical implications of the use of AI in military and security applications, and transnational cybersecurity. In 2021/22, Henning was a Hauser Post-Doctoral Global Fellow at NYU School of Law, pursuing research on the use of open-source intelligence in the context of the war in Ukraine, with support from a research grant by the German Academic Exchange Service. Prior to joining Leiden University, he worked as Program Leader International Cyber Law at the Digital Society Institute at the ESMT Berlin. From 2020 to 2022, he also served as an associate research fellow at the Geneva Academy of International Humanitarian Law and Human Rights. In 2019, Henning pursued a research fellowship at the Israel Public Policy Institute and the Institute for National Security Studies at Tel Aviv University. Henning holds a doctoral degree in international law from the University of Potsdam, Germany. Previously, he worked as senior policy advisor at the Berlin-

based think tank iRights.Lab and acted as the German correspondent for Freedom House's annual "Freedom on the Net" report. Henning studied law and philosophy in Hamburg and Prague and held research fellow positions at the Walther Schücking Institute for International Law at the University of Kiel, the University of Potsdam, and FU Berlin.

**Mr. Laurent Gisel** is the Head of the Arms and Conduct of Hostilities Unit at the Legal Division of the International Committee of the Red Cross (ICRC) in Geneva. He leads the development and promotion of the ICRC's strategies and activities to reaffirm, clarify, and strengthen international humanitarian law with regard to weapons of humanitarian concern, new technologies of warfare and the conduct of hostilities. Laurent worked in the ICRC Legal Division in various positions since 2008, including Legal Adviser to Operations, and Senior Legal Adviser and Cyber Team Leader. From 2013 to 2020, he was the file holder for the rules governing the conduct of hostilities under international humanitarian law, including their application during urban warfare, cyber operations, and outer space operations, on which he publishes regularly. Laurent began his career at the ICRC in 1999 and held several positions in conflict areas, in Israel and the Occupied Territories, Eritrea, Afghanistan, and as Deputy Head of Delegation in Nepal. He served as Diplomatic Adviser to the ICRC Presidency from 2005 to 2008. Prior to joining the ICRC, Laurent became attorney-at-law in Geneva and worked at the Public and Administrative Law Court of the Canton de Vaud. He holds a Degree in Law from the University of Geneva and a Masters in International Law from the Graduate Institute of International Studies (Geneva, Switzerland).

**Ms. Jessica Dorsey** is an Assistant Professor of International Law and director of the Realities of Algorithmic Warfare project at Utrecht University. She is also an Expert Member of the Global Commission on the Responsible Use of AI in the Military Domain. Her current research focuses on the legitimacy of military targeting operations in light of increasing autonomy in warfare, with a specific focus on the protection of civilians in armed conflict. Jessica is also a renowned legal scholar and practitioner on issues related to the use of force, especially in the context of drone warfare, having worked in the field for more than 15 years. She is an Associate Fellow at the International Centre for Counter-Terrorism, The Hague and the Managing Editor of the international law weblog, Opinio Juris.

## Day 2: Friday, 22 November 2024

### Panel 4: Upholding humanity in the conduct of hostilities: contemporary challenges to the application of the principle of proportionality

**Prof. Gloria Gaggioli** is Associate Professor at the Law Faculty of the University of Geneva and Vice-Dean of the Law Faculty. She is member of the board of Geneva Call and of the International Review of the Red Cross. She has published in various fields of public international law with a focus on international humanitarian law, human rights law and counter-terrorism. She was the Director of the Geneva Academy until August 2024 and previously served as Legal Adviser in the legal division of the International Committee of the Red Cross.

**Dr. Sigrid Redse Johansen** is a Senior Public Prosecutor at the Norwegian Director of Public Prosecutions' Office. Until July 1st she held the position as Generaladvokat (Judge Advocate General) for the Norwegian Armed Forces (a function which is now incorporated into the Director of Public Prosecutions Office). In the position as JAG she was both the Director General of Military Prosecutions leading the military prosecutors, and advisor to the Chief of

Defence in cases and matters concerning criminal law, criminal procedure and summary punishment. She has also been working as a Special Adviser in law for the Norwegian Special Operations Command and an associate professor and lecturer in international and operational law at the Norwegian Defence Command and Staff College for more than ten years, where she has been responsible for teaching programmes in the Law of Armed Conflict, for all levels of command in the Norwegian Armed Forces. She has also practiced as an attorney at law, acting as defence counsel for the accused in criminal cases in the district courts, courts of appeal and before the Supreme Court of Norway. Sigrid Redse Johansen has a PhD in international law from the University of Oslo. She has published various articles and books within the field of the Law of Armed Conflict, both in Norwegian and English. Among these is the book The military Commander's Necessity: The Law of Armed Conflict and its Limits (Cambridge University Press, 2019).

**Ms. Emily Tripp** is the Executive Director of Airwars, a civilian harm monitor and watchdog organisation. In 2021 she joined Airwars managing the Casualty Recording team, and took over the leadership of the organisation in June 2022. Her previous experience includes working in humanitarian aid delivery in the Middle East, with a focus on carrying out research and managing assessment teams in Syria and Libya to help inform humanitarian responses.

**Mr. Laurent Gisel** is the Head of the Arms and Conduct of Hostilities Unit at the Legal Division of the International Committee of the Red Cross (ICRC) in Geneva. He leads the development and promotion of the ICRC's strategies and activities to reaffirm, clarify, and strengthen international humanitarian law with regard to weapons of humanitarian concern, new technologies of warfare and the conduct of hostilities. Laurent worked in the ICRC Legal Division in various positions since 2008, including Legal Adviser to Operations, and Senior Legal Adviser and Cyber Team Leader. From 2013 to 2020, he was the file holder for the rules governing the conduct of hostilities under international humanitarian law, including their application during urban warfare, cyber operations, and outer space operations, on which he publishes regularly. Laurent began his career at the ICRC in 1999 and held several positions in conflict areas, in Israel and the Occupied Territories, Eritrea, Afghanistan, and as Deputy Head of Delegation in Nepal. He served as Diplomatic Adviser to the ICRC Presidency from 2005 to 2008. Prior to joining the ICRC, Laurent became attorney-at-law in Geneva and worked at the Public and Administrative Law Court of the Canton de Vaud. He holds a Degree in Law from the University of Geneva and a Masters in International Law from the Graduate Institute of International Studies (Geneva, Switzerland).

## Panel 5: Upholding humanity during high-intensity armed conflicts: risks, challenges, and opportunities

**CAPT (NAVY) Stephane-Emmanuel Lesnard** was graduated in History and in Private Law from University Paris X. He joined the French Navy in 1997. After several assignments as supply officer and officer of the watch on warships and on a naval air station, in Toulon (France) and in New Caledonia, he served in various positions in Brest and in Paris in support and logistic areas as well as in human resources management. He got a legal specialization in Maritime Law and International Humanitarian Law and was deployed as maritime legal advisor in naval operations. He was posted in London and Mombasa (Kenya) as senior legal advisor of anti-piracy operation EUNAVFORMED ATALANTA and was appointed senior legal advisor of NATO Maritime Command (MARCOM) in London from 2026 to 2019. After 3 years of

appointment at the French Joint Center of Operations in Paris as senior legal advisor, he headed the Operational Law office within the French Joint Chief of Staff cabinet. Since September 2023, he leads the operational law Branch within ACO/SHAPE Office of Legal Affairs.

**Cdr Caroline Tuckett** joined the Royal Navy (RN) as a Logistics Officer in 2006. Her first assignment was at sea as the Deputy Logistics Officer of a destroyer, with deployments around the globe. Selected for the Naval Legal Service in 2008, she completed 3 years of training to qualify as a Barrister. Since then, her assignments have included Legal Adviser to 3 Commando Brigade Royal Marines with a number of overseas deployments, and a 10-month tour to the United Kingdom Maritime Component Command (UKMCC) in Bahrain as the Legal Adviser for both UKMCC and the Combined Maritime Force, a maritime coalition of 34 nations. In 2020 Cdr Tuckett completed a Masters by Research in International Law through the University of Exeter, exploring the legal issues of sub-threshold operations in the maritime environment, with a particular focus on the South China Sea. She then became the lead legal adviser in International and Operational Law within the RN. With a focus on the applicability of international maritime law to the military operation of unmanned vessels, she has provided evidence to the House of Lords International Relations and Defence Committee on this topic. As a result of her work regarding the legal issues surrounding maritime autonomy, she was named the Armed Forces Barrister of the Year in the Employed Bar Awards 2022. Now the lead maritime legal adviser at the UK Permanent Joint Headquarters, she also represents the United Kingdom in the Group of Experts for the revision project for the San Remo Manual on the Law of Armed Conflict at Sea. She is also a Visiting Research Fellow at the University of Plymouth, her current research focuses on sovereign immunity, and its relevance to military operations.

**Ms. Helené Lackenbauer** is a Deputy Research Director at the Swedish Defence Research Agency (FOI). Her focus is on command and control in armed forces, international peace support operations, civil military coordination, humanitarian aid, protection of civilians and gender in crises management. She has worked extensively with the Swedish Armed Forces at all levels, served as a political advisor in international operations and teaches regularly at the Armed Forces Intelligence and Security School. Before joining FOI, she served with the International Red Cross Movement as a policy adviser on protection of displaced populations in international humanitarian crises.

**Ms. Pauline Warnotte** is Senior Legal Advisor at the International Committee of the Red Cross (ICRC) Delegation to the EU, NATO and the Kingdom of Belgium and lecturer at the Law Faculty of the University of Namur (Belgium). Before joining the ICRC, Pauline held successively the positions of legal advisor within the International and Humanitarian Law Unit of the Belgian Ministry of Defence (2013-2019) and assistant to the Chair of Law of the Royal Military Academy (2019-2020), where she notably taught LOAC, Disarmament and Weapons Law. As part of her military duties, Pauline has been deployed in Qatar (OIR, 2017) and Mali (EUTM Mali, 2017 and MINUSMA, 2018). She left the armed forces in 2021, with the rank of Captain. Her previous experiences include the IHL Unit of the Belgian Ministry of Justice (2011-2013), and the Security and Technology Programme of the United Nations Institute for Disarmament Research in Geneva (2020-2021), where she worked on autonomous weapons.

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