



# Protecting civilians in siege warfare: Constraints on military action

Stuart Casey-Maslen



Cover photo:  
Families cross the frontline  
at dawn as Iraqi forces fight  
to regain control of the  
Old City from ISIS. Mosul,  
Iraq, 10 July 2017

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April 2022

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### Acknowledgements

This publication was funded by the Joseph Rowntree Charitable Trust. The views expressed are not necessarily those of the Trust. Ceasefire is grateful to Dr Nathan Derejko and Marc Garlasco for serving as peer reviewers. Additional research by Victoria Kerr and Albie Morrissey. This report draws on research by the Human Rights Centre Clinic of the University of Essex, undertaken by Alejandra Alvite Pose, Giacomo Corbo, Muhammad Hassan Akhtar and Perdo Rosa Mendes, under the supervision of Nathan Derejko.



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Published April 2022. Printed in the UK on recycled paper.



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# Abbreviations

AMISOM	African Union Mission in Somalia
CHM	Civilian Harm Mitigation
DoD	Department of Defense (US)
FRS	Fondation pour la recherche stratégique (Foundation for Strategic Research)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
ISIS	Islamic State of Iraq and Al-Sham, also known as ISIL or 'Islamic State (group)'
MBRLs	multiple-barrel rocket launchers
MoD	Ministry of Defence (UK)
NATO	North Atlantic Treaty Organization
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations
UNAM	UN Assistance Mission for Iraq
UNMISS	UN Mission in South Sudan
UNPROFOR	UN Protection Force (Bosnia and Herzegovina)

# Executive summary

The siege is a longstanding method of warfare, but with modified tactics and new weapons, it has seen a rising incidence in recent years. There is one constant: the severity of the humanitarian impacts on civilians resulting from the intense and lethal methods of warfare inherent in sustained bombardment and denial of access to adequate food and medicine. These combine not only to kill or injure civilians but also to persistently decrease food security and degrade medical capacity to treat the sick and the wounded, further exacerbating the negative humanitarian consequences for the civilian population.

Recent trends in warfare show a concerted shift from rural to urban fighting, in itself a significant cause of rising civilian harm. But in a siege, civilians are effectively trapped in the battlespace. Over the last decade, major city sieges in the Middle East in Syria, Iraq and Yemen, as well as in Ukraine, Ethiopia and the Philippines, have together seen tens of thousands of civilian casualties and massive destruction to civilian infrastructure.

## The siege in modern warfare

Urban migration patterns and a shift in insurgency tactics have created a new interest in urban warfare among military planners. Two decades ago, counterterrorism operations typically focused on ‘winning hearts and minds’ throughout the countryside. Insurgents shifted to cities for protection and shorter supply lines, finding modern militaries vulnerable to hit-and-run tactics in areas where they could blend in with the local population. In response, militaries such as those in Syria encircled cities and slowly bombarded them into defeat. The UK’s *Manual of the Law of Armed Conflict*, in comparison, cites the besieging of a town or stronghold as an effective method of avoiding costly attacks by ‘encirc[ling] enemy forces, cutting them off from supplies and communications with the outside world and forcing their surrender’.

Operations to besiege an urban centre can be divided into:

- *terrain-focused sieges*, where the aim is to control or conquer strategic areas of land, such as the siege of Sarajevo in the Bosnian war; and
- *enemy-focused sieges*, where the aim is to defeat, and not merely contain, enemy forces, including in counter-terrorism operations such as the siege of Mosul in the war against ISIS.

Modern sieges may exhibit features of both kinds, as well as other differences. For example, Western militaries have been said to prefer to focus on strategies that aimed to win over the population’s loyalty. In practice, however, as the experiences in Aleppo in Syria and Mosul in Iraq have demonstrated, the humanitarian consequences for civilians do not appear to differ very markedly whatever the stated or apparent aim of the operation of a siege may be.

## Sieges under international law

Military action in siege warfare is subject to significant legal constraints under international humanitarian law (IHL) and international human rights law, but the level of compliance has varied widely, with conduct sometimes amounting to an international crime.

Although it may be lawful to besiege a defended city or other populated area strictly on the basis that military personnel remain within and are not *hors de combat* because of wounds or sickness, in all circumstances both the besieging and the besieged forces must comply with the principle of distinction. Civilians can never be the target of attack. Indiscriminate attacks which fail to distinguish between military and civilian objects are also prohibited, including area or ‘carpet’ bombing. To undertake such attacks intentionally is a war crime, as is the launching of air raids and other attacks whose primary purpose is to spread terror among the civilian population.

By virtue of the proportionality rule, all parties to armed conflict are prohibited from launching attacks which ‘may be expected’ to cause ‘excessive’ civilian harm when compared to the ‘concrete and direct military advantage anticipated’. Particularly in populated areas, the less accurate the weapon that is to be used, or the greater the blast or fragmentation effects, the more likely it is that civilians will be struck. In addition to the direct effects on civilians of an attack, civilian harm may also be caused by reverberating effects, for example a deterioration in essential public services because of the destruction of infrastructure.

Each use of force in a siege must comply with the rules on distinction and proportionality in attack. Furthermore, if laying a siege is held to constitute an ‘attack’ under IHL, then the siege itself would be unlawful if the expected civilian harm from *the siege as a whole* was excessive in relation to the concrete and direct military advantage anticipated.

Constant care must be taken to spare the civilian population, civilians and civilian objects and there is a duty to take precautionary measures, both in attack and in defence, to avoid and in any event to minimise incidental civilian harm. Measures include the verification of the military nature of an objective, the choice of weapon and method of attack, including its timing, the provision of warnings and the construction of shelters and other civil defences. It is prohibited to use civilians in order to render a military objective immune from attack, but the presence of such ‘human shields’ does not remove the duty on the attacker to consider the proportionality rule and to take precautions.

The starvation of the civilian population as a method of war is prohibited, as is the destruction or removal of food, water sources and other objects indispensable to the survival of the civilian population. In practice, this renders illegal the besieging of towns and cities that contain civilians as soon as food and water supplies are insufficient to meet their needs, resulting in starvation. In cases of encirclement, the UK specifically recognizes an obligation to allow essential relief supplies through to the civilian population.

Civilians are not just protected by IHL but also by human rights law which continues to apply in situations of armed conflict, as confirmed by the UK Supreme Court and the International Court of Justice. Of particular importance in the context of sieges are the right to life (comprising the prohibition on arbitrary deprivation of life, a duty of due diligence to protect life, and the duty to investigate all potentially unlawful deaths); the right to freedom from torture or inhuman or degrading treatment or punishment; and the right to food.

## Avoiding or minimising civilian harm

Given the acute impact on civilians of siege warfare – even when parties to conflict claim to adhere to IHL – there is a pressing need to consider how, in practice, the consequences for civilians can be minimized, if not entirely avoided, through appropriate action by key actors.

Both NATO militaries and the African Union see the developing approach of Civilian Harm Mitigation (CHM) as a way to improve civilian protection during military operations. CHM promotes consideration of the primary, secondary and tertiary effects of operations on the civilian population and institutes a planning and review process to mitigate them. However, siege warfare and its particular challenges are not mentioned once in the 2020 NATO *Protection of Civilians Handbook* – nor in the UK's *Integrated Review of Security, Defence, Development and Foreign Policy* published in 2021. Amending military doctrine and policy to better safeguard civilians demands dedicated effort and a willingness to adapt military objectives and tactics to the dictates of civilian protection.

The current style of warfare favoured by the UK and other NATO members, owing much to US doctrine, is based on stand-off, long-distance precision strikes, delivered on an industrial scale. While there may be benefits in terms of force protection, the extensive destruction that results can be catastrophic for civilians trapped under siege.

Central to any improvement in the protection of civilians during a siege is the increased restriction on the means and methods of warfare used in attacks. This includes simple measures such as eschewing the use of unguided rockets, systematic employment of precision-guided munitions, reducing the explosive yield incorporated in missiles, and other measures to reduce indirect fire. Even with drone surveillance and precision-guided weapons, however, civilian casualties can be extensive. Other factors need to be taken into account such as the quality of targeting intelligence, the presence of civilians invisible to surveillance, weapons malfunction rates, and reverberating or second or third order effects of attacks. In the siege of a populated area, minimising civilian harm will require avoiding altogether the use of explosive weapons with a wide impact area or, better still, the development of strategies and tactics to take combat out of populated areas.

Civilian evacuation from besieged areas is another approach envisaged by IHL. The relevant provisions of the Geneva Conventions refer to vulnerable civilians (wounded, sick, infirm, and aged persons, children and maternity cases) but their evacuation is subject to the conclusion of local agreements between the parties to conflict. Such agreements in practice may depend on the role of neutral intermediaries (either states or humanitarian organisations), even if – or particularly if – one or more of the conflict parties is subject to international condemnation. Evacuation should always be voluntary and both those evacuated and those left behind continue to benefit from the right to protection.

The duty on states and armed groups not to arbitrarily withhold consent to humanitarian relief for a civilian population in a besieged area, including in conditions threatening starvation, demands clear and urgent confirmation in international law. One way to do this would be to draft and pass a UN General Assembly resolution, building on the content of Resolution 71/130 of 2016 which demanded ‘rapid, safe, sustained, unhindered and unconditional humanitarian access’ and an ‘immediate end to all sieges’ in Syria. In its own Resolution 2417 (2018) the UN Security Council condemned ‘the unlawful denial of humanitarian access’ in armed conflict generally but has been unable to take action in recent country situations due to political divisions in the Council and the veto power of permanent members.

The role of civilians themselves in supporting civilian protection and resilience is often overlooked. The Core Humanitarian Standard of 2014, developed by three leading NGOs, stipulates that communities and people affected by crisis should know their rights and entitlements, have access to information, and be able to participate in decisions that affect them. This requires support for effective and secure communications for civilians under siege, measures of inclusion with regard to age, gender, language and ethnic or religious background, and particular attention paid to the specific needs of persons with disabilities in armed conflict.

## Recommendations

Given the rapidly escalating threat to civilian populations by the rise in siege warfare, state armed forces should as a matter of urgency examine and elaborate their military doctrine to ensure that they are conducting sieges entirely lawfully. In order to avoid or minimise civilian harm, this report further recommends:

The UK should lead a specific reflection within NATO on the protection of civilians in siege warfare, to include *inter alia*:

- research into and development of alternative methods for isolating enemy forces (including in counter-insurgency operations), rather than besieging large urban conurbations;
- the need to ensure that rules of engagement reflect civilian harm avoidance or mitigation techniques specific to situations of siege;
- the improvement of pre-attack proportionality assessment procedures, including incorporating an estimation of the reverberating effects on civilians;
- the conduct of post-strike assessments, in cooperation as necessary with partner forces on the ground, to determine legal compliance and learn lessons to improve civilian protection.

The UK should join other states in ongoing intergovernmental negotiations to support the agreement of a strong Political Declaration on the use of explosive weapons in populated areas, and commit to avoiding the use of explosive weapons with wide-area effects in such areas, in particular where populations are living under siege.

The UK should commit unequivocally to the prohibition on the starvation of civilians as a method of warfare. It should withdraw its stated understanding that IHL is not violated ‘if military operations are not intended to cause starvation [of the civilian population] but have that incidental effect’.

The role of civilians themselves in supporting civilian protection and resilience should be better understood and supported, including civilian-led monitoring, and relevant IHL training for both military and humanitarian personnel should include information about common self-protection measures taken by civilians and challenge the assumption that where civilians are not visible they are not present.

# Introduction

This report describes and assesses the impacts and incidence of sieges, a long-standing method of warfare whose consequences for civilians in besieged areas can be disastrous. Indeed, experiences in Iraq and Syria over the last decade have shown just how terrible their suffering can be. For example, the United Nations (UN) Secretary-General described the Palestinian refugee camp of Yarmouk in Damascus in 2015, then under government siege for two years, as the ‘deepest circle of hell.’<sup>1</sup> A year later, in Mosul, there were warnings of a ‘humanitarian catastrophe’, with the danger for civilians in the city increasing apace with the military campaign to take the city from the armed opposition group, Islamic State of Iraq and Al-Sham (ISIS).<sup>2</sup> But despite the often dramatic impact on all those encircled, the besieging of towns and cities containing enemy fighters is not *per se* illegal under international law. This is so, unless and until those fighters surrender.

Although no formal definition of a siege exists in either international humanitarian law (IHL, also called the law of armed conflict) or other international law, the term has the following meaning for the purpose of this report: **a partial or total encirclement of enemy forces in a village, town, or city for military advantage in an armed conflict, whether with a view to inducing the surrender of the besieged forces or to impeding their effective contribution to military action.**<sup>3</sup> Sieges must thus be distinguished from blockades, which seek to prevent the importation of goods into the blockaded area,<sup>4</sup> although the two concepts often overlap.<sup>5</sup>

The report is structured in three main sections. The first discusses the role and impact of sieges in modern warfare, with case studies highlighting the siege of Sarajevo in the 1990s and the sieges of Mosul and Aleppo in the past decade. The second section reviews international law regulating sieges. Analysis focuses on respect for the IHL principles of distinction and proportionality, as well as on its prohibition on the starvation of civilians as a method of warfare. Also accorded particular attention is the prohibition on the use of terror tactics against civilians, which applies to sieges as it does to other methods of

1 Doucet, L., ‘Syria conflict: Fighting for a future for Yarmouk’, BBC, 17 April 2015, <https://bbc.in/3AThSmV>

2 Cooper, T., ‘The battle for Mosul rages on’, Forces.net, 19 December 2016, <https://bit.ly/3BPFhpY>

3 The United States (US) Department of Defense (DOD) defines siege warfare as encirclement of enemy forces ‘with a view towards inducing their surrender by cutting them off from reinforcements, supplies, and communications with the outside world’. US DOD, *Law of War Manual*, Washington, DC, December 2016, para. 5.19.1. Another definition offered is: ‘any attempt by an adversary to control access into and out of a town, neighbourhood, or other terrain of strategic significance to achieve a military or political objective’. Beehner, L.M., Berti, B. and Jackson, M.T., ‘The strategic logic of sieges in counterinsurgencies’, *Parameters*, 47(2), 2017, pp. 77–86, at p. 78, <https://bit.ly/3wFGcWc>

4 ‘A blockade is a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral ... from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation.’ Heintschel von Heinegg, W., ‘Blockade’, *Max Planck Encyclopedia of International Law*, October 2015, <https://bit.ly/3z8XFrB> (subscription needed).

5 The blockade of Gaza, for instance, also manifests elements of a siege. ‘Gaza Strip: A beginner’s guide to an enclave under blockade’, *Al Jazeera*, 14 March 2021, <https://bit.ly/3xBGyOP>

warfare. Consideration is also given to the relevance of international human rights law, especially the rights to life, to freedom from inhumane treatment, and to food.

**whatever the nature of sieges in contemporary military doctrine, there is one constant: the severity of the humanitarian impacts on civilians**

leave). The section then addresses the role of key actors in protecting civilians during sieges: both state armed forces and non-state armed groups, as well as the UN Security Council and the UN General Assembly, humanitarian actors, as well as the civilian population itself. The report concludes with recommendations to these actors on how to better protect civilians caught up in sieges.

But given that sieges are not inherently unlawful, the third section of the report addresses how their acute civilian impact can be avoided, or at least minimized, through actions such as weapon selection, evacuation of besieged areas, and humanitarian relief for those who choose to stay (or who cannot

## 2

# The role and impact of sieges in modern warfare

A 2018 essay by US Army Major Amos C. Fox was entitled 'The re-emergence of the siege'.<sup>6</sup> Referring to 'the siege of Sarajevo', which lasted for almost four years in the early 1990s,<sup>7</sup> Major Fox notes that while this method of warfare was generally considered at the time an anomaly, 'in truth it turned out to be a portent of future war'. Indeed, he concludes that the modern siege, 'perhaps slightly modified from that of a bygone era', is 'alive and well'.<sup>8</sup>

The modern siege can, he observed, be 'terrain-focused, enemy-focused or a blending of the two, depending on the action of the besieged and the goal of the attacker'. But whatever the nature of sieges in contemporary military doctrine, there is one constant: the severity of the humanitarian impacts on civilians resulting from the intense and lethal methods of warfare inherent in sustained aerial and artillery bombardment,<sup>9</sup> and denial of access to adequate food and medicine. These combine not only to kill or injure civilians but also to persistently decrease food security and degrade medical capacity to treat the sick and the wounded, further exacerbating the negative humanitarian consequences for the civilian population in a besieged area.

It has been predicted that siege warfare 'will become even more relevant in the future if urban migration patterns persist'.<sup>10</sup> Indeed, recent trends in warfare show a concerted shift from rural to urban fighting. Two decades ago, counterterrorism operations typically focused on winning hearts and minds throughout the countryside. Insurgents shifted to cities for protection and shorter supply lines, finding modern militaries vulnerable to hit-and-run tactics in areas where they could blend in with the local population. In response, militaries like those in Syria encircled cities and slowly bombarded them into defeat. While the fall of Kabul to the Taliban in August 2021 occurred without a fight, a prolonged siege of the Afghan capital would undoubtedly have led to very significant civilian harm.

Modern sieges can also allow armies to keep the enemy geographically contained in urban areas and prevent their resupply while minimizing the besieger's own casualties through avoidance of direct combat.<sup>11</sup> Thus, the United Kingdom (UK) Ministry of

Defence explains in its *Manual of the Law of Armed Conflict*: 'Attacks can be costly in casualties and incidental loss or damage. A more effective method may be to encircle

recent trends in warfare show a concerted shift from rural to urban fighting

6 Fox, A.C., 'The reemergence of the siege: An assessment of trends in modern land warfare', Landpower Essay, *Institute of Land Warfare*, No. 18-2, June 2018, <https://bit.ly/3eZ5pWn>

7 BBC, 'Surviving the longest siege in modern history', 24 February 2016, <https://bbc.in/3i3t2N4>

8 Fox, 'The reemergence of the siege', p. 2.

9 Beehner et al., 'The strategic logic of sieges in counterinsurgencies', p. 81.

10 Ibid., p. 78.

11 Ibid., p. 80.

enemy forces, cutting them off from supplies and communications with the outside world and forcing their surrender. The same is true of besieging a town or stronghold.<sup>12</sup> Indeed, when used as an indirect-fire siege weapon (as is often the case), artillery can result in adverse effects for the attacker entering a populated area amid the challenges of urbanized warfare – the rubble generated by bombardment creates physical obstacles to military progress while it provides the defender with materials to facilitate cover and concealment.<sup>1</sup>

## Terrain-focused sieges in armed conflict

Counterinsurgency focuses on the enemy, while more conventional warfare is often directed rather towards control of territory. The siege of Sarajevo that began in 1992 is a classic example of a modern, terrain-focused siege. The aim was to control strategic areas of land and not, as such, to overwhelm the Bosniak forces inside the city. Given the geography of the city, control of the surrounding mountains was critical. The Bosnian Serb forces moved first to seize them, repelling all Bosniak army attempts to dislodge them. As a consequence, 13,000 Bosnian Serb troops encircled the city, with snipers and mortar teams taking up strategic positions and raining down often indiscriminate fire on the soldiers and civilians intermingling in the city.

In the course of the four-year-long siege, one UN expert estimated that half a million shells were fired at the city, the overwhelming majority from Bosnian Serb positions.<sup>14</sup> Many were targeted at Bosniak civilian areas or fired indiscriminately into the city centre. In 1993–5, some 1,000 shells landed each day in Sarajevo, aside from a lull in 1994 due to a ceasefire.<sup>15</sup> Colonel Andrey Demurenko, Chief of Staff of the UN Protection Force (UNPROFOR) for Sector Sarajevo in 1995, testified before the International Criminal Tribunal for the former Yugoslavia (ICTY) that ‘if one looks at the human suffering, then it was a case of a full siege, just like in Leningrad during Second World War’.<sup>16</sup>

As time went by, supplies of food, water, and fuel dwindled. Residents burnt furniture to keep warm and foraged for wild plants and dandelion roots to stave off hunger. People risked their lives queuing for hours to collect water from fountains that were in full view of the snipers in the hills. On 5 February 1994, 68 people were killed by mortar fire while queuing to buy bread at Merkale market. The marketplace was the scene of the greatest loss of life in a single incident during the four years of the siege. During that time, almost 14,000 people were killed in and around the Bosnian capital; nearly 40 per cent of the fatalities were of civilians.<sup>17</sup>

## Enemy-focused sieges in armed conflict

An enemy-focused siege is about defeating, not merely containing, an adversary. In counterterrorism operations, Western militaries have been said to prefer to focus on

12 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, 2004, para. 5.34.1.

13 US Marine Corps, *Military Operations on Urbanized Terrain (MOUT)*, MCWP 3-35.3, 1998, <https://bit.ly/3xMwkeg>, pp. 1–15.

14 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dragomir Milošević*, Judgment (Trial Chamber III) (Case No. IT-98-29/1-T), 12 December 2007, para. 415.

15 Ibid.

16 Ibid., para. 725.

17 Christou, E., ‘What caused the siege of Sarajevo and why did it last so long?’, *History Hit*, 4 July 2019, <https://bit.ly/3923Bbj>

strategies that aimed to win over the population's loyalty while 'non-democratic' states have sought to starve an enemy populace into capitulation.<sup>18</sup> Today, in the context of siege warfare, this Manichaeian bifurcation is overly simplistic. For, as comparison of the experiences in Aleppo and Mosul have demonstrated, the humanitarian consequences for civilians do not appear to differ very markedly whatever the stated or apparent aim of the operation of a siege may be.

comparing experiences in Aleppo and Mosul, the humanitarian consequences for civilians do not appear to differ very markedly whatever the stated or apparent aim of the siege may be

### The siege of Aleppo

In Aleppo, a four-year-long siege by Syrian regime forces began in 2012.<sup>19</sup> Rebel fighters had forced government troops out of what was once Syria's most populous city, seeking thereby to gain control over northern Syria. Aleppo ended up divided roughly in half: the opposition in control of the east and the government in control of the west.<sup>20</sup> With about 25,000 troops initially, the Syrian government lacked the material strength to occupy the area and it struggled to take and hold territory. Accordingly, rather than attempting a ground assault, the army sought to encircle rebel-held pockets of the city, cutting off their supply lines, and restricting their access to electricity and water. At one point in late November 2016, Aleppo residents were said to be no more ten days away from starvation.<sup>21</sup>

The encirclement, combined with sustained aerial bombardment, displaced large swathes of the population, thereby reducing the number of people falling under rebel control. But it was Russian military intervention in the city from September 2015 onwards that would ultimately prove decisive, serving to cut off the rebels' northern supply lines to the Turkish border. Heavy bombing, combined with the withholding of humanitarian assistance, eventually enabled government troops to advance into the city, resulting in the rebels' capitulation in Aleppo in December 2016.<sup>22</sup>

The humanitarian consequences of the siege were exceptionally harsh. As the Independent International Commission of Inquiry on Syria reported, pursuant to its mandate from the UN Human Rights Council, in eastern Aleppo, pro-government forces 'pummelled vital civilian infrastructure, with disastrous consequences'. 'Day after day', the commission stated, 'hospitals, markets, water stations, schools and residential buildings were razed to the ground.' Attacks are reported to have included use of chemical weapons. In western Aleppo, civilians 'lived in fear of indiscriminate and deliberate shelling by armed groups'.<sup>23</sup>

18 Beehner et al., 'The strategic logic of sieges in counterinsurgencies', p. 80.

19 BBC, 'Aleppo: Key dates in battle for strategic Syrian city', 13 December 2016, <https://bbc.in/2XqyNhN>

20 BBC, 'What's happening in Aleppo?', 23 December 2016, <https://bbc.in/2UH0iSk>

21 See e.g. 'Syria's war: Aleppo residents "10 days from starvation"', *Al Jazeera*, 25 November 2016, <https://bit.ly/3vlqc6j>

22 Beehner et al., 'The strategic logic of sieges in counterinsurgencies', pp. 82–3.

23 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/34/64, 2 February 2017, para. 25, 35.

The then UK Foreign Secretary, Boris Johnson, said in August 2016: ‘Recently the situation in Aleppo has deteriorated following weeks of siege conditions imposed by the regime, with a significant increase in airstrikes and the horrific targeting of medical facilities. Over two million residents are faced with dangerously low supplies of food, water and medicine.’<sup>24</sup> Later in November he added: ‘All involved in the siege and assault on Aleppo have a responsibility to change course to protect civilians. Civilians and armed actors should be treated according to International Humanitarian Law. Elsewhere, the Assad regime is using siege and bombardment tactics to force surrenders – this too must stop.’<sup>25</sup>

In November 2016, Stephen O’Brien, then UN Under-Secretary-General for Humanitarian Affairs, described eastern Aleppo turning into a ‘giant graveyard’.<sup>26</sup> And as the east of the city fell into the hands of government forces, the UN was told of allegations that hundreds of men had gone missing since crossing into government-controlled areas. Inside the city, the rebel groups that remained had forcibly prevented civilians from leaving.<sup>27</sup>

## The siege of Mosul

The siege of Mosul, Iraq’s second largest city, constituted a nine-month-long effort by Iraqi government forces with international support, especially from US forces, to overwhelm the ISIS forces controlling the city. The battle for Mosul was the first large-scale combat operation involving US forces since the 2003 invasion of Iraq.<sup>28</sup> By the time it ended, ‘comparisons to Aleppo, which had once seemed exaggerated, were now obvious, even inadequate’.<sup>29</sup>

ISIS had held Mosul as their Iraqi stronghold since seizing it in June 2014, driving out the government forces stationed there. The then leader of the group, Abu Bakr al-Baghdadi, famously proclaimed the creation of the ‘caliphate’ from Mosul’s ancient Great Mosque of al-Nuri. Thousands of Iraqi soldiers, Kurdish fighters, Sunni Arab tribesmen, and Shia militiamen took part in the offensive to retake the city that began in October 2016, assisted by US-led coalition warplanes and military advisers. British forces played ‘a key part’ in the battle for Mosul, with Royal Air Force (RAF) combat aircraft striking ISIS positions around the city.<sup>30</sup> The collective victory in Mosul of Iraqi forces with international support would prove decisive in the military effort to defeat ISIS in Iraq.<sup>31</sup>

Iraqi special forces first entered Mosul on 1 November 2016. But progress slowed as troops encountered fierce resistance from ISIS snipers, suicide bombers, and shelling. By late March 2017, Lieutenant-General Stephen Townsend, the top US-led coalition commander, was describing the fight as ‘the most significant urban combat to take place since World War II’. It was, he added, ‘tough and brutal’.<sup>32</sup> It has been suggested by others that US forces were unprepared, from a doctrinal perspective, for siege warfare. Sources indicate that a

24 UK, Foreign Secretary statement on Syria, 12 August 2016, <https://bit.ly/3A6xfbG>

25 UK, Foreign Secretary statement on Syria, 28 November 2016, <https://bit.ly/3fBtmCc>

26 Borger, J., ‘Eastern Aleppo becoming “one giant graveyard” says UN humanitarian chief’, *The Guardian*, 30 November 2016, <https://bit.ly/2VzFaOz>

27 BBC, ‘What’s happening in Aleppo?’, 23 December 2016.

28 Arnold, Major T.D. and Fiore, Major Nicolas, ‘Five operational lessons from the battle for Mosul’, *Military Review*, January–February 2019, <https://bit.ly/3kmFQRE>, p. 58.

29 Verini, J., *They Will Have to Die Now: Mosul and the Fall of the Caliphate*, London, Oneworld, 2019, p. 268.

30 ‘Battle for Mosul: The British involvement’, *Forces.net*, 17 October 2016, <https://bit.ly/2V9Gffl>

31 Fox, Major A.C., ‘The Mosul Study Group and the lessons of the battle of Mosul’, *Land Warfare Paper 130*, Association of the United States Army, February 2020, <https://bit.ly/3hWH4A4>, p. 1.

decision was made to leave an escape route for ISIS fighters to the west of the city, in order to shorten the siege and to limit the damage to civilians and urban infrastructure,<sup>33</sup> although some commentators suggested after the battle that allowing ISIS fighters to escape and resupply was a strategic mistake.<sup>34</sup> In any case, Kata'ib Hezbollah and other Shi'a militias operating with Iraqi forces moved to isolate the city from the west by the end of the year, and the second and most destructive phase of the siege became centred on the densely populated centre of west Mosul.

To target the advancing Iraqi soldiers, ISIS first made and deployed, and later used to devastating effect, vehicle-borne improvised explosive devices. These proved to be 'the most lethal and fearful, psychologically fearful, weapon' the group had<sup>35</sup> UK combat aircraft, including Reaper drones, were used to support the Iraqi advance.<sup>36</sup> But the British Forces charity website, Forces.net, was already warning in December 2016 of a 'humanitarian catastrophe', with the ever-increasing danger for civilians in the city 'leading to real fears of another Aleppo-type civilian crisis'.<sup>37</sup>

James Verini, a journalist who wrote a book about the siege of Mosul, claimed that the Iraqi soldiers were 'really serious about protecting the people of Mosul, at least at the beginning when the Iraqi special forces were in charge of the invasion'. Some Iraqi civilians inside Mosul, he declared, even provided information on ISIS targets to assist the besieging forces.<sup>38</sup> But as the bombardments intensified, and when the Iraqis introduced their own air power in the form of helicopter gunships,<sup>39</sup> the citizens of Mosul became 'more and more wary of the Iraqi military's intentions'.<sup>40</sup> A review of air power by the RAND Corporation in the battle for Mosul stated that 'even with high levels of support from the air, the fight was grinding and the performance [of air power] was variable'.<sup>41</sup>

Following the recapture of eastern Mosul in January, thousands of people remained in the densely populated west of the city, with food supplies reported to be very low and clean drinking water in short supply. The UN Children's Fund (UNICEF) stated in late January 2017 that almost half of all the casualties in Mosul during the offensive in the east of the city had been civilians.<sup>42</sup> In the battles for Fallujah and Ramadi, the cities were emptied of their civilian populations as Iraqi forces battled ISIS fighters. But in Mosul, the Iraqi government had asked civilians to remain in place to prevent large-scale displacement.<sup>43</sup>

*continued on p16*

32 Michaels, J., 'Iraqi forces in Mosul see deadliest urban combat since World War II', *USA Today*, 29 March 2017, <https://bit.ly/3klGxea>

33 Gulmohamad, Z., 'Unseating the Caliphate', *CTC Sentinel*, October 2016, p. 21.

34 Beehner et al., 'The strategic logic of sieges in counterinsurgencies', p. 85.

35 NPR, 'The battle for Mosul – and why the threat of ISIS won't go away', 23 October 2019, <https://n.pr/3kcPKVO>

36 'RAF take fight to IS In Mosul', Forces.net, 4 January 2017, <https://bit.ly/3BPDPuY>

37 Cooper, T., 'The battle for Mosul rages on', Forces.net, 19 December 2016, <https://bit.ly/3BPFhpY>

38 Verini, *They Will Have to Die Now: Mosul and the Fall of the Caliphate*, p. 88.

39 'Hind' helicopter gunships (Russian-made Mil Mi-24s) can fire more than 3,000 rounds a minute from their two 30mm cannon.

40 NPR, 'The battle for Mosul — and why the threat of ISIS won't go away'.

41 RAND Corporation, *The Air War Against the Islamic State*, 2021, <https://bit.ly/3epOpr4>, p. 180.

42 UNICEF, 'Humanitarians fear for the 750,000 civilians in western Mosul', Press release, 24 January 2017, <https://uni.cf/3AcM9kG>

43 'Coalition "failing to protect civilians" in Mosul', Forces.net, 28 March 2017, <https://bit.ly/3zJdu8q>

## The siege of Aleppo



The siege of Aleppo © Orkhan Azim /Shutterstock

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<b>City population:</b>	2 million
<b>Parties to conflict:</b>	1. Syria; Iran, Russia; allied militias incl. Hezbollah; 2. Rebel militias incl. Free Syrian Army, Jaish Halab, Al-Nusra Front, ISIS.
<b>Timescale:</b>	July 2012 – December 2016 (final siege of eastern Aleppo from July – December 2016)
<b>Civilian deaths:</b>	23,000 province-wide (Violations Documentation Center)
<b>Siege conditions:</b>	'Day after day, hospitals, markets, water stations, schools and residential buildings were razed to the ground. ... The permanent severing of supply routes resulted in exorbitant food prices, which made it impossible for many families to purchase more than rice and bulghur. Bombardment of water stations forced the population in the east to drink water from boreholes, risking the contraction of waterborne diseases. ... Conditions significantly worsened in December, when all hospitals were bombed out of service. Residents were concentrated in ever-shrinking territory, where they lived under aerial attacks, and with insufficient food, water and heating.' - UN, Report of the International Independent Commission of Inquiry on the Syrian Arab Republic, 2 February 2017, A/HRC/34/64
<b>Displacement:</b>	Over 1 million (accurate estimates impossible due to repeated displacements)
<b>Extent of destruction:</b>	36,000 buildings damaged or destroyed (REACH)

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## The siege of Mosul

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**City population:** 1.5 million

**Parties to conflict:** 1. Iraq; US, UK, France and other coalition members (Combined Joint Task Force – Operation Inherent Resolve); allied militias incl. Kata'ib Hezbollah.  
2. Islamic State of Iraq and al-Sham (ISIS).

**Timescale:** October 2016 – July 2017

**Civilian deaths:** 9,000 – 11,000 (AP)

**Siege conditions:** 'Families that chose to stay are at risk, families that leave are also at risk. ... Meanwhile, people who stay are without food and water. No steady supplies have been able to reach the city since mid-November.' -- UN Humanitarian Relief Coordinator, 16 March 2017

'Even when there is food available at the markets, people don't have any money left to buy it. Families and their children are on the brink of starvation.' -- Iraq director, Save the Children, 22 February 2017

**Displacement:** 1.1 million (IOM)

**Extent of destruction:** 138,000 or 65 per cent of housing assets damaged (World Bank 2018)

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In late May, the UN was warning that civilians were not only enduring severe shortages of food, water, medicine, and electricity but also that those seeking to escape were being shot by ISIS fighters.<sup>44</sup> Some civilians would choose to remain until the bitter end to care for infirm family members.<sup>45</sup> By the time the siege was over, in July 2017, with Mosul largely retaken,<sup>46</sup> many thousands had died.

The precise number of civilian casualties is not known with any degree of accuracy. In December 2017, Associated Press, which cross-referenced morgue lists and multiple databases from non-governmental organizations, concluded that between 9,000 and 11,000 civilians had perished, with Iraqi or coalition forces responsible for at least 3,200 civilian deaths from airstrikes, artillery fire, or mortar rounds between October 2016 and July 2017. Most of the victims were described simply as ‘crushed’ in Iraqi Ministry of Health reports.<sup>47</sup> The UN had previously reported a much lower casualty figure: more than 2,500 civilians killed during the nine-month military operation, mostly as a result of ISIS attacks. This included 741 people who had been summarily executed. The UN recorded 461 civilian deaths as a result of airstrikes during the most intensive phase of the offensive from 19 February 2017 onwards.<sup>48</sup>

An investigation by the US Department of Defense, which reported in May 2017, found that more than 100 civilians had been killed in a single airstrike in March when the US air force dropped a 500-pound bomb on a building in the city. (Other estimates for civilian casualties in the airstrike were twice that.) The report of the US’s own investigation claimed that the bomb had triggered secondary explosions from devices the United States said had been clandestinely planted there by ISIS fighters. The military asserted that resultant secondary blasts had caused the concrete building to collapse. The airstrike had been requested by Iraqi troops located 100 yards away who could see the location of two snipers on the second floor of the two-storey building.<sup>49</sup>

Human Rights Watch called on the coalition to ‘thoroughly and transparently investigate the dozens of civilian deaths, and in the case of wrongdoing, hold those responsible to account’. Lama Fakih, Human Rights Watch’s Deputy Middle East Director stated: ‘The high number of civilian deaths in recent fighting, as well as recent announcements about changed procedures for vetting airstrikes, raise concerns about the way the battle for west Mosul is being fought.’<sup>50</sup> In December 2016, the coalition spokesperson, Air Force Colonel John Dorrian, had confirmed to the media that a US directive that month had reduced the number of steps required for some coalition troops to authorize and clear coalition

44 ‘UN warns Mosul civilians in grave danger’, Forces.net, 27 May 2017, <https://bit.ly/2VhrOpN>

45 Verini, *They Will Have to Die Now: Mosul and the Fall of the Caliphate*, p. 87.

46 The fighting ‘carried on at a low simmer until August, when the Islamic State’s final holdouts were defeated’. Cooper, H., ‘Revived after Mosul, Iraqi forces prepare to battle ISIS in Tal Afar’, *The New York Times*, 18 August 2017.

47 ‘AP: Death toll in Mosul 10 times higher than acknowledged’, *CBS News*, 20 December 2017, <https://cbsn.ws/3AX2oON>

48 UN Assistance Mission for Iraq (UNAMI) and Office of the UN High Commissioner for Human Rights (OHCHR), *Report on the Protection of Civilians in the context of the Ninewa Operations and the retaking of Mosul City, 17 October 2016–10 July 2017*, 2017, <https://bit.ly/3hXp2hi>, p. 10.

49 ‘Pentagon report says more than 100 civilians killed in March bombing in Iraq’, *CBS News*, 25 May 2017, <https://cbsn.ws/3r5zPdm>

50 Human Rights Watch, ‘Iraq: Airstrike vetting changes raise concerns’, Erbil, 28 March 2017, <https://bit.ly/3k7Bm0E>

airstrikes. But despite the subsequent spike in civilian casualties, US and Iraqi military officials denied that the rules for avoiding civilian casualties had been loosened. A US spokesperson stated: 'Although our partners and the coalition have made mistakes that harmed civilians, we have never targeted them – not once.'<sup>51</sup>

The threat to civilians emanating from the outside of the city was sharply exacerbated by the atrocities committed within. ISIS used civilians as both cannon fodder and as human shields. Zeid Ra'ad al Hussein, the UN High Commissioner for Human Rights, referred to the group's 'depraved, cowardly strategy', seeking to use 'the presence of civilians to render certain points, areas or military forces immune from military operations, effectively using tens of thousands of women, men and children as human shields.'<sup>52</sup> In their joint report on the siege, information gathered by the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the High Commissioner for Human Rights (OHCHR) 'strongly suggests' that 'international crimes may have been perpetrated' by ISIS in Mosul.<sup>53</sup> This conclusion appears overly tentative.

'The women, children and men of Mosul have lived through hell on earth, enduring a level of depravity and cruelty that is almost beyond words', declared High Commissioner Ra'ad Al Hussein in July 2017.<sup>54</sup> And although the humanitarian impact of the siege for civilians was horrendous, it was not the end of their suffering. An 'orgy' of torture and summary executions followed as Iraqi soldiers took revenge against fighter and civilian alike for ISIS exactions on their colleagues and family members.<sup>55</sup>

51 'U.S. denies loosening rules for avoiding civilian casualties in Mosul fight against ISIS', *CBS News*, updated 29 March 2017, <https://cbsn.ws/3kdznIQ>

52 Nebehay, S., 'Islamic State using tens of thousands as human shields in Mosul: U.N.', *Reuters*, 28 October 2016, <https://reut.rs/2UK9GVy>

53 UNAMI and OHCHR, *Report on the Protection of Civilians in the context of the Ninewa Operations and the retaking of Mosul City, 17 October 2016–10 July 2017*, p. 2.

54 Middle East Online, 'UN rights chief calls for justice, healing after Mosul', 11 July 2017, cited in Minority Rights Group (MRG) and Ceasefire, *Mosul after the Battle: Reparations for Civilian Harm and the Future of Ninewa, Report*, January 2020, <https://bit.ly/3yITQcq>

55 Abdul-Ahad, G., 'After the liberation of Mosul, an orgy of killing', *The Guardian*, 21 November 2017, <https://bit.ly/3xBC0rL>

## 3

## Sieges under international law

This section of the report discusses the legality of siege warfare under international law, primarily from the perspective of the obligations upon besieging forces but also with regard to those rules that bind the forces caught within an encirclement. For, despite the lack of a formal legal definition of a siege, long-standing norms of IHL pertain not only to the besieging forces but also to the besieged.<sup>56</sup> The mainstay of this section considers the obligations under IHL (and associated international criminal law, with respect to war crimes and crimes against humanity). Opposing parties to any armed conflict, whether state armed forces or non-state armed groups, each has clear obligations under IHL during a siege to both respect and protect civilians. But as the description of specific sieges in the previous section illustrated, the level of compliance has varied widely, with conduct sometimes amounting to an international crime.

The second part of this section reviews the application of international human rights law to sieges. International human rights law, in particular the rights to life, to freedom from inhumane treatment, and to food, imposes obligations of conduct (both act and omission) during a siege. For states, the duty to respect and ensure rights applies under treaty law and custom. Although non-state armed groups cannot formally adhere to human rights treaties, it is increasingly recognized that, at the least, peremptory human rights norms bind such groups, obligating them to refrain from summary executions, torture, and hostage-taking.<sup>57</sup>

As a preface to this legal review, however, it is important to bear in mind that no rule of international law unequivocally prohibits sieges as a method of warfare as long as they are targeted at military forces. This is so, whether the armed conflict in question is international (between two or more states) or non-international in character (between a state – acting with or without international military assistance – and an organized armed group, where the violence between the two opposing parties is both intense and sustained). The law focuses instead on the means by which, and the circumstances under which, a siege is conducted. This is so, whether one is looking at military operations from the outside-in or regulating acts and omissions within the besieged area.

<sup>56</sup> In 1880, the *Oxford Manual on the Laws of War on Land* noted the duty on the besieged to indicate to their enemy, by visible signage, 'buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered'. This standard would become a legal obligation under the Hague Regulations of 1899 and again in the regulations adopted at The Hague eight years later. See Art. 27, 1899 Regulations concerning the Laws and Customs of War on Land; and Art. 27, 1907 Regulations concerning the Laws and Customs of War on Land.

<sup>57</sup> See e.g. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/19/69, 22 February 2012, para. 106; UN Mission in South Sudan (UNMISS), *Conflict in South Sudan: A Human Rights Report*, 8 May 2014, <http://bit.ly/3lpLYqi>, para. 18.

## Sieges under international humanitarian law

### The legality of sieges per se

It is generally lawful under IHL to besiege enemy forces.<sup>58</sup> This is so in both international and non-international armed conflict. As the UK Ministry of Defence has stated, siege ‘is a legitimate method of warfare as long as it is directed against enemy armed forces’.<sup>59</sup> Indeed, it is not prohibited to conduct a siege during an armed conflict even if the express aim is to starve to death the soldiers or fighters<sup>60</sup> within the encircled area. This is the case because they are able to surrender to the besieging forces and become prisoners. According to IHL, they must then be treated humanely, which encompasses the provision of adequate food and potable water, as well as medical treatment where necessary, and they must all times be protected against harm.<sup>61</sup> Failure to meet the duty of humane treatment may constitute the war crime of ‘wilfully causing great suffering or serious injury to body or health’.<sup>62</sup>

Besieged fighters may justly be fearful of the fate that awaits them if they attempt to surrender. Accordingly, the mere threat by besieging forces that no prisoners will be taken – known as ‘denial of quarter’ – is itself a serious violation of IHL and a war crime.<sup>63</sup> These rules apply whether the conflict is international or non-international in character<sup>64</sup>

### Undefended cities

An ‘undefended’ city or other populated area may not be either besieged or attacked. As the UK Ministry of Defence explains, it would be ‘unlawful to besiege an undefended town since it could be occupied without resistance’.<sup>65</sup> This is a long-standing customary IHL rule.<sup>66</sup> Under treaty law, an attack on an undefended locality is explicitly outlawed in the 1977 Additional Protocol I to the Geneva Conventions, which applies in international armed conflict.<sup>67</sup> In this regard, the protocol provides simply that: ‘It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities’.<sup>68</sup>

The 1977 Additional Protocol I decrees that to be considered ‘undefended’, any given populated area must fulfil all of the following conditions:

58 US DOD, *Law of War Manual*, para. 5.19.

59 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.34.1.

60 Technically, the term ‘combatant’ is only to be used as a legal term of art in international armed conflict. The term ‘soldier’ is used in this report to denote troops in government armed forces, while ‘fighters’ are those engaged in combat for a non-state armed group.

61 Arts 3 and 13, 1949 Geneva Convention III on Prisoners of War.

62 International Committee of the Red Cross (ICRC), Customary IHL Rule 156: ‘Definition of war crimes’, <http://bit.ly/32HjZb2>, at (i) and (iv).

63 ICRC Customary IHL Rule 46: ‘Orders or threats that no quarter will be given’, <https://bit.ly/3B6Asl7>; ICRC Customary IHL Rule 156: ‘Definition of war crimes’, at (ii) and (iv).

64 The International Criminal Court has jurisdiction over the war crime of denial of quarter in both international and non-international armed conflict. Art. 8(2)(b)(xii) and (2)(e)(x), 1998 Rome Statute of the International Criminal Court.

65 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.34.1.

66 ICRC Customary IHL Rule 37: ‘Open towns and non-defended localities’, <https://bit.ly/3k8g56Y>

67 ICRC commentary on Article 59 of the 1977 Additional Protocol I, 1987, <http://bit.ly/3cM1AB3>, para. 2263.

68 Art. 59(1), 1977 Additional Protocol I.

- all fighters, as well as mobile weapons and military equipment, must have left the area;
- no hostile use may be made of fixed military installations or establishments;
- no acts of hostility may be committed by the authorities or by the population; and
- no activities may be undertaken in support of military operations (such as reconnaissance).<sup>69</sup>

Fighters may, though, remain in the besieged area as long as they are no longer able or willing to fight, especially in situations where they have been hospitalized owing to wounds or sickness. Defended localities include ‘not only fortified towns or those equipped with a fixed defence system, but also localities in or around which troops have taken up position.’<sup>70</sup>

### The principle of distinction

Although it may be lawful to besiege a city or other populated area strictly on the basis that military personnel remain within and are not *hors de combat* because of wounds or sickness, in all circumstances both the besieging and the besieged forces must comply with the principle of distinction in their military operations. This fundamental IHL principle dictates that, in order to ensure the protection of the civilian population, parties to an armed conflict must ‘at all times’ distinguish between the civilian population and military personnel, and between civilian objects and military objectives, and direct their operations ‘only’ against military objectives.<sup>72</sup>

## both the besieging and the besieged forces must comply with the principle of distinction in their military operations

The principle of distinction, which governs all military operations and not merely ‘attacks’,<sup>73</sup> comprises a number of distinct but interrelated rules. One concerns the prohibition on targeting civilians and a second concerns the prohibition of indiscriminate attacks. Although a

disproportionate attack is designated a form of indiscriminate attack according to the 1977 Additional Protocol I,<sup>74</sup> its prohibition is ordinarily – and better – treated as a distinct rule.

### The war crime of targeting civilians

First and foremost, civilians must never be targeted by an attack, unless and for such time as they participate directly in hostilities. This prohibition applies to a sniper firing at an individual civilian inside a besieged area just as it does to the targeting of a group of civilians, for instance using indirect mortar fire. To do so intentionally in any armed conflict is to commit the war crime of ‘making the civilian population or individual civilians, not taking a direct part in hostilities, the object of attack.’<sup>75</sup> The fact that a siege

69 Art. 59(2), 1977 Additional Protocol I.

70 ICRC commentary on Art. 59 of the 1977 Additional Protocol I, 1987, para. 2266.

71 The term ‘attack’, despite its ordinary meaning, is defined more broadly in IHL to mean ‘acts of violence against the adversary, whether in offence or in defence’. Art. 49(1), 1977 Additional Protocol I.

72 Art. 48, 1977 Additional Protocol I; ICRC Customary IHL Rule 1: ‘The principle of distinction between civilians and combatants’, <http://bit.ly/32rIER0>; and Customary IHL Rule 7: ‘The principle of distinction between civilian objects and military objectives’, <http://bit.ly/2G8to2w>

73 Art. 48, 1977 Additional Protocol I.

74 Art. 51(5)(b), 1977 Additional Protocol I.

75 ICRC Customary IHL Rule 156: ‘Definition of war crimes’, at (ii) and (iv).

is ongoing does not alter the application or content of these rules. As the UK Ministry of Defence has affirmed: ‘The principles of the law of armed conflict, particularly the rules relating to attacks, apply equally to situations of siege or encirclement.’<sup>76</sup>

The ICTY convicted a number of Bosnian Serbs for their role in the commission of war crimes and crimes against humanity during the siege of Sarajevo.<sup>77</sup> Most recently, in June 2021, the conviction at trial of Ratko Mladić, the commander of the Bosnian Serb army, for his role in the joint criminal enterprise in relation to the siege, was confirmed by the Appeals Chamber of the Tribunal’s Residual Mechanism. Mr Mladić had contended that the Trial Chamber had erred by failing to give weight to his orders prohibiting the targeting of civilians in the besieged city. But this line of argument was rejected on the basis that ‘mere lip-service’ had been paid to such orders, which were designed to reflect assurances given to the international community rather than to protect civilians from attack. In practice, such orders were not adhered to, and the Bosnian Serb leadership did not take measures to enforce them.<sup>78</sup>

### Indiscriminate attacks

Also prohibited by IHL are indiscriminate attacks, including in the context of any siege. The concept of an indiscriminate attack, which is often miscast, even by experts,<sup>79</sup> applies to an attack that is not targeted at a lawful military objective. In contrast to an attack directed against civilians, where fire is aimed at them, in an indiscriminate attack the attacking party does not care what it hits – military objective or civilian.<sup>80</sup>

Area bombardment (also called ‘carpet bombing’ in the vernacular) is an obvious example of an indiscriminate attack. There is a specific prohibition under customary IHL of bombardment ‘by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.’<sup>81</sup> Carpet bombing belongs, legally speaking, to another era. But the practice persists. In September 2019, France’s Ambassador to the UN in New York, Nicolas de Rivière, told reporters that the ‘tragedy’ in Syria was ‘worse than ever’.

Referring to Russia, Ambassador de Rivière condemned those who were ‘currently carpet-bombing Idlib’, the besieged province in Syria, pledging that they ‘will be held accountable.’<sup>82</sup>

**Carpet bombing belongs, legally speaking, to another era. But the practice persists.**

76 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.34.

77 See, in particular, ICTY, *Prosecutor v. Stanislav Galić*, Judgment (Trial Chamber) (Case No. IT-98-29-T), 5 December 2003; ICTY, *Prosecutor v. Dragomir Milošević*, Judgment (Trial Chamber III) (Case No. IT-98-29/1-T), 12 December 2007.

78 International Residual Mechanism for Criminal Tribunals, *Prosecutor v. Ratko Mladic*, Judgment (Appeals Chamber) (Case No. MICT-13-56-A), 8 June 2021, para. 308.

79 Unfortunately, this may even extend to the ICTY and the International Criminal Court (ICC), both of which appear to have conflated indiscriminate attacks with attacks directed against civilians in their case law. For an example of this, see ICC, *Prosecutor v. Bosco Ntaganda*, Judgment (Trial Chamber VI), 2019, para. 921.

80 Art. 51(4), 1977 Additional Protocol I. See Dinstein, Y., *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn, Cambridge, Cambridge University Press, 2016, para. 393.

81 ICRC Customary IHL Rule 13: ‘Area bombardment’, <https://bit.ly/3aSIHxL>

82 Reinl, J., ‘Russia blasted at UN for “carpet bombing” Syria’, *Al Jazeera*, 19 September 2019, <https://bit.ly/3rhLxls>

An indiscriminate attack may be conducted through a weapon that is inherently indiscriminate (meaning a weapon that is simply, by its nature, incapable of being targeted accurately at a military objective).<sup>83</sup> More often, an indiscriminate attack is perpetrated through the indiscriminate manner of use of a weapon: one that is, in the circumstances at the time of its firing, not aimed at a military objective. Very few weapons are inherently indiscriminate (biological weapons are a generally agreed example, as are certain rudimentary, unguided rockets), but each and every weapon is capable of being used indiscriminately. This is particularly a risk during bombardment of a populated area in the context of a siege since the besieging forces may ordinarily rely on ‘indirect’ fire, where the target cannot be seen by those directing the firing of a particular weapon.

Milan Martić, the head of the breakaway Serb Krajina region in Croatia in the early 1990s, would be prosecuted for the war crime of attacking civilians for his artillery firing of cluster munitions against the city of Zagreb on 2 May 1995. An ICTY Trial Chamber observed that the ‘high-dispersion’ weapon was fired from ‘the extreme of its range’ (some 50 km from the city). It was in any event not suitable for ‘point targets’ (meaning specific military objectives) as it was too inaccurate. The tribunal thus held that the firing of cluster munitions into a densely populated civilian area such as Zagreb ‘would inevitably result in the infliction of severe casualties.’<sup>84</sup> Indeed, there is evidence that 160 people in total were killed or injured during the attack on 2 May 1995 alone.<sup>85</sup>

The later Gotovina judgment by the ICTY concerned the siege of Knin in early August 1995, where Milan Martić and his forces were then themselves under attack from Croatian forces. Two main weapons were used in the attack on Knin: field guns (howitzers) and multiple-barrel rocket launchers (MBRLs).<sup>86</sup>

The Trial Chamber held that, although MBRLs were ‘generally less accurate’ than howitzers or mortars, their use by the Croatian army against Knin on 4 and 5 August 1995 was not inherently indiscriminate.<sup>87</sup> This is surprising given that an artillery expert would later submit an *amicus curiae* brief to the tribunal in support of General Gotovina’s appeal whereby he expected around one half of the rockets to fall within 300 metres of a specific target. This is the Circular Error Probable, or CEP of a weapon. A common metric to adjudge the accuracy of a weapon is 3 CEP, which in the case of the MBRLs used against Knin would mean that around 90 per cent of those fired were expected to land up to 900 metres away from their target.<sup>88</sup> This huge margin of error would appear to fit the

83 The International Court of Justice (ICJ) described the prohibition of the use of any weapon that is ‘incapable of distinguishing between civilian and military targets’ as a ‘cardinal’ principle in its 1996 Nuclear Weapons Advisory Opinion. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 1996, para. 78.

84 ICTY, *Prosecutor v. Milan Martić*, Judgment (Trial Chamber) (Case No. IT-95-11), 12 June 2007, para. 463.

85 *Ibid.*, para. 307.

86 ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Judgment (Trial Chamber I) (Case No. IT-06-90-T), 15 April 2011, para. 1367.

87 *Ibid.*, para. 1897.

88 ICTY, *Prosecutor v. Gotovina* (Appeals Chamber) (Case No. IT-06-90-A), Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks during Operation Storm, <https://bit.ly/3wTLs8N>, Comments by LTG (Ret.) Wilson A. Shoffner on the Report by Major General Robert H. Scales on Croatian Army (‘HV’) Use of Artillery and Rockets on Targets Based in Knin, Croatia, August 4–5, 1995, p. 3, para. (b)(i).

definition of an indiscriminate weapon, at least when the weapon was fired into a populated area. Instead, the Trial Chamber considered that only the – at least 50 – projectiles of any type that landed at distances of between 300 and 700 metres from any lawful military objective constituted indiscriminate attacks.<sup>89</sup>

The conviction of the defendant at trial was, however, reversed on appeal in what was one of the ICTY's most controversial decisions.<sup>90</sup> The Appeals Chamber held, albeit with two of its judges dissenting strongly, that absent 'an established range of error', it could not exclude the possibility that all of the impact sites considered at trial were the result of shelling aimed at legitimate targets. Although evidence on the record suggested that individual units of the Croatian army aimed artillery in the general direction of the Four Towns rather than at specific targets, the Trial Chamber had found that this evidence was not wholly conclusive when considered alone.<sup>91</sup>

The judgment on appeal did not, though, provide clear guidance as to what would have constituted an indiscriminate attack in the prevailing circumstances in the siege of Knin.<sup>92</sup> This was required of the tribunal under its established rules. As Judge Fausto Pocar observed in his dissenting opinion, by not articulating the correct legal standard, the majority of the judges in the Appeals Chamber failed to correct legal errors in the trial judgment and clarify the law that should have been applied at trial. With respect to the assessment of the legality of an attack, he asked what margin of error constituted an attack against civilians or civilian objects: 'Does the Majority consider that the correct legal standard was a 400-metre standard? A 100-metre standard? A 0-metre standard? The Appeal Judgment provides no answer to this question.'<sup>93</sup>

## Sieges and the terrorizing of the civilian population

In addition to violating the principle of distinction and potentially amounting to war crimes of attacking civilians, where a siege involves a significant number of attacks against civilians and/or widespread indiscriminate attacks, it may also contravene the prohibition on terrorizing the civilian population. Within the conduct of hostilities, the use of terror tactics against the civilian population is explicitly prohibited, in identical terms, by the two 1977 Additional Protocols (the first protocol applying in international armed conflict and the second applying in certain non-international armed conflicts). Therein it is stipulated in identical wording that: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'<sup>94</sup> This is also a customary rule, applicable to all armed conflicts and all states and non-state armed groups that are party to them.<sup>95</sup>

89 ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Judgment (Trial Chamber I), para. 1906.

90 See e.g. Milanovic, M., 'The Gotovina omnishambles', *EJIL: Talk!*, 18 November 2012, <https://bit.ly/3kCOifV>

91 ICTY, *Prosecutor v. Gotovina and Markač*, Judgment (Appeals Chamber) (Case No. IT-06-90-A), 16 November 2012, para. 65.

92 See e.g. Vallentgoed, D., 'The last round? A post-Gotovina reassessment of the legality of using artillery against built-up areas', *Journal of Conflict & Security Law* 18(1), 2013, pp. 25–57.

93 ICTY, *Prosecutor v. Gotovina and Markač*, Appeals Judgment, 16 November 2012, Dissenting Opinion of Judge Fausto Pocar, para. 13.

94 Art. 51(2), 1977 Additional Protocol I; and Art. 13(2), 1977 Additional Protocol II.

95 ICRC, Customary IHL Rule 2: 'Violence aimed at spreading terror among the civilian population', <http://bit.ly/2ONFTT7>

The acts proscribed by the prohibition constitute, the International Committee of the Red Cross (ICRC) avers, a ‘special type of terrorism.’<sup>96</sup> According to the organization’s commentary on the Additional Protocols: ‘Air raids have often been used as a means of terrorizing the population.’ Thus, for instance, the Independent International Commission of Inquiry on Syria has affirmed that use of barrel bombs in area bombardment is prohibited ‘as a tactic that spreads terror among the civilian population.’<sup>97</sup> That said, under IHL, large-scale aerial bombardments that are ‘pounding’ military objectives and ‘breaking the back of the enemy armed forces’ are not unlawful according to this rule, ‘even if they lead ... to the collapse of civilian morale.’<sup>98</sup>

## the use of terror tactics against the civilian population is explicitly prohibited

Aerial bombardment is not the only method that is used to terrorize civilians. The ICTY prosecuted several individuals involved in commanding the siege of Sarajevo for the war crime of terrorizing civilians. The *Galić* case was the first time the ICTY had considered

the charge of terror as a war crime, whose customary status as a war crime was uncertain. General Stanislav Galić, as commander of the Bosnian Serb army around Sarajevo, was accused of having ‘conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population.’<sup>99</sup> The Trial Chamber heard ‘reliable evidence that civilians were targeted during funerals, in ambulances, in hospitals, on trams, on buses, when driving or cycling, at home, while tending gardens or fires or clearing rubbish in the city.’<sup>100</sup> The Majority at trial were convinced by the evidence that civilians in government-held areas of Sarajevo were ‘directly or indiscriminately attacked’ from Bosnian Serb-controlled territory, and that, as a result and ‘as a minimum, hundreds of civilians were killed and thousands others were injured.’<sup>101</sup>

General Van Baal, Chief of Staff of UNPROFOR in 1994, testified before the Trial Chamber that sniping in Sarajevo was ‘without any discrimination, indiscriminately shooting defenceless citizens, women, children, who were unable to protect and defend themselves, at unexpected places and at unexpected times.’<sup>102</sup> This led him to conclude, the Trial Chamber recalled in its judgment, ‘that its objective was to cause terror; he specified that women and children were the predominant target.’<sup>103</sup> In its trial judgment against Radovan Karadžić in 2016, the ICTY held that the scope of the crime potentially encompassed not only direct attacks against civilians but also indiscriminate attacks.<sup>104</sup>

96 Sandoz, Y., Swinarski, C. and Zimmermann, B. (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Martinus Nijhoff, 1987, para. 4538.

97 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/27/60, 13 August 2014, para. 102.

98 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p. 146, para. 390.

99 ICTY, *Prosecutor v. Galić*, Judgment (Trial Chamber) (Case No. IT-98-29-T), 5 December 2003, paras 65, 66.

100 *Ibid.*, para. 584.

101 *Ibid.*, para. 591.

102 *Ibid.*, para. 573.

103 *Ibid.*

104 Thus, the Trial Chamber held that ‘as is the case with unlawful attacks on civilians, the acts or threats of violence constituting terror need not be limited to direct attacks on civilians or threats thereof, but may include indiscriminate or disproportionate attack’. ICTY, *Prosecutor v. Radovan Karadžić*, Judgment (Trial Chamber) (Case No. IT-95-5/18-T), 24 March 2016, para. 460.

The Residual Mechanism of the ICTY that followed the tribunal's formal closure at the end of 2017 once again addressed the issue of whether terrorizing civilians in the conduct of hostilities was a war crime under customary law in its adjudication of the appeal of Ratko Mladić in June 2021. Mr Mladić had asserted that the prohibition against spreading terror among the civilian population did not extend to its criminalization under customary international law, at least when the siege of Sarajevo was ongoing, 'due to insufficient evidence of settled, extensive, or uniform state practice'.<sup>105</sup> The Residual Mechanism rejected his assertion.<sup>106</sup>

It therefore appears that indiscriminate attacks on populated areas, such as during a siege, as well as directly attacking civilians in such a context, may amount to the war crime of terror. This is so where the primary purpose is to spread terror among the civilian population.

### Sieges and the principle of proportionality in attack

The second fundamental principle regulating attacks is that of proportionality. This is only applicable where an attack is targeted at a lawful military objective (thereby satisfying the principle of distinction). By virtue of the proportionality principle, all parties to armed conflict are prohibited from launching attacks which 'may be expected' to cause 'excessive' civilian harm when compared to the 'concrete and direct military advantage anticipated'. The principle applies as a matter of custom irrespective of whether the armed conflict is international or non-international in character.<sup>107</sup>

The principle of proportionality generally accepts that certain civilian casualties may be inevitable during the conduct of warfare, but it expressly imposes legal limits on the expected harm. In a situation of siege, each attack launched by the besieging forces must not only target a lawful military objective, but must also consider the risk that civilians will be killed or injured. Such harm may occur because of the resultant blast or fragmentation emanating when an artillery projectile explodes on a military objective, or because the projectile misses its target. Naturally, the less accurate the weapon that is to be used, the more likely it is that civilians will be struck. In addition to the direct effects on civilians of an attack, civilian harm may also be caused by reverberating effects, for example a deterioration in essential public services because of the destruction of infrastructure.

At the least, where there is ongoing bombardment it has been suggested that the 'encirclement dimension of sieges affects the application of the rule of proportionality'. It does so by affecting 'the weight to be given in proportionality assessments to injuries to civilians and damage to civilian property'. Thus, for example, 'injuries are likely to be harder to treat in sieges, as medical facilities may be limited and supplies stretched. Damage to civilian residences may have a more severe impact on civilians if alternative shelter is limited. If previous attacks have already damaged water treatment facilities, any further damage will be more significant than if they had been intact'.<sup>108</sup>

105 International Residual Mechanism for Criminal Tribunals, *Prosecutor v. Ratko Mladic*, Judgment (Appeals Chamber) (Case No. MICT-13-56-A), 8 June 2021, para. 280.

106 *Ibid.*, para. 287.

107 ICRC Customary IHL Rule 14: 'Proportionality in attack', <https://bit.ly/3z3M253>

108 Gillard, E.-C., 'Sieges, the law and protecting civilians', Briefing, International Law Programme, Chatham House, London, June 2019, pp. 5–6, <https://bit.ly/39e6WEn>

Given the rule of proportionality, such assessment by a commander would, however, demand a level of knowledge of the circumstances in the area under siege that may not be possessed by the besieging party. As Gillard has observed, after all, can besieging forces even identify military objectives with the requisite degree of certainty?<sup>109</sup>

## Sieges as an attack under IHL

The extent to which, under IHL, a siege is to be considered an attack in and of itself is disputed and the issue will not be finally resolved here. It has, for instance, been doubted whether a siege can violate the rules on attack in the absence of bombardments or sniping into the besieged area. But the better view is that a siege is to be considered as a form of attack.

One lawyer, who casts it as ‘a difficult argument to make’,<sup>110</sup> suggests a parallel with cyber operations, in which the effects of a cyber attack are considered salient, rather than merely the ‘non-violent’ introduction of a virus or worm into a computer network.<sup>111</sup> But perhaps a better parallel to be drawn is one with the ‘use’ of a firearm. Pointing a gun at someone is still an act of violence even if the firearm is not discharged. This is how it is reported or understood by numerous national jurisdictions, including in the UK.<sup>112</sup> As Judge Chile Eboe-Osuji stated in his partly concurring opinion in the judgment on appeal of Bosco Ntaganda before the International Criminal Court in March 2021: ‘Assailants need not shoot to rob their victims. Vocal or silent demand of compliance with force of arms is enough – an understanding that the assailant wants “your money or your life” is enough, whether or not the assailant vocalises that message.’<sup>113</sup>

Moreover, despite its ordinary meaning, an attack is defined in broad terms in IHL to mean ‘acts of violence against the adversary, whether in offence or in defence.’<sup>114</sup> Encircling a city or town with heavily armed forces is little different in its effects even if the guns are, for a time, silent. State practice, although fragmented and a little obscure, does not appear to support the more conservative position. The United States, for instance, considers that a siege ‘must be conducted in accordance with the principles of distinction and proportionality.’<sup>115</sup> Similarly, the UK stipulates that the ‘principles of the law of armed conflict, particularly the rules relating to attacks, apply equally to situations of siege or encirclement.’<sup>116</sup>

This certainly confirms that, to be lawful under the principle of distinction, the siege of a city or other populated area must be targeted at a locality that is defended, that is to say, where fighters within the besieged area continue to offer resistance. Of course, each use of

109 Ibid., p. 5.

110 Gillard, ‘Sieges, the law and protecting civilians’, pp. 8, 10.

111 Rule 92 in Schmitt, M.N. (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge, Cambridge University Press, 2017.

112 In the UK, for instance, a police officer is deemed to have used a firearm when it is pointed or aimed at another person as well as when it is actually discharged. College of Policing, ‘Armed policing: Use of force, firearms and less lethal weapons’, <https://bit.ly/2OV8ID7>

113 ICC, *Prosecutor v. Bosco Ntaganda*, Judgment (Trial Chamber) (Case No. ICC-01/04-02/06 A A2), 30 March 2021, Partly concurring opinion of Judge Chile Eboe-Osuji, 29 March 2021, <https://bit.ly/3rAJmYK>, para. 112.

114 Art. 49(1), 1977 Additional Protocol I.

115 US DOD, *Law of War Manual*, para. 5.20.

116 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.34.

force against the besieged area and those within it must similarly comply with the principle of distinction in attack.

Whether a siege is considered an attack under IHL has particular significance for the application of the proportionality rule. If laying a siege does constitute an attack, then the siege itself would be unlawful if the expected civilian harm from *the siege as a whole* was excessive in relation to the concrete and direct military advantage anticipated.

**if laying a siege does constitute an attack under IHL, then the siege itself would be unlawful if the expected civilian harm from *the siege as a whole* was excessive in relation to the concrete and direct military advantage anticipated**

### Precautionary measures

As the ICRC has determined, it is a customary IHL rule in all armed conflict that, in the conduct of military operations (including in sieges), ‘constant care must be taken to spare the civilian population, civilians and civilian objects.’<sup>117</sup> The principles of distinction and proportionality in attack are directly underpinned by the duty on the attacker and the defender to take certain ‘precautions.’ But the precautionary measures required by IHL are not especially demanding, largely using the threshold of ‘feasibility.’ This has been defined as those measures that are ‘practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.’<sup>118</sup> The extent of the obligation is thus not set at a high bar, whether for defender or attacker, even though the stipulated aim is to ‘avoid,’ and in any event to ‘minimize’ incidental loss of civilian life, injury to civilians, and damage to civilian objects.<sup>119</sup>

The aim of minimizing civilian harm is to be achieved either by seeking to ensure that civilians are not present when an attack strikes, or by limiting, as far as reasonably possible, the ambient effects of an attack to a military objective. With respect to the former issue, three of the four Geneva Conventions of 1949 refer to a ‘besieged or encircled area’ and direct the possibility (specifically in international armed conflict) of ‘removal’ of the wounded and sick, as well as, in the case of civilians, the infirm and aged, children, and ‘maternity cases.’<sup>120</sup>

Those who plan or decide on an attack must do ‘everything feasible’ to verify that the objectives to be attacked are military objectives that may lawfully be attacked.<sup>121</sup> This status may change over time, for instance between day and night, as the case of the bunker in the Amariyah suburb of south-west Baghdad illustrated during the 1991 Gulf War. The bunker was a military command-and-control centre by day and therefore a lawful military objective. Extensive reconnaissance had, however, failed to discern that each night the wives and children of the Iraqi secret police sheltered from US air raids in the basement of

117 ICRC Customary IHL Rule 15: ‘Precautions in attack’, <http://bit.ly/2m6mCnj>

118 Ibid.

119 Art. 57(2)(a)(ii), 1977 Additional Protocol I.

120 Art. 15, 1949 Geneva Convention I; Art. 18, 1949 Geneva Convention II; and Art. 17, 1949 Geneva Convention IV.

121 Art. 57(2)(a)(i), 1977 Additional Protocol I.

the bunker.<sup>122</sup> This was a clear failure of intelligence, but while the consequences were tragic and avoidable, the attack did not amount to a violation of IHL rules.<sup>123</sup>

Those who plan or decide on an attack must further take all feasible precautions in the choice of weapons and their methods of attack so as to avoid, or at least minimize, incidental civilian harm.<sup>124</sup> Targeting a locality in a besieged area when and where civilians are expected to be present in especially high numbers – for instance, a railway station at rush hour – is therefore to be avoided if at all possible, even though the station itself may be a lawful military objective.

With regard to the precautionary duties on the besieged, the relevant customary rule demands that parties to any armed conflict must take ‘all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.’<sup>125</sup> The ICRC offers as examples of such precautions the construction of shelters, the digging of trenches, distribution of information and warnings, withdrawal of the civilian population to safe places, guarding of civilian property, and the mobilization of civil defence organizations.<sup>126</sup> There is a specific obligation on the besieged to indicate to the enemy, by visible signage, ‘buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered’.<sup>127</sup>

Moreover, the ICRC cautions, an attacker is not prevented from attacking military objectives if the defender fails to take appropriate precautions or deliberately uses civilians to shield military operations. The attacker remains bound in all circumstances, though, to take appropriate precautions in attack and must respect the principle of proportionality even though the defender violates IHL.<sup>128</sup>

## Human shields

Despite the duty of precautionary measures on the defending party, it is known that besieged forces sometimes use civilians as so-called ‘human shields’. This is a violation of IHL, at the least when the civilians concerned do not volunteer. Civilians were forced to act as human shields in Mosul, as was previously observed.<sup>129</sup> The 1977 Additional Protocol I stipulates that the ‘presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations’.<sup>130</sup> The UK Ministry of Defence affirms that even where human shields are being used, ‘the proportionality rule must be considered’. This would seem to reward the unscrupulous party or the reckless individual, but to do otherwise would be tantamount to inviting indiscriminate attacks. It further notes,

122 Solis, G.D., *The Law of Armed Conflict: International Humanitarian Law in War*, 2nd edn, New York, Cambridge University Press, 2016, p. 275.

123 Casey-Maslen, S., *Hague Law Interpreted*, Oxford, Hart, 2018, p. 200.

124 Art. 57(2)(a)(ii), 1977 Additional Protocol I.

125 ICRC Customary IHL Rule 22: ‘Principle of precautions against the effects of attacks’, <https://bit.ly/2UQXRg4>

126 Ibid.

127 Art. 27, 1907 Hague Regulations.

128 ICRC Customary IHL Rule 22: ‘Principle of precautions against the effects of attacks’.

129 Kouhnavard, N., ‘Islamic State group using human shields in Mosul’, BBC, 3 April 2017, <https://bbc.in/3hG6SSm>

130 Art. 51(7), 1977 Additional Protocol I.

though, that ‘if defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives.’<sup>131</sup> Thus, where so-called ‘human shields’ are forcibly placed in or near a military objective, the attacker is to be accorded a greater margin of discretion than would otherwise be the case.<sup>132</sup> This should not extend, however, to treating the entire population of a besieged area as if they were being used as human shields (as some commentators implied in the battle for Mosul).<sup>133</sup>

## The prohibition of starvation of civilians

The ICRC has stated that the prohibition of starvation as a method of warfare does not render siege warfare unlawful ‘as long as the purpose is to achieve a military objective and not to starve a civilian population.’ This prohibition was first codified in the two 1977 Additional Protocols. While it was considered a new rule at the time of their adoption, the customary status of the norm in all armed conflict has since been confirmed.<sup>135</sup> In 2018, for the first time, the UN Security Council adopted a resolution strongly condemning the starvation of civilians as a method of warfare.<sup>136</sup>

Indeed, its violation is a serious violation of IHL and a war crime in all armed conflict. This is so under both the Rome Statute of the International Criminal Court<sup>137</sup> and customary law.<sup>138</sup> Although the Rome Statute initially had jurisdiction over the crime only in international armed conflict, this omission with respect to non-international armed conflict was duly rectified by the states parties in 2019.<sup>139</sup> In this regard, the amendment to the statute stipulates that the crime consists of: ‘Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.’<sup>140</sup>

In practice, the customary and conventional prohibition renders illegal the besieging of towns and cities that contain civilians as soon as food and water supplies are insufficient

131 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 2.7.2.

132 Ibid. In contrast, where a person voluntarily positions himself or herself between the enemy and a lawful military objective, he may be directly participating in hostilities. For detail on this issue see Melzer, N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, Geneva, ICRC, 2009, pp. 56–7. One may legitimately inquire as to how, in most circumstances, an attacker will reasonably know whether the positioning is forced or voluntary.

133 Gordon, N. and Perugini, N., ‘Human shields, sovereign power and the evisceration of the civilian’, *AJIL Unbound*, 110, 2016, pp. 329–34.

134 ICRC Customary IHL Rule 53: ‘Starvation as a method of warfare’, <http://bit.ly/2BNHBAi>

135 Ibid.

136 UN Security Council Resolution 2417, adopted on 24 May 2018 by unanimous vote in favour, operative para. 5.

137 Under the Statute of the International Criminal Court, ‘intentionally using starvation of civilians as a method of warfare’ is a war crime in both international and, since December 2019, also non-international armed conflicts. Art. 8(2)(b)(xxv) and (e)(ix), Rome Statute of the International Criminal Court.

138 ICRC, Customary IHL Rule 156: ‘Definition of war crimes’, (ii) and (iv).

139 Amendment to Article 8 of the Rome Statute of the International Criminal Court (Intentionally using starvation of civilians); adopted at The Hague, 6 December 2019, not yet in force. The provision entered into force, initially for New Zealand, on 14 October 2021.

140 Art. 8(2)(e)(ix), Rome Statute. In comparison to the provision in the context of international armed conflict in the Statute, the words ‘as provided for under the Geneva Conventions’ are omitted after ‘wilfully impeding relief supplies’, to reflect the legislative difference in a situation of non-international armed conflict.

to meet their needs. Thus, while adverse claims continue to be made by both certain states (such as the UK)<sup>141</sup> and a number of commentators,<sup>142</sup> it is impermissible to starve the enemy into submission where to do so would also result in the starvation of civilians. The US Department of Defense has affirmed: ‘Military action intended to starve enemy forces ... must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained.’<sup>143</sup>

**In 2018, for the first time, the UN Security Council adopted a resolution strongly condemning the starvation of civilians as a method of warfare. It is also a war crime.**

But this would suggest that starving certain civilians to death might be lawful when combatant adversaries are also starved and the incidental civilian harm is proportionate. On this issue, the 2019 New Zealand *Manual of Armed Forces Law* states that ‘Particular care is to be taken when members of the opposing force and the civilian population are reliant on the same sources of food and other essentials.’<sup>144</sup>

In its commentary on the provision in the 1977 Additional Protocol I,<sup>145</sup> the ICRC interpreted the scope of the prohibition narrowly as being limited to action ‘deliberately undertaken to provoke starvation. This mental element appears to be reflected in the elements of the war crime under the Rome Statute, which demands that the alleged perpetrator be proven to have ‘intended to starve civilians as a method of warfare.’<sup>146</sup> But the narrowing of the rule for the purpose of international criminal law does not similarly narrow the primary rule in treaty or custom.

It is also likely the case that intent can be inferred from the act of ‘causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.’<sup>147</sup> After all, the general provision on mental elements in the Rome Statute, which requires both intent and knowledge, explains that intent in relation to conduct demands that the accused ‘means to engage in the conduct’ and, in relation to a consequence, that the accused ‘means to cause that consequence *or is aware that it will occur in the ordinary course of events*’.<sup>148</sup> France’s manual of the law of armed conflict thus explains that attacks on objects indispensable to the survival of the civilian population are prohibited where this ‘would result in the starvation of the population or force it to displace.’<sup>149</sup>

141 The UK, for instance, states that IHL is not violated ‘if military operations are not intended to cause starvation but have that incidental effect’. UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.27.2.

142 Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, pp. 253–57, paras 688–99.

143 US DOD, *Law of War Manual*, para. 5.20.2.

144 New Zealand Defence Force, *Manual of Armed Forces Law*, DM 69 (2 edn), vol. 4: *Law of Armed Conflict*, Wellington, 2019, para. 8.8.25.

145 Art. 54(1), 1977 Additional Protocol I.

146 Element 2, Elements of Crime for Article 8(2)(b)(xxv) of the Rome Statute.

147 ICRC commentary on Article 54 of the 1977 Additional Protocol I, 1987, <https://bit.ly/3iXSdzA>, para. 2089.

148 Art. 30(2)(a) and (b), Rome Statute (emphasis added).

149 In the original: ‘qui auraient pour conséquence d’affamer la population ou de la forcer à se déplacer’. French Ministry of Defence, *Manuel de droit des conflits armés*, Paris, 2012, p. 25.

Allowing civilians to leave the besieged area is not sufficient to allow the siege to be prosecuted should they decline to take advantage of the offer and go on to starve. Reluctance may arise, for instance, from a legitimate fear of either summary execution or arbitrary detention (and perhaps likely torture) at the hands of the besieging party.

More broadly it is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, including during a siege (whether or not kinetic attacks are being launched at the besieged area). Pertaining to food, crops, livestock, and drinking water installations and supplies, among others, this supplements the general prohibition in customary law on attacking civilian objects. The prohibition of deprivation of sources of food or supplies that are critical to the civilian population is elucidated by provisions in the two Additional Protocols of 1977. For instance, in the relevant article in the Additional Protocol II, it is stipulated that it is 'prohibited to attack, destroy, remove or render useless, for that purpose [i.e. starvation of the civilian population], objects indispensable to the survival of the civilian population, such as food stuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'.<sup>150</sup>

In its commentary on the corresponding war crime under customary law, the ICRC notes that:

*Destroying objects indispensable to the survival of the civilian population also reflects a customary prohibition. There had, in fact, been a prosecution relating to a case of destruction of crops in a scorched earth operation during World War II, although the basis of the prosecution was the destruction of property not required by military necessity.*<sup>151</sup>

According to the UK, as a result of the prohibition of starvation of civilians as a method of warfare, the customary law rule that permitted measures to dry up springs and to divert rivers and aqueducts must now be considered as applying only to water sources used exclusively by military personnel or for military purposes.<sup>152</sup>

In contrast, the US Department of Defense argues that the rule in the protocol that prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population would not apply to attacks carried out for specific purposes other than to deny sustenance. It cites as an example of permitted conduct destroying a field of crops to prevent it from being used as concealment by the enemy, or destroying a supply route that is used to move military supplies but which is also used to supply the civilian population with food.<sup>153</sup> This is subject to the prohibition whereby 'in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement'.<sup>154</sup> An exception is also foreseen in the 1977 Additional Protocol I that allows a state to engage in a 'scorched earth' defence of a party's own territory.<sup>155</sup>

150 Art. 14, 1977 Additional Protocol II.

151 ICRC, Customary IHL Rule 156: 'Definition of war crimes'.

152 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.27.2.

153 US DOD, *Law of War Manual*, para. 5.20.4.

154 Art. 54(3), 1977 Additional Protocol I.

155 Article 54(5) allows such action 'by a Party to the conflict within such territory under its own control where required by imperative military necessity'.

## Humanitarian relief

In some instances in Syria, as the Commission of Inquiry reported, ‘shortages of food, water, and medicine – often due to the Government’s deliberate obstruction of aid access – led to acute malnutrition and deaths among vulnerable groups, including children, the elderly and the infirm.’<sup>156</sup> As noted above, wilfully impeding relief supplies may ground the war crime pertaining to the prohibition on starvation.<sup>157</sup> At the least, the prohibition on starvation as a method of warfare demands that humanitarian relief to a besieged area must be allowed to proceed. In terms of threshold of need, as Gillard has observed, ‘starvation’ implies a high degree of deprivation, more significant than the ‘not adequately provided’ standard that brings into play the rules of IHL regulating humanitarian relief operations.<sup>158</sup> However, it is not necessary for deaths to occur.<sup>159</sup>

Both parties in a siege are entitled to adopt measures of control such as searches of the relief consignments to ensure that weapons (or listening devices) are not being smuggled in. The problem of course does not end there. The besieging forces will argue, sometimes with justification, that any food allowed in is going to be consumed by the fighters and not in fact distributed to the starving civilians.

## civilians who decide to remain in a besieged area do not lose their protected status

One solution to this conundrum is the departure of civilians from the besieged areas. As noted in the introduction, the Fourth Geneva Convention of 1949, which in this regard applies in an international armed

conflict only, refers to the possibility of ‘removal’ of the wounded and sick, infirm and aged civilians, children, and maternity cases from a ‘besieged or encircled area.’<sup>160</sup> But such departures must be ‘voluntary, informed, and conducted in safety, during both the actual evacuation and the subsequent arrangements for shelter.’<sup>161</sup>

Moreover, civilians who decide to remain in a besieged area ‘do not forfeit their status and protections. Hostilities cannot be conducted on the presumption that anyone who chose not to be evacuated is a fighter, and the rules regulating humanitarian relief operations continue to apply for the benefit of civilians who have remained.’<sup>162</sup>

## Sieges under international human rights law

### The right to life

The right to life comprises three main elements: a prohibition on arbitrary deprivation of life, a duty of due diligence to protect life, and the duty to investigate all potentially unlawful

156 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/46/54, para. 46.

157 Art. 8(2)(b)(xxv) and (2)(e)(xix), Rome Statute.

158 Art. 70(1), 1977 Additional Protocol I. Article 18 of 1977 Additional Protocol II uses the expression ‘suffering undue hardship’.

159 Gillard, ‘Sieges, the law and protecting civilians’, p. 10.

160 Art. 15, 1949 Geneva Convention I; Art. 18, 1949 Geneva Convention II; and Art. 17, 1949 Geneva Convention IV.

161 Gillard, ‘Sieges, the law and protecting civilians’, p. 12.

162 Ibid., p. 13.

deaths, whether or not the state's involvement is suspected or alleged. The 1966 International Covenant on Civil and Political Rights (ICCPR), which allows a state party to take measures derogating from its obligations under the covenant, explicitly excludes the possibility of any derogation pertaining to the right to life. The International Court of Justice considers that no derogation is possible even in the context of a use of nuclear weapons in an international armed conflict.<sup>163</sup> The Human Rights Committee, which oversees the implementation of the ICCPR, has similarly declared: 'Like the rest of the Covenant, article 6 [on the right to life] continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities.'<sup>164</sup>

During the negotiation of the ICCPR, several states had proposed that the text should explicitly provide that killings lawfully perpetrated by the military in time of war would not violate the right to life.<sup>165</sup> Instead, the decision was taken to prohibit 'arbitrary' deprivation of life in all circumstances. The Human Rights Committee has made it clear that use of lethal force consistent with IHL 'and other applicable international law norms is, in general, not arbitrary'.<sup>166</sup> Thus, in a situation of armed conflict, compliance with the IHL principles of distinction and proportionality in attack (as well as the underlying precautionary measures) would not normally mean that a civilian death constituted a violation of the right to life.

Conversely, as the Human Rights Committee further clarifies, practices 'inconsistent' with IHL, entailing a risk to the lives of civilians and other persons protected by IHL, including 'the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields', would violate the right to life protected under the ICCPR.<sup>167</sup>

This approach has been applied also in the regional human rights mechanisms. In 2012, in its judgment in the *Santo Domingo massacre* case, the Inter-American Court of Human Rights found violations of human rights by applying the duty to take precautions to the non-international armed conflict between Colombia and the non-state armed group, the Colombian Revolutionary Armed Forces (FARC).<sup>168</sup> The Court cited the position of the ICRC on the customary status of the norm in all armed conflict as authoritative.<sup>169</sup> The violation of the principle appears

**' the right to life continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities'** UN Human Rights Committee

163 ICJ, Nuclear Weapons Advisory Opinion, para. 25.

164 Human Rights Committee, 'General Comment No. 36: Article 6: right to life', UN doc. CCPR/C/GC/36, 3 September 2019, para. 70 (hereinafter, General Comment 36 on the right to life).

165 Bossuyt, M.J., *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff, 1987, pp. 115–25.

166 Human Rights Committee, General Comment 36 on the right to life, para. 64.

167 Ibid.

168 Inter-American Court of Human Rights, *Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, esp. paras 229–30.

169 Ibid., para. 216.

to have been determinative in the Court's finding of a violation of the right to life in those killed by an attack by means of a Second World War-era cluster bomb dropped by the Colombian Air Force.<sup>170</sup>

In its judgment in 2013 in the *Benzer* case, the European Court of Human Rights observed that 'an indiscriminate aerial bombardment of civilians and their villages ... cannot be reconcilable with ... the customary rules of international humanitarian law'. The Court held that the attacks by the Turkish air force violated the right to life of those killed by the bombing, as well as those severely injured but who survived.<sup>171</sup>

More disputed in international law is whether a non-state armed group is also bound by human rights law. It is pointed out that such groups cannot become party to a human rights treaty, such as the ICCPR or the UN Convention against Torture.<sup>172</sup> So understood, non-state armed groups do not violate human rights; they 'abuse' them. But the absolutist position has come under strain in recent years, in particular from the UN and leading jurists. After all, armed groups are at the least partial subjects of international law when they are party to an armed conflict as that notion is understood under IHL.<sup>173</sup>

Moreover, there is no doubt in any quarter as to the extent of the threat posed by non-state armed groups to the enjoyment of fundamental human rights. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has remarked, such actors 'have become a pervasive challenge to human rights protection'.<sup>174</sup> In her 2018 report to the Human Rights Council, the Special Rapporteur also maintained that such groups are bound by human rights obligations.<sup>175</sup> But by which obligations? A narrow, and perhaps the most persuasive route, is the duty on every group and entity, armed or not, to respect peremptory – *jus cogens* – norms. These are customary norms that are so fundamental that they cannot be overridden by treaty.<sup>176</sup>

Thus, as the Independent International Commission of Inquiry on Syria declared in 2012, 'at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups'.<sup>177</sup> More broadly, the UN Mission in South Sudan (UNMISS) stated in 2014: 'The most basic human rights obligations, in particular those emanating from peremptory international law (*ius cogens*) bind both the State and armed opposition groups in times of peace and during armed conflict'.<sup>178</sup>

170 Ibid., paras 228–30.

171 European Court of Human Rights, *Benzer v. Turkey*, Judgment (Former Second Section), 12 November 2013, paras. 184–5.

172 See e.g. Rodley, N.S., 'Can armed opposition groups violate human rights?', in K. Mahoney and P. Mahoney (eds) *Human Rights in the Twenty-first Century*, Dordrecht, Martinus Nijhoff, 1993, pp. 297–318.

173 Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Appeals Chamber) (Case No. SCSL-2004-14-AR72(E)), 31 May 2004, para. 22.

174 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on non-state actors, UN doc. A/HRC/38/44, 5 June 2018, para. 4.

175 Ibid., para. 8.

176 Art. 53, 1969 Vienna Convention on the Law of Treaties.

177 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc. A/HRC/19/69, 22 February 2012, para. 106.

178 UNMISS, *Conflict in South Sudan: A Human Rights Report*, para. 18.

A range of conduct will thus violate the *jus cogens* elements of respect for the right to life. The most obvious examples are arbitrary deprivation of life through deliberate extrajudicial executions (i.e. murders)<sup>179</sup> or other arbitrary killings by members of non-state armed groups. In this regard, a violation, by a non-state armed group that is party to an armed conflict, of a basic IHL rule regulating the conduct of hostilities, in particular the principle either of distinction or of proportionality in attack, will also amount to arbitrary deprivation of life, at the least where the victim dies.<sup>180</sup> This is so during a siege as it is in any amid other hostilities.

## The right to freedom from inhumane treatment

While exceptionally the right to life may be violated if the victim of an unlawful attack survives,<sup>181</sup> more often it is the right to freedom from torture or other forms of cruel, inhuman, or degrading treatment ('inhumane treatment' in short form) that is at stake. While ordinarily torture is applied to someone who is in the custody of another who acting as a public authority, whether that be the police or the army, the notion is broader in international law. The prohibition of torture is a *jus cogens* norm and thus pertains to non-state armed groups as it does to state armed forces.

Acts of torture or other inhumane treatment in a besieged area would include infliction of severe pain or suffering, such as the shooting of civilians, their use as human shields, rape, and the wilful refusal to ensure the provision of food or water to anyone in their care. Abductions and hostage-taking would also potentially be considered within this human rights rule. They may, for instance, be perpetrated by the besieging forces against the besieged civilians or by the besieged forces against the civilians in their midst.

## The right to food

The right to food is a fundamental human right and is a rule of customary law, applying in armed conflict as it does in peacetime. Where a person is in the care of a state, that state's failure to ensure sufficient and appropriate food and water will be a violation of the right to freedom inhumane treatment. If that concerns a detainee, it will also breach the duty to treat 'with humanity and with respect for the inherent dignity of the human person' all persons deprived of their liberty.<sup>182</sup> Should the detainee die as a consequence of avoidable deprivation of food and water, this will amount to a violation of the right to life.<sup>183</sup>

179 In 1987, in Section 702(c) of the Restatement of the Law, Third, Foreign Relations Law of the United States, published by the American Law Institute, the prohibition of 'murder' as a customary human rights rule was described as a norm of *jus cogens*. See also the African Commission on Human and Peoples' Rights' General Comment on the Right to Life: 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', adopted at Banjul (fifty-seventh Ordinary Session), November 2015, para. 5. See also Rodley, N.S., 'Integrity of the person', in D. Moeckli, S. Shah and S. Sivakumaran (eds) *International Human Rights Law*, Oxford, Oxford University Press, 2010, p. 222.

180 Casey-Maslen, S., *The Right to Life under International Law: An Interpretive Manual*, Cambridge, Cambridge University Press, September 2021, para. 35.39.

181 See e.g. European Court of Human Rights, *Ilhan v. Turkey*, Judgment (Grand Chamber), 27 June 2000, para. 76; Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 11 May 2007, paras 123–5.

182 Arts 7 and 10(1), ICCPR.

183 HRC, *Yekaterina Pavlovna Lantsova v. Russia*, Views, UN doc. CCPR/C/74/D/763/1997, 15 April 2002, para. 9.2.

The protections apply to all detainees, civilian or military. Accordingly, a fighter in a non-international armed conflict in a besieged area may choose to surrender. While he or she may be put on trial for offences committed under domestic law (such as treason, or insurrection, or murder, or all three) and potentially even executed in certain states upon conviction, the detainee must at all times be treated humanely. As an ICTY Trial Chamber held in its 2013 judgment in the *Prlić* case, the deliberate deprivation of food and water with intent to cause serious bodily harm and leading to the death of a detainee constitutes wilful killing as a war crime.<sup>184</sup> The prosecution had alleged that the conditions of confinement at Dretelj prison were harsh and unsanitary due to overcrowding, poor ventilation, the lack of beds and bedding, sanitation facilities, food and water, and that the Bosnian Croat army often made detainees eat amid cruel and humiliating conditions. It further alleged that, in mid-July 1993, at least one Muslim detainee died after not receiving any food or water.<sup>185</sup>

184 ICTY, *Prosecutor v. Prlić*, Judgment (Trial Chamber) (Case No. IT-04-74-T), Vol. 4, 29 May 2013, para. 1017.

185 ICTY, *Prosecutor v. Prlić*, Judgment (Trial Chamber) (Case No. IT-04-74-T), Vol. 3, 29 May 2013, para. 56.

## 4

# Avoiding or minimizing the impact on civilians of sieges: the role of key actors

Given the typically acute impact on civilians of siege warfare, parties conducting sieges and those within besieged areas not only need to comply fully with their international legal obligations but also find ways to better protect civilians. Accordingly, this section considers how, in practice, the consequences for civilians caught in a siege can be minimized – if not entirely avoided – through appropriate action by key actors. It looks at a range of options, including the choice of weapons and their manner of use, the safe evacuation of besieged areas, and the delivery of humanitarian relief, at the least to prevent the starvation of the civilian population.

The particular importance of developing doctrine and policy specifically to protect civilians in besieged areas is emphasized first. The role of the UN Security Council in protecting civilians during sieges is also considered, along with the subsidiary role of the General Assembly. Finally, some of the practical measures that civilians can take to protect themselves are recalled.

## The need to develop national military doctrine on sieges that effectively protects the civilian population

Since it appears that siege warfare cannot be avoided in certain circumstances – and all the more so if it is true that sieges will become increasingly common in years to come – **state armed forces need as a matter of urgency to examine and elaborate their military doctrine to ensure that they are conducting sieges entirely lawfully.** Part of this effort should use techniques of the developing approach of Civilian Harm Mitigation (CHM). While militaries have tactics, techniques, and procedures to minimize harm, often they are ineffective because there is a break in the chain that brings lessons learned back to those engaged in planning and overseeing combat operations. CHM tries to remedy this through doctrinal changes to the way civilian harm is considered and addressed.<sup>186</sup> Many Western militaries and the African Union see CHM as a way to improve civilian protection. But the UK needs to do more on this issue.

Indeed, armed forces, including those of the UK (which, as noted above, was directly involved in the siege of Mosul), need to consider each time they engage in siege warfare how civilian lives and property can be safeguarded to the maximum extent, beyond the confines of the law. This in turn demands the preparation of general plans for siege warfare by UK forces that can be adapted to, and focused on, each specific siege in which they engage in order to ensure far better protection of civilians than has been the case so

<sup>186</sup> NATO describes CHM as efforts to protect civilians ‘from both intended and unintended effects of hostile activities from perpetrators of violence and from own actions’. NATO, *ACO [Allied Command Operations] Protection of Civilians Handbook*, Brussels, 2020, <https://bit.ly/3ydsxa8>, para. 4-1, p. 23.

far. Regrettably, *The Integrated Review of Security, Defence, Development and Foreign Policy*, published by the UK government in March 2021,<sup>187</sup> does not mention siege warfare once (nor, for that matter, the protection of civilians in armed conflict).

Yet the protection of civilians, the UK's 2010 strategy on the topic declared, is 'central to the achievement of UK Government policy to prevent, manage and resolve conflict and to improve the effectiveness of the humanitarian system'. The strategy affirms that the protection of civilians matters from both a moral and a legal perspective. Everyone, it reaffirms, has the right not to be arbitrarily deprived of their life and the right not to be tortured. In addition, it acknowledges that the UK 'has specific obligations concerning the protection of civilians in situations where it is involved in military action'.<sup>188</sup>

## the UK *Integrated Review* does not mention siege warfare once – nor the protection of civilians in armed conflict

Population support will inevitably ebb and flow relative to the treatment they receive from the different parties involved in any siege. Thus, recognizing the oftentimes permissive boundaries of IHL, parties to an armed conflict can clearly act to either enhance or degrade the level of protection

that civilians in besieged areas receive. A policy decision that air or artillery strikes will be conducted only where there is 'near certainty' that civilians will not be harmed is an obvious centrepiece in the protection of civilians during a siege. This goes beyond the requirements of IHL. In this regard, in 2013, US President Barack Obama had established such a requirement for drone strikes by the United States,<sup>189</sup> only to relax it with respect to attacks against ISIS in Syria a year later.<sup>190</sup>

With respect to the US military, it has been suggested that not only should siege warfare be included as part of its overall military doctrine, but it should also even be 'prioritized'. Relevant doctrine, it is recommended, should establish best practices on how best to seal off terrain, provide humanitarian aid, and avoid civilian casualties<sup>191</sup> These best practices could be most usefully identified and discussed with the UK armed forces based on their own experiences. In reviewing the siege of and battle for Mosul, in 2019 two US army officers put forward five lessons for future US military operations in the next 'urban fight': (1) it is impossible to isolate a modern city; (2) difficulty increases with depth and duration; (3) attackers lose the initiative once they enter the city; (4) dense urban terrain enhances sustainment; and (5) operational reach is proportional to population support.<sup>192</sup> Implementing these lessons in the context of doctrine and policy that will better safeguard civilians demands dedicated effort and a willingness to adapt military objectives and tactics to the dictates of civilian protection.

187 HM Government, *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, London, March 2021, <https://bit.ly/3f4dPe1>

188 UK National Strategy on the Protection of Civilians in Armed Conflict, 2010, p. 2.

189 Associated Press, 'No drone strikes without "near certainty" of no civilian casualties: Obama', *Dawn*, 23 May 2013.

## The need to develop NATO doctrine on civilian protection in siege warfare

But it is not enough to focus on national doctrine. The UK's leading role within the North Atlantic Treaty Organization (NATO) means that it should be working to ensure that the alliance also has clear plans in place for the conduct of siege warfare: ones in which the protection of civilians is paramount. In June 2021, retired Lieutenant-General Michel Yakovleff, the former Vice Chief of Staff at NATO's Supreme Headquarters Allied Powers Europe (SHAPE), wrote a policy brief for the Fondation pour la recherche stratégique (Foundation for Strategic Research – FRS), a French non-profit organization and the main French centre of expertise on international security and defence issues. General Yakovleff introduced the topic by observing that no one knows where the next NATO war will be fought, 'nor when, nor against whom, nor for what reason'. But, he said, 'we all know where it will be decided: in a city'.<sup>193</sup>

'Is NATO seriously preparing for the environment in which this combat will culminate, namely, an urban one?' the general asks rhetorically. The 'short answer', he confirms, is no. Moreover, he observes, urban military operations 'are not a subsidiary of a more generic type of combined operations', but 'an entirely different set of operations'. The civilian population, 'both as an objective and a shield', possesses 'a gravity of its own, with moral, psychological, legal, political implications that utterly change the nature of the fight'.

The current NATO style of warfare, which owes much to US doctrine, is based on stand-off, long-distance precision strikes, 'delivered on an industrial scale', with the 'avowed intent of destroying any adversary long before' he can engage with NATO troops on the ground. While this allows for the minimization of casualties among NATO forces, operations conducted by 'some members' of the military alliance 'are sometimes oblivious of collateral damage at the receiving end – an issue of itself, when innocents happen to live in the targeted area'. The existing approach by NATO to such warfare, he indicates, offers two options: 'siege warfare or complete demolition, in other words: liberation by destruction'. While once, 'not long ago', this was considered acceptable in 'distant lands where some NATO members could turn a blind eye to the suffering of the population', neither option is acceptable today.<sup>194</sup>

That is not to say that no thinking is ongoing in NATO on these critical issues, just that it is not, as General Yakovleff makes clear,

**'The NATO way of war offers two options to resolve this quandary: siege warfare or complete demolition, in other words: liberation by destruction. ... In a collective defence situation, neither option is acceptable'**

Lt-Gen Michel Yakovleff,  
former Vice Chief of Staff, NATO SHAPE

190 Acosta, J. and Liptak, K., 'White House exempts ISIS strikes from civilian casualty guidelines', *CNN*, 2 October 2014, <https://cnn.it/2USFCal>

191 Beehner et al., 'The strategic logic of sieges in counterinsurgencies', p. 86.

192 Arnold and Fiore, 'Five operational lessons from the battle for Mosul', p. 58, <https://bit.ly/3kmFQRE>

193 Yakovleff, M., 'NATO is not preparing for the next war', NATO Briefs Series No. 2, FRS, Paris, 10 June 2021, p. 1, <https://bit.ly/3zHU2cf>

194 *Ibid.*, pp. 1-2.

being accorded sufficient priority, nor is the reflection on siege warfare in particular mature. In November 2014, NATO's Military Committee tasked the alliance's Allied Command Transformation to lead a conceptual study on urbanization. The detailed study, issued in 2016, showed that NATO needed to 'enhance and advance' its methods of operating doctrinally, organizationally, and materially on urban warfare, as well as its leadership and training on the topic.<sup>195</sup> In 2019, two military experts declared that it was not a matter of 'if' but rather 'when' NATO will be involved in urban operations 'across the spectrum of conflict from humanitarian to stabilization missions and combat operations'. Indeed, they argue, precisely *because* urban operations are 'complex, challenging, and difficult to sustain and win, cities are also the most likely environment for a serious adversary to challenge NATO'.<sup>196</sup>

**The UK should lead a specific reflection within NATO on the protection of civilians in siege warfare.** It is revealing that NATO's latest *Protection of Civilians Handbook*, published in 2020, does not specifically refer to sieges once, although it does at least include an acknowledgement that operations 'may be conducted amongst the population, for example in urban areas'.<sup>197</sup>

The handbook notes that 'good practices' were used during the battle of Mosul, such as using a combination of sources to verify civilian presence near a target location and using smaller or precision-guided munitions, 'especially in the first phase of operations' in east Mosul. But these efforts faced 'limitations' when operations intensified in the densely populated Old City of the western part of the city.<sup>198</sup> The coalition forces, the handbook concedes, 'lacked sufficient understanding of urban terrain' to anticipate the effect from weapons on old structures, and the secondary explosions from ISIS tactics of booby-trapping buildings resulting in civilian harm.<sup>199</sup>

The concept of CHM, mentioned above, calls for consideration of potential primary, secondary, and tertiary effects. These are detailed by NATO to include the following:

**Primary:**

- Death and injury to civilians
- Sexual violence
- Destruction of civilian objects (i.e. houses) and critical infrastructure (i.e. water treatment plant)

**Secondary:**

- Forced displacement
- Family separation
- Inadequate access to food and water
- Damaged infrastructure, affecting transportation routes, electricity, water and telecommunications access
- Decreased mobility, lack of freedom of movement

195 NATO, 'NATO Urbanisation Project', 2021, <https://bit.ly/3rG4ZIQ>

196 Bodnar, Lt.-Col. J. and Collins, S., 'NATO joint military operations in an urban environment: A capstone concept', *Three Swords Magazine* 34, 2019, pp. 93–6, <https://bit.ly/3BQGY6s>, at p. 94.

197 NATO, *ACO Protection of Civilians Handbook*, para. 2-2.

198 *Ibid.*, p. 21, para. 3-3.

199 *Ibid.*, p. 22.

- Lack of access to medical attention
- Damages to schools, disruptions to education
- Disruption in financial services, access to banking and cash

**Tertiary:**

- Weakened government and judicial services
- Traumatized population
- Sluggish and dysfunctional infrastructure
- Lack of medical services
- Market disruption, reduced economic activity
- Cycles of violence
- Increase in criminality
- Spread of infectious diseases.<sup>200</sup>

Blame for civilian harm was attributed to local forces in Iraq and Syria on the basis that they did not conduct post-strike assessments to better understand the impact of their operations on civilians and civilian infrastructure. Without this information, both local forces and the coalition lacked the capacity to adjust tactics appropriately in order to reduce civilian harm. What is more, the tempo of operations in Mosul and Raqqa ‘outpaced resources allocated to analyse, in real time, the causes of civilian harm’ in order to be able to inform adjustment of tactics to address that harm.<sup>201</sup> **Post-strike assessments should be conducted by all parties to armed conflict engaged in a siege to determine compliance with the law and to learn lessons that could better protect civilians in such scenarios in the future.**

## The need for greater restraint on means and methods of warfare

Central to any improvement in the protection of civilians during a siege is the increased restriction on the means and methods of warfare used in attacks. Simple measures such as eschewing the use of unguided rockets, especially in wildly inaccurate barrages from a multiple-barrelled rocket launcher, will save civilian lives. So too will the systematic employment of precision-guided munitions instead of gravity ordnance. Reducing the explosive yield incorporated in missiles will consequently limit the impact of blast and fragmentation and thus mitigate their potentially indiscriminate effects. The United States did this to good effect in its Hellfire missiles upon direction by President Barack Obama a decade ago.<sup>202</sup>

Reducing the extent of indirect fire is also key to reducing civilian casualties (*see Box*). This can be aided, for instance, by using remotely piloted vehicles (‘drones’) that have a direct video feed to the operator, helping to ensure that only lawful military objectives are targeted and that proportionality

central to any improvement in the protection of civilians during a siege is the increased restriction on the means and methods of warfare used in attacks

<sup>200</sup> Ibid., p. 25.

<sup>201</sup> Ibid.

<sup>202</sup> Becker, J. and Shane, S., ‘Secret “Kill List” proves a test of Obama’s principles and will’, *The New York Times*, 29 May 2012.

## Indirect fire and AMISOM in Somalia

In 2011, the African Union Mission in Somalia (AMISOM), which acts in support of the Somali government in its fight against al-Shabaab, developed a policy on indirect fire which resulted in reduction of harm to the civilian population. AMISOM had come under strong criticism for responding to al-Shabaab fire without considering the risks to civilians. In late September 2009, Human Rights Watch told the UN Human Rights Council that opposition fighters had deployed unlawfully in densely populated civilian neighbourhoods and at times used civilians as shields to fire mortars at government forces and AMISOM positions, 'attacks conducted so indiscriminately that they frequently destroy civilian homes but rarely strike military targets'. Often, however, the AMISOM forces would respond in kind, 'launching indiscriminate mortar strikes on the neighbourhoods from which opposition fighters had fired and then fled, leaving only civilians to face the devastation that ensues'.<sup>203</sup>

As a rule, AMISOM forces no longer engage in counter-battery fire targeting the artillery and mortar positions of al-Shabaab, at least when these are located within population centres. The new policy further limits their overall use to firing on depopulated areas where there is little risk of collateral damage. Direct fire weapons, such as long-range, large-calibre rifles, can provide a rapid and accurate response, with less potential for civilian casualties than indirect fire. The indirect-fire policy reflected the fact that civilian casualties served to undermine the mission and longer-term political objectives.

Also part of the new policy is the duty to ensure that maps are kept up to date, and that hospitals, schools, residential areas, markets, places of worship, and internally displaced persons (IDP) camps are defined on maps as No Fire Zones. The use of 107mm rocket launchers is also restricted. The rockets may still be used to disperse groups of insurgents en route to deployment but only single shots may be fired. Under no circumstances are 107mm rockets to be fired in salvos.<sup>204</sup> In all circumstances, an After-Action Review must be conducted after an incident, in order to learn lessons and improve training.<sup>205</sup>

assessments can be made in almost real time. This brings obvious military benefits as well as meeting humanitarian goals.

The use of precision-guided munitions and 'eye-in-the-sky' technology, however, cannot be relied on to minimize civilian casualties, as the experience of the siege of Mosul makes clear. A range of other factors need to be taken into account, including the size, explosive yield and blast radius of munitions used; rates of weapons malfunction; the presence of potentially large numbers of civilians who are hiding and may be invisible to surveillance; and, crucially, the quality of targeting intelligence. Importantly, the latest NATO *Protection of Civilians Handbook* identifies the need for the military 'to take into account the negative wide-area effects of explosive weapons in populated and/or urban areas, including foreseeable second and third order effects'.<sup>206</sup>

203 'Accusations traded over rising casualties at Mogadishu market', *New Humanitarian*, 2 December 2010, <https://bit.ly/3esisON>

204 Chinese Type 63 rocket artillery is notoriously inaccurate. The rockets cannot be accurately directed against a point target and when fired in a salvo will encompass a wide area with indiscriminate effects.

205 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Reducing the Humanitarian Impact of the Use of Explosive Weapons in Populated Areas: Compilation of Military Policy and Practice*, 19 October 2017, <https://bit.ly/2U9XMo5>, p. 25.

206 NATO, *ACO Protection of Civilians Handbook*, para. 4-3, p. 29.

Intergovernmental discussions are currently at an advanced stage on the agreement of a Political Declaration on the use of explosive weapons in populated areas (EWIPA). The draft declaration contains potentially valuable guidelines for states. In the context of this process, Ceasefire has called for assessments of expected civilian deaths or injury or damage to civilian objects to include not just immediate direct effects but also the medium- and longer-term effects of explosive remnants of war, and the reverberating effects of damage to vital civilian infrastructure.<sup>207</sup> In its critique of the draft declaration of January 2021, Human Rights Watch called for the text to break the impacts of the use of explosive weapons in populated areas into ‘direct, indirect, and reverberating effects’ to ensure the declaration fully captures the categories of harm to civilians.<sup>208</sup>

In September 2019, the UN Secretary-General and the ICRC President issued a joint appeal calling on states and all parties to conflict to avoid the use of explosive weapons with a wide impact area in populated areas. Referencing recent sieges or siege-like situations in Idlib, Tripoli, Mosul, Aleppo, Raqqa, Taiz, Donetsk, Fallujah and Sana’a, the two leaders called on all parties to armed conflict ‘to employ strategies and tactics that take combat outside populated areas to try to reduce urban fighting altogether’, and urged ‘parties to allow civilians to leave besieged areas.’<sup>209</sup>

More broadly, given the imprecision as to the implementation of the principle of distinction with respect to the accuracy of weapons, and the lack of clear meaning of ‘excessive’ in the proportionality principle, states could do far more to clarify the law. **There is a need to understand what margin of error in targeting weapons in armed conflict is unlawful under international humanitarian law/the law of armed conflict and what margin of error is criminal.**

**the UN Secretary-General and the ICRC President called on all parties to armed conflict ‘to employ strategies and tactics that take combat outside populated areas to try to reduce urban fighting altogether’**

## The role of evacuation of besieged areas in civilian protection

Civilian departures from besieged areas is one approach favoured by IHL. This takes them out of the line of fire while, in theory at least, enabling them to be properly fed, treated for wounds or sickness, given access to safe drinking water, and protected against further harm. As has been duly noted, evacuations can be ‘a way of striking a balance between the military aims pursued in sieges and belligerents’ obligations towards civilians.’<sup>210</sup>

207 Ceasefire, ‘Protecting civilians from the use of explosive weapons in populated areas: Towards a strong political declaration’, London, 2019.

208 Human Rights Watch, *Analysis of the Draft Elements of a Political Declaration on the Use of Explosive Weapons in Populated Areas*, 22 February 2021, <https://bit.ly/3hBVdDs>

209 Joint Appeal by UN Secretary-General and the President of the ICRC on the Use of Explosive Weapons in Cities, Note to correspondents, 18 September 2019, <https://bit.ly/3lcN0kb>

210 Gillard, ‘Sieges, the law and protecting civilians’, p. 12.

Not everyone agrees with this analysis. Writing in 2019 for *International Law Studies*, a publication of the US Naval War College, Sean Watts, Professor of Law at the Creighton University School of Law, addressed what he termed ‘humanitarian logic’ and international law applicable to sieges. He endorsed retaining civilians in besieged areas as a military strategy ‘to contribute to the depletion of food stores and water that sustain enemy forces to hasten capitulation.’<sup>211</sup> Moreover, as he notes, the provisions of the 1949 Geneva Convention IV on evacuation of besieged areas do not – at least not explicitly – extend to ‘healthy adult civilians who are not pregnant or aged’. Moreover, the convention only obligates that *attempts* be made to ensure the safe departure of the vulnerable: ‘endeavour to conclude local agreements’, in the wording of Article 17.

even if agreement is secured on evacuations, there may be an understandable reluctance on the part of some civilians to leave and pass into the hands of the enemy with their fate equally uncertain

Even if agreement is secured on evacuations, however, there may also be an understandable reluctance on the part of some civilians to leave and pass into the hands of the enemy with their fate equally uncertain. The Independent International Commission on Syria published a policy paper on sieges in 2018. In it, the commission noted that the evacuation from besieged areas of civilians who were perceived to be sympathetic to opposition

factions ‘appears also to serve a Government strategy of punishing those individuals.’<sup>212</sup> The commission called on the parties to the conflict to refrain from ‘any actions that can lead to forced or involuntary displacement of the population.’<sup>213</sup>

## The obligation to allow humanitarian relief

Humanitarian relief, in the form of food and water, medical assistance, and casualty evacuation, is life saving for civilians in besieged areas. In cases of encirclement, the UK specifically recognizes ‘an obligation to allow essential relief supplies through to the civilian population.’<sup>214</sup> Impartial humanitarian organizations complying with humanitarian principles in a siege can minimize the perception that such provisions are assisting the enemy fighters. But humanitarian actors still need to be honest about the challenges they face. (The perpetual trade-off between protection and access will not be resolved here.)

The *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, published in 2016, offers guidance on when the withholding of consent to humanitarian relief will violate a state’s obligations under international law with respect to the civilian population (see *Box overleaf*).<sup>215</sup>

211 Watts, S., ‘Humanitarian logic and the law of siege: A study of the Oxford guidance on relief actions’, *International Law Studies* 95, 2019, <https://bit.ly/3i6QFpf>, pp. 18–19.

212 Independent International Commission of Inquiry on the Syrian Arab Republic, *Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate*, Policy Paper, Geneva, 29 May 2018, <https://bit.ly/3vKX1Qi>, p. 5.

213 *Ibid.*, p. 8.

214 UK Ministry of Defence, *Manual of the Law of Armed Conflict*, para. 5.34.2, p. 87.

215 Akande, D. and Gillard, E.-C., *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, Commissioned by the UN Office for the Coordination of Humanitarian Affairs and Oxford Institute for Ethics, Law and Armed Conflict, 2016, <https://bit.ly/3krAXXI>

## Withholding consent to humanitarian relief operations

- (i) Consent to humanitarian relief operations must not be withheld arbitrarily if:
- civilians are inadequately provided with essential supplies; and
  - the party responsible for meeting their needs does not provide the necessary assistance; and
  - offers of services have been made by actors capable of carrying out relief operations that are exclusively humanitarian and impartial in character, and conducted without any adverse distinction.
- (ii) Consent is withheld arbitrarily if it is withheld:
- in circumstances that result in a violation of obligations under international law with respect to the civilian population in question, including, in particular, obligations under international humanitarian law and international human rights law (for example, in circumstances which violate the prohibitions on starvation of the civilian population as a method of warfare or on collective punishment of the civilian population, or discriminate against a particular section of the civilian population by selectively withholding consent); or
  - in violation of the principles of necessity and proportionality (for example, limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim); or
  - in a manner that is unreasonable, or that may lead to injustice or lack of predictability, or that is otherwise inappropriate (for example, a total failure to provide reasons for withholding consent).<sup>216</sup>

But there is not universal support for ensuring that the civilian population in a siege receive humanitarian relief, even among legal experts. In this regard, Professor Watts attacks the *Oxford Guidance* for its stance on consent, arguing that the discretion to withhold consent to offers of humanitarian relief ‘is an entirely logical, if potentially cruel, outgrowth of the isolation imperative and operational experience’.<sup>217</sup> Watts concedes that, throughout the history of warfare, ‘human suffering has seldom been more dire than during sieges’, but asserts that ‘while the humanitarian logic and regulatory aspirations of the Oxford Guidance are admirable, military logic and military imperatives require equally deliberate attention in formulating the international law regulating the critical matter of humanitarian relief during armed conflict’.<sup>218</sup>

Watts observes that a broad interpretation of the prohibition on starvation of the civilian population ‘essentially compels besieging forces to alleviate starvation of not only civilians but also of trapped enemy forces’, since the military ‘will inevitably consume supplies permitted to enter the besieged area or will be sustained by supplies no longer consumed by civilians allowed to evacuate’.<sup>219</sup> The main thrust of his argument is that civilians should remain in a besieged area and not receive humanitarian relief, as this will quicken the end of the siege. (This contention is hardly borne out by the operational realities in Aleppo and Mosul; in practice, given the challenge of isolating a modern city, the hardship was experienced almost exclusively by civilians.) Where his analysis of the existing law falls short is in his belief that those civilians who remain in a besieged area should not be provided with food or water since their ‘incidental’ starvation during a siege is not unlawful: ‘only military operations undertaken with the *purpose* of starving civilians are prohibited’.<sup>220</sup> This,

216 Ibid., paras 50–1.

217 Watts, ‘Humanitarian logic and the law of siege’, p. 48.

218 Ibid., pp. 4, 6–7.

219 Ibid., pp. 18–19.

220 Ibid., p. 19.

implicitly, would require a self-incriminating statement by the besieging commander that this is exactly what he plans to do, hardly a likely scenario. Only then could a starving civilian be given humanitarian relief and assistance.

With respect to the interrelationship between IHL (the law of war) and international human rights law, Watts criticizes the *Oxford Guidance* for misrepresenting, ‘whether by error, or by a clever turn’,<sup>221</sup> the dictum of the International Court of Justice in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Therein, the Court declared that: ‘In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.’<sup>222</sup> This in effect makes the use of weapons in the conduct of hostilities only a violation of the right to life when that use violates the principles of distinction or proportionality or of precautions in attack.

In his legal analysis, however, Professor Watts appears to confuse two strands of IHL/the law of war: Hague Law (which regulates the conduct of hostilities, including the use of all weapons) and Geneva Law, which focuses on alleviating the suffering of civilians, the sick and the wounded, and detainees. Humanitarian relief falls under the rubric of latter, not the former. He also omits to cite the Court’s later dicta in its 2004 Advisory Opinion on the Palestinian Wall (and reproduced with approval in its 2005 judgment in the contentious case between the Democratic Republic of Congo and Uganda). Therein, the Court determined that: ‘As regards the relationship between international humanitarian law and human rights law, there are ... three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.’<sup>223</sup> The right to life, in the context of a siege, applies to both Hague Law and Geneva Law. But the greatest need in humanitarian terms is to refrain from methods of warfare that lead inexorably to the starvation of civilians.

In any event, **the duty on states and armed groups not to arbitrarily withhold consent to humanitarian relief for a starving civilian population in a besieged area demands clear and urgent confirmation in international law.** One way to do this would be to draft and pass a UN General Assembly resolution on the issue. Such a resolution could usefully be adopted that builds on the content of Resolution 71/130 of 2016 (discussed further below), which ‘demand[ed]’ that ‘rapid, safe, sustained, unhindered and unconditional’ humanitarian access be granted throughout Syria ‘for the United Nations and its specialized agencies, and all humanitarian actors’.<sup>224</sup> A new UN resolution, which addressed humanitarian assistance without reference to a specific context – and especially if it were adopted without a vote (or by consensus) – would constitute important evidence of *opinio juris* in the formation of international custom.

221 *Ibid.*, p. 36.

222 ICJ, Nuclear Weapons Advisory Opinion, 1996, para. 25.

223 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 216.

224 UN General Assembly Resolution 71/130, adopted on 9 December 2016 by 122 votes to 13, with 36 abstentions, operative para. 2.

## The role of the UN Security Council in civilian protection

Under the UN Charter, the UN Security Council has primary responsibility for the maintenance of international peace and security.<sup>225</sup> Since 1999, the Security Council has considered that the protection of civilians is not only a central part of its work,<sup>226</sup> it has also authorized the use of force to ensure that civilians are protected, at least from imminent threat of physical violence.<sup>227</sup>

At the meeting of the Security Council on 21 September 2018 on the protection of civilians in armed conflict, the Council President issued a statement on its behalf.<sup>228</sup> The council reaffirmed its commitment to treat the protection of civilians in armed conflict as one of the core issues on its agenda. It further reaffirmed that parties to armed conflict ‘bear the primary responsibility to take all feasible steps to ensure the protection of civilians,’ while recalling that states ‘bear the primary responsibility to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction.’

In May 2018, in its Resolution 2417 the council underlined in a preambular paragraph the obligations upon parties to armed conflicts to allow and facilitate ‘the rapid and unimpeded passage of impartial humanitarian relief to all those in need.’<sup>229</sup> In an operative paragraph, the council ‘strongly’ condemned ‘the unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict-induced food insecurity in situations of armed conflict, which may constitute a violation of international humanitarian law.’<sup>230</sup>

But in relation to Syria, with Russia supporting the government in power, and France, the UK, and the United States seeking its replacement, the Security Council has sometimes been stymied with regard to taking effective action to protect civilians in besieged areas. Its Resolution 2401 of February 2018 did demand that all parties allow safe, unimpeded and sustained access for UN and implementing partners’ humanitarian convoys, including to the ‘2.9 million people in hard-to-reach and besieged locations,’ but it made the implementation of the obligation subject to a prior cessation of hostilities.<sup>231</sup> In its Resolution 2449, adopted in December of the same year, the council condemned once more attacks on schools and medical facilities; the indiscriminate use of weapons, including artillery, barrel bombs and air strikes; indiscriminate shelling by mortars, car bombs, and suicide attacks; as well as the widespread use of torture, ill-treatment, arbitrary executions, extrajudicial killings, enforced disappearances, sexual and gender-

225 Art. 24, 1945 Charter of the United Nations.

226 The adoption of Security Council Resolution 1265 on 17 September 1999 was the first time the council had dedicated a resolution to the protection of civilians as a subject of global importance to international peace and security in its own right.

227 UN Security Council Resolution 1270, adopted by unanimous vote in favour on 22 October 1999, operative para. 14.

228 Statement by the President of the Security Council, UN doc. S/PRST/2018/18, 21 September 2018.

229 UN Security Council Resolution 2417, adopted by unanimous vote in favour on 24 May 2018, fourteenth preambular para.

230 *Ibid.*, operative para. 6.

231 UN Security Council Resolution 2401, adopted by unanimous vote in favour on 24 February 2018, operative para. 5.

## ‘Mariupol goes to Aleppo’: Ukraine’s cities facing siege



Following the Russian invasion of Ukraine that began on 24 February 2022, a number of Ukrainian cities came under military bombardment, including the capital Kyiv and the eastern city of Kharkiv. In an operation to establish a land bridge between Crimea and the Donbas, Russian forces captured Kherson and encircled the Black Sea city of Mariupol.

Within days of the Russian invasion there were numerous reports of violations of international humanitarian law, such as the targeting of civilian objects, including educational and medical facilities, indiscriminate artillery shelling and the use of cluster munitions in or near residential areas (the majority of civilian casualties were due to the use of explosive weapons in populated areas). In an unprecedented move, 41 states including the UK referred the situation in Ukraine to the International Criminal Court. After the Russian Federation used its veto power to stall a UN Security Council resolution, an overwhelming 141 countries voted on 2 March for a ‘Uniting for Peace’ resolution at the UN General Assembly demanding that Russia ‘immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders’.

By the beginning of March 2022, Mariupol was reported to be under siege. The city was surrounded by Russian troops from three directions, the deputy mayor Serhiy Orlov told the BBC, and Mariupol was without water, electricity and sanitary systems. Bombardment was continual and the deputy mayor claimed that the Russian president was deliberately targeting civilian objects. He compared the fate of his city with the conflict in Syria: ‘Today Putin’s style of war is like Aleppo, so Mariupol goes to Aleppo’.

Under fire, Mariupol’s streets were largely deserted. Most of the civilian population, however, was still present in the city. As in Aleppo or Mosul, many civilians were hiding in underground shelters, not visible to surveillance but still vulnerable to air or artillery bombardment or collapsing structures. Although a tentative agreement had been reached between Ukraine and Russia on the establishment of humanitarian corridors in Ukraine, the ICRC warned that evacuation may not be feasible for the elderly, persons with disabilities and other vulnerable populations, and that civilians who remained were still entitled to protection. The first attempts to open a humanitarian corridor for evacuees from Mariupol had to be abandoned due to continued Russian shelling of the evacuation route.

At the time of publication of this report, Mariupol and other cities in Ukraine continued to face Russian attack.

based violence, and all grave violations and abuses committed against children.<sup>232</sup> But it did not even mention the conduct of sieges, with Russia opposed to any notion that sieges as a method of warfare would be denoted *per se* unlawful.

Given the impasse in the Security Council, a resolution on Syria was adopted in the UN General Assembly in December 2016. By the terms of the resolution, introduced by Canada as its main co-sponsor and later adopted by a recorded and contested vote, the General Assembly expressed outrage at the recent escalation of violence, particularly in Aleppo, and demanded an immediate and complete end to all attacks on civilians and civilian objects and to all sieges throughout the country.<sup>233</sup> None of the aims of the resolution would, though, be implemented on the ground in Syria.

## The civilian population and self-protection

Civilians in besieged areas are often caught between two elephants. They can opt to provide information about lawful military targets to the besieging forces with a view to bringing the siege to a speedier end, but they obviously do so at their extreme peril. Their use as human shields, directly or indirectly, and on a forced or voluntary basis, has already been recounted in a number of instances earlier.

As the siege proceeds, simple protective measures can save lives and limbs. Such measures cover a huge range, from simple stockpiling of essential medicines to ensuring there are heavy curtains in the windows that are closed to prevent deadly shards of glass being projected by blast or fragmentation. Having reinforced areas under the stairs in a house can be a refuge that may replace a bunker. Knowledge of first aid can keep a badly injured person alive until expert medical help can be provided. **Relevant IHL training for both military and humanitarian personnel should include information about common self-protection measures taken by civilians to challenge the assumption that where civilians are not visible they are not present.**

There is also increasing understanding of the importance of information exchange for disaster-affected populations, including in situations of armed conflict. Humanitarians recognize that keeping people connected to each other, providing information for and communicating with people affected by conflict are among the most important elements of emergency response.<sup>234</sup> This is so, even though some humanitarian organizations remain cautious about the balance between benefits and the risks – primarily in relation to protection – of collective approaches to two-way communication, particularly in situations of armed conflict.<sup>235</sup>

232 UN Security Council Resolution 2449, adopted by unanimous vote in favour on 13 December 2018, fifth preambular para.

233 UN General Assembly Resolution 71/130, adopted on 9 December 2016 by 122 votes to 13, with 36 abstentions, operative para. 1.

234 Communicating with Disaster-Affected Communities (CDAC) Network, *Collective Communication and Community Engagement in Humanitarian Action: 'How to' Guide for Leaders and Responders*, London, 2019, p. 10.

235 CDAC Network, *The Role of Collective Platforms, Services and Tools to Support Communication and Community Engagement in Humanitarian Action*, Policy Paper, London, April 2017, p. 23.

The Core Humanitarian Standard of 2014, developed by three leading non-governmental organizations, stipulates that communities and people affected by crisis should know their rights and entitlements, have access to information, and be able to participate in decisions that affect them.<sup>236</sup> While this work has not focused on sieges, **there is an opportunity and a need to identify specific information that can support civilian resilience during sieges.** This information needs to be inclusive, paying particular attention to the gender, age, and diversity of the population, including language, ethnic background, and culture. It must include provision to ensure it is accessible and accessed by persons with disabilities, who are all too often forgotten about in armed conflict.<sup>237</sup> Their prevalence in a siege is likely to be especially high. At the same time, communication and community engagement approaches require a careful assessment of risk, especially in situations of armed conflict, given that engaging individuals or certain groups may put them at greater risk or alienate them.<sup>238</sup>

Finally, there is growing interest in the potential role of civilians in ceasefire monitoring, including the monitoring of humanitarian access. With the expansion of communications technology enabling secure reporting, civilians on the ground may be well placed to report ceasefire violations, including those that traditional ceasefire monitors find it hard to track, such as house-to-house operations, sexual and gender-based violence, and pillage. Again, this requires careful risk assessment. **Ceasefire monitoring agreements should be designed and implemented to include the receipt and protection of information from civilian sources.**

236 CHS Alliance, Group URD, and the Sphere Project, *Core Humanitarian Standard on Quality and Accountability*, 1st edn, Geneva, 2014, Standard 4, p. 13.

237 Priddy, A., *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, p. 13. The UN Department of Peace Operations' 2019 policy on the protection of civilians in UN peacekeeping operations has a single reference to the importance of planning for the needs of persons with disabilities.

238 CDAC Network, *Collective Communication and Community Engagement in Humanitarian Action*, p. 13.

# Recommendations

1. Given the rising incidence of siege warfare, state armed forces should as a matter of urgency examine and elaborate their military doctrine to ensure that they are conducting sieges entirely lawfully.
2. The UK should promote a specific reflection within NATO on the protection of civilians in siege warfare, given the devastating consequences of sieges for civilian populations. This should include *inter alia*:
  - research into and development of alternative methods for isolating enemy forces (including in counterinsurgency operations), rather than besieging large urban conurbations;
  - the need to ensure that rules of engagement reflect civilian harm avoidance or mitigation techniques specific to situations of siege;
  - the improvement of pre-attack proportionality assessment procedures, including incorporating an estimation of the reverberating effects on civilians, including on vulnerable members of the population such as wounded, sick, pregnant and aged persons, children and people with disabilities;
  - clarification as to what margin of error in targeting weapons in armed conflict is unlawful under international humanitarian law/the law of armed conflict and what margin of error is criminal.
3. Post-strike assessments should be conducted by all parties to armed conflict engaged in a siege to determine compliance with the law and to learn lessons that could better protect civilians in such scenarios in the future. Given common discrepancies between civilian harm reported by military actors and harm reported by civil society and the local population on the ground, processes for documenting civilian harm should be improved and triangulated between internal and external sources.
4. The UK should join other states in supporting the agreement of a strong Political Declaration on the use of explosive weapons in populated areas, and commit to avoiding the use of explosive weapons with wide-area effects in populated areas, in particular where populations are living under siege. The commitment should be to restrict the use of such weapons unless sufficient mitigation measures are taken to limit their wide-area effects and the risk of civilian harm that arises therefrom.
5. The UK should withdraw its stated understanding that IHL is not violated ‘if military operations are not intended to cause starvation [of the civilian population] but have that incidental effect’. It should commit unequivocally to the prohibition on the starvation of civilians as a method of warfare.

6. The duty on states and armed groups not to arbitrarily withhold consent to humanitarian relief for a starving civilian population in a besieged area demands clear and urgent confirmation in international law. The UK should support the drafting of a UN General Assembly resolution to this end.
7. Relevant IHL training for both military and humanitarian personnel should include information about common self-protection measures taken by civilians and challenge the assumption that where civilians are not visible they are not present.
8. Further research and education should be undertaken to identify and disseminate specific information that can support civilian resilience during sieges.
9. Ceasefire monitoring agreements should be designed and implemented to include the consideration and protection of information from civilian sources.



# Protecting civilians in siege warfare:

## Constraints on military action

### In brief

The siege is a longstanding method of warfare, but with modified tactics and new weapons, it has seen a rising incidence in recent years. There is one constant: the severity of the humanitarian impacts on civilians resulting from the intense and lethal methods of warfare inherent in sustained bombardment and denial of access to adequate food and medicine. These combine not only to kill or injure civilians but also to persistently decrease food security and degrade medical capacity to treat the sick and the wounded, further exacerbating the negative humanitarian consequences for the civilian population in a besieged area.

Recent trends in warfare show a concerted shift from rural to urban fighting, in itself a significant cause of

rising civilian harm. But in a siege, civilians are effectively trapped in the battlespace. Over the last decade, major city sieges in the Middle East in Syria, Iraq and Yemen, as well as in Ukraine, Ethiopia and the Philippines, have together seen tens of thousands of civilian casualties and massive destruction to civilian infrastructure.

This report considers the international law constraints on siege warfare and the role of key actors in avoiding or minimising the impact of sieges on civilians. It ends with a series of specific recommendations for the UK, NATO and other military actors to improve civilian protection.

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