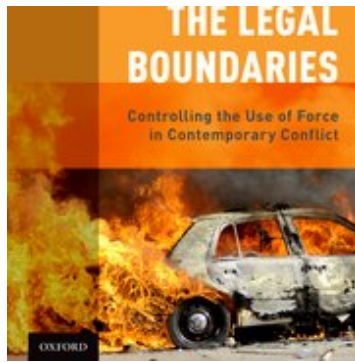


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## INTERCROSS RESOURCES

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This week Kenneth Watkin has written a summary exclusively for **Intercross** of his new book, **Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict (Oxford University Press, 2016)**.

The international law governing armed conflict is at a crossroads. A well-established framework of law that has primarily been designed to control the resort to, and conduct of inter-State conflict is now being forced to confront 21st Century violence. The contemporary threats are significantly different than those of the previous century. While the danger of inter-State conflict remains real, the predominate security threats involve insurgencies with violence sometimes bordering on the level of inter-State conflict, transnational terrorism, and criminal gangs transcending national borders. Even when conventional war between States has occurred it has been followed by lengthy counterinsurgencies where terrorism and criminal activity have flourished. These subsequent internal conflicts have presented a much more significant challenge than simply defeating the State's conventional forces

Conflict between states and non-state groups is not new. What is new is that non-State actors increasingly operate transnationally. For example, the Islamic State and Al Qaeda have been recognized by the United Nations as **global threats**. Non-State actors do not respect the borders upon which the State-focused international law system is based. The impact of transnational terrorism has been felt in such

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violence spectrum where the armed conflict and law enforcement paradigms overlap. A particular challenge for international law is how to deal with threats that resemble “criminal insurgencies”, such as where drug trafficking paramilitary gangs take on the attributes of insurgent groups challenging the State in a competition for ungoverned or poorly governed spaces. Added to this are uniquely criminal gangs focused on economic gain. These groups thrive in regions where governance is weakest, and seek to perpetuate ineffective governance instead of seizing the reins of government. They engage in acts such as piracy and hostage taking that threaten the citizens of more stable States.

One of the greatest challenges facing the international legal community is the historically State centric focus of international law with its overwhelming emphasis on inter-State warfare. While there is a relatively well developed body of treaty and customary law applicable to international armed conflict, the same cannot be said for conflict with non-State actors. Further, there is an interpretive preference to treat the various bodies of law impacting on armed conflict in an exclusionary fashion. Those laws include international humanitarian law; the law governing the recourse to war, including State self-defence; international human rights law; domestic law, including human rights law; and international criminal law. In addition, international lawyers have a communication challenge. The highly technical, and even insular nature of this aspect of international law is reflected in the tendency by international lawyers to use Latin (e.g. *jus ad bellum*, *jus in bello*, *lex specialis*, *lex lata*) to describe concepts that need to be communicated to a 21st Century audience. The use of such terms does not effectively contribute to resolving these complex strategic and operational challenges.

Practitioners often find themselves struggling to simultaneously apply these international and domestic

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attempt to apply these areas of law. The boundaries placed around these bodies of law are twofold. First, there is the outer limits of established treaty and customary law, which is in turn limited by a historic focus on inter-State conflict. Secondly, internal barriers are frequently applied between each area of law. One example of the internal boundaries is the separation of the law governing State self-defence from humanitarian law. The purpose is to ensure the application of the latter body of law equally to all belligerents notwithstanding the purpose for which they are fighting. Another example of the separation between bodies of law has become almost ideologically charged. In that regard it is not uncommon to have the respective proponents of international humanitarian law and human rights law deny any application of the other body of law in the midst of armed conflict. The emphasis on legal boundaries results in formal, and frequently rigid, approaches towards applying each legal framework. Such formalism does not work well in practice. In this respect, the theoretical discussion can often appear to be far removed from the practical security challenges facing States.

However, while lawyers seem increasingly mired in debate about such issues the nature of conflicts involving 21st Century security threats is forcing reconsideration of these categorical approaches. As Adam Roberts has **noted** the separation between the law relating to State self-defence and humanitarian law “has never been absolute”, and conflicts within States and against terrorism “have always raised difficult challenges in relation to the application—let alone the equal application—of the laws of war.”

Contemporary conflict is forcing legal practitioners to consider the application of law in its broadest sense. This has led to the adoption of the doctrinal term “operational law” to describe the wide range of international and domestic laws impacting on military operations. The change toward a more holistic approach is also reflected in Harold Koh’s 2010 **reference** to “the law of 9/11”, and a



determine how these bodies of law interface and interact. This issue can arise in a myriad of contexts including the simultaneous application of the law governing State self-defence and humanitarian law, the human rights and humanitarian law interface, the post 9/11 “drone war”, the categorization of conflict, and the protection of nationals.

Notwithstanding the “secularization” of international law a basis for assessing the interaction of these bodies of law arises from their grounding in Just War theory. Of particular relevance is the “proper authority” principle, which makes the State the focus of the external use of force (international armed conflict), as well as responsible for the maintenance of order over those being governed (conflict not of an international character). It is the obligations of governance that mandates the application of human rights based norms whether operating within the State’s own territory, or, consistent with an increasingly accepted view, externally within another (e.g. occupation, assistance to another State fighting an insurgency). However, one challenge in assessing how the various bodies of law interact is reflected in the often confusingly common use of Just War based terminology such as necessity, proportionality, imminence, immediacy, etc. For example, despite their shared origins, terms like necessity and proportionality do not mean the same thing when dealing with State self-defence, humanitarian law, or human rights based law enforcement.

Turning first to the interface between humanitarian law and the law governing State self-defence, two theories have been developed. Considered largely in the context of inter-State warfare one theory argues for an “overarching” application of the law controlling State self-defence, and the other a more “limited” approach. Under the “overarching” theory the State self-defence principles governing the use of force are seen as having a continuing impact throughout the subsequent conflict, even controlling how hostilities are



acknowledges a continuing application of self-defence principles during limited defensive reactions by States, but significantly not in the context of a war involving a comprehensive inter-State use of force. Following the attacks of 9/11 there has been an increasing acceptance that self-defence can be exercised by States against non-State actors without the threat posed by the latter group being attributed to a State. This raises the issue of the applicability of the “overarching” and “limited” theories to these defensive responses. However, an armed conflict with non-State actors can never constitute a “war” as contemplated by the more limited theory. This means that the law governing State self-defence continues to apply throughout the conflict with non-State actors regardless of whether the “overarching” or more “limited” theory applies. Therefore, as States take defensive action against these groups they must reconcile the interaction between the law governing their course to war and that applicable to the conduct of hostilities.

What does this mean in practical terms? The interaction of the two bodies of law is best considered in the context of the levels of war: strategic, operational and tactical. The law governing the recourse to war is not superior to, nor does it trump humanitarian law. The State self-defence principles do not apply directly to the operational and tactical direction provided to military commanders. Issues central to the conduct of hostilities: what constitutes a lawful military objective, how collateral effects from an attack are assessed, or the lawfulness of weapons are determined by international humanitarian law. Where the two bodies of law interact is at the strategic level with the nature and scope of the justifiable defensive response determining the range of military action undertaken by the State. In this context self-defence principles may restrict what valid military objectives are struck, the number of attacks carried out, and their location. The self-defence principle of proportionality may also influence the boundaries of an



There is also a requirement to consider the interface and overlap of international human rights and humanitarian law. This has become one of the most significant, disputed and enduring legal issues arising in the post 9/11 period. There has, in many respects, been a strategic level battle for “control” waged by proponents of the two governing legal frameworks. Unfortunately, this battle between theorists has largely been divorced from the situation facing security forces on the ground. Masked behind exclusionary arguments as to which body of law applies is the reality that human rights norms have always been an integral part of humanitarian law. In addition, military forces have long had to apply a law enforcement approach particularly when confronting non-State actors fighting amongst the people (e.g. occupation, counterinsurgency). In this respect military commanders and other State security personnel face daily dilemmas regarding the use of force that can fall under either, or both legal regimes.

Unfortunately, more time and effort has been spent on assessing the differences between these bodies of law than considering their similarities and intimate history. Historically, these legal frameworks have a shared grounding in religious humanism and morality. Since World War II the understanding of the relationship between human rights and humanitarian law has been affected by periods of neglect, forced integration, divergence and finally growing reconciliation. As can be seen from the treaty law alone international humanitarian law (e.g. the *Fourth Geneva Convention*, Common Article 3, *Additional Protocol I*, Article 75 and *Additional Protocol II*, Article 4) incorporates substantial human rights law provisions. There has also been an acceptance by States, courts and academics of the customary nature of human rights law. Whether by operation of customary law, or because human rights norms are incorporated into humanitarian law, the result is they apply to contemporary operations even where States deny the extra-territorial application of treaty law, or





The renewed interest in human rights norms is directly linked to State involvement in counterinsurgency, counterterrorism and countering criminal activity even in the midst of armed conflict. This reality is perhaps best represented in the 2015 United States Army *Operational Law Handbook*, which has a stand-alone chapter on human rights. Further, as is reflected in its 2014 *Department of Defense Detainee Program* directive (para. 3a.) the United States has substantively moved toward the application of human rights norms as part of humanitarian law in respect of detainees regardless of how a conflict is characterized. The operating environment is simply too complex to keep these bodies of law trapped within their “silos”. However, acknowledgement of the simultaneous and complementary application of both human rights and humanitarian law is just the beginning of the discussion. In assessing which body of law is applicable it is necessary to consider the limits of each normative regime. For example, as was highlighted in the 2006 Israeli *Targeted Killing Case* (para. 40), the applicability of a human rights based capture approach is itself limited by the ability of the security forces to physically control the area in which the operation will take place, and assessments of the risk posed to those forces and uninvolved civilians. Further, the group nature of the IED threat highlights the necessity of frequently privileging a conduct of hostilities based approach over a law enforcement one.

The existence of the overlap between human rights and humanitarian law was acknowledged in the International Court of Justice *Wall Case* (para. 106) when it indicated there are situations that “may be matters of both these branches of international law.” However, what has not occurred is an in depth consideration of what this means in practice. As States confront organized armed groups hiding amongst civilians they are placed in the position of considering not only the overlap between these bodies of law, but also their convergence in application and tactical



collateral effects resulting from attacks. Lower level threats, the development of specialized police forces, as well as an increasing acknowledgment that human rights law authorizes the use of deadly force (e.g. when confronting hostage takers, suicide bombers) means that body of law can offer an effective, but overall less violent means for dealing with many security threats. As a result, States can and do make a policy choice to apply the more restrictive law enforcement paradigm either on its own, or in conjunction with a conduct of hostilities approach. This is reflected in the post 9/11 migration of operations from “kill or capture” to “capture or kill” missions, and finally to ones seeking the *arrest* or killing of insurgents and terrorists. Whatever the reasons for the fight amongst some lawyers about whether humanitarian or human rights law should prevail there is increasing reliance by States on their simultaneous application. That acceptance is often directly linked to the “police primacy” requirements of counterinsurgency and counterterrorism doctrine.

With the application of humanitarian law being dependent upon the existence of an armed conflict one challenge confronting international lawyers is categorizing violence with non-State actors. That fight can occur in the context of inter-State warfare, its non-international counterpart, or as part of law enforcement operations. It has been argued international armed conflicts can be interpreted to be occurring when non-State actors are controlled, or harboured and supported by a State; because of a non-consensual crossing of State borders to attack terrorists; through the application the *Additional Protocol I*, Article 1(4) “wars of national liberation” provision; or because of the now dated “recognition of belligerency” theory. The Israeli *Targeted Killing Case* refers to “conflicts of an international character”, and Yoram Dinstein to “extra-territorial law enforcement”. There are also post 9/11 “transnational armed conflicts” and the United States, *Hamdan vs. Rumsfeld*, decision indicating that armed conflict between States and



States, and those that “spill over” to adjacent States being viewed as non-international conflicts. Further, international and non-international armed conflicts may be seen as occurring simultaneously in the same geographic space. The lack of consensus, the novelty of a number of these theories, their complexity, and the opportunity for terminological confusion is not helpful. It should come as no surprise that practitioners increasingly simply ask the question whether an “armed conflict” is in existence, rather than engage in this categorization debate.

Adding to the legal debate is a further disagreement regarding the threshold for non-international armed conflict. There is a general acceptance of the *Tadić* criteria of intensity of violence (protracted violence) and group organization. However, there is also growing recognition that reliance on the protracted nature of the violence, or the exclusive use of the *Tadić* criteria cannot adequately address all contemporary threats. There is a danger that setting the threshold for non-international armed conflict too high not only wrongly categorizes the violence, but also asks human rights based law enforcement to perform a role it cannot carry out without significantly altering its governing principles. Instead, there is an increasing reliance on the *Additional Protocol II* Article 1(2) threshold criteria of violence having to exceed “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” constituting an armed conflict, or a “totality of the circumstances” approach that considers a broader range of factors. In this respect consideration of tactics and weapons used by the organized armed group, the type of State forces required to defeat the armed group, and the purpose for which the violence is occurring (i.e. a political or conversely an economic goal) more realistically addresses current threats. This is especially the case when they involve what might be viewed as “one off” attacks, such as those experienced in Mumbai (2008), Benghazi (2012), the Westgate Mall in



Consideration of the multiple bodies of law applicable to contemporary operations is also reflected in largely unresolved debates about “direct action” counterterrorist missions, and defensive action to defend nationals. Counterterrorist action largely takes the form of Special Forces missions or the use of airpower, with drone strikes attracting the most controversy. The suggested analytical frameworks can be referred to as a restricted “Law Enforcement” theory, the permissive “Conduct of Hostilities” approach, and the “Self-Defense” option. While the law enforcement framework may be seen as too restrictive, the other two options are often viewed as being overly destructive, and ones that are too easy to apply. The **approach** chosen by the Obama administration has been to temper a conduct of hostilities approach with human rights like restrictions (e.g. consider capture before killing, restrictive “certainty” thresholds for application). While an “unable or unwilling” justification for such cross border attacks continues to attract criticism it is also clear a number of States, including European ones, have accepted the need to act in Syria on the basis that the territorial government does not exercise adequate control over the areas from which the terrorist threat is generated.

Similarly, States have long taken action in other countries to protect their nationals. While controversial this is an activity the international community has consistently accepted, or at least tolerated, particularly in the ungoverned spaces of the world. It has been variously justified as law enforcement, forceful countermeasures, self-defense in response to an armed attack, proportionate defensive measures, noncombatant evacuation operations, or simply the defense of nationals. Transnational hostage rescues can occur across the spectrum of violence including inter-State warfare (e.g. Entebbe, 1976), armed conflict with non-State actors (Sierra Leone, 2000), and human rights based law enforcement against criminal gangs (e.g. Somalia, 2012). These operations have demonstrated a growing



to perform cross-border law enforcement based operations.

One issue that receives little attention is how human rights law relates to the State self-defence legal framework governing many international operations. While they share common Just War roots, principles such as necessity, imminence, proportionality and last resort are traditionally interpreted in a more restrictive fashion under human rights law. In other words, an interpretation that reflects the exercise of personal self-defense under domestic criminal law. This means that transnational law enforcement action should fit comfortably within a broader overarching national self-defence framework. However, a particular challenge in assessing how force is controlled at the tactical level is the dominant position that the right to act in self-defense in its recourse to war form has attained in the international law dialogue about the use of force. How broadly or narrowly that right is assessed can have a significant impact on how human rights based the law enforcement authority to use force is interpreted to apply. One challenge is that law enforcement is not solely limited to acting in individual self-defence, meaning greater authority to use force for mission accomplishment (i.e. enforce the law) must be accommodated within the overarching legal framework. Indeed, depending on the operation, State self-defence principles must accommodate both humanitarian law and human rights law based authority to use force.

Challenges have arisen in the context of interpreting self-defence Rules of Engagement (ROE), UN peacekeeping and the US Standing ROE (SROE). For example, ROE doctrine often struggles to provide a homogenous interpretation of self-defence for national, unit and more individualized uses of force. For peacekeeping an exceptionally narrow interpretation of governing self-defence principles in the 1990s proved inadequate to address threats faced during increasingly complex UN



including the maintenance of law and order. Finally, there is a danger in an SROE context that expansive State self-defence based interpretations of imminence will be incorporated into rules intended to be applied in a traditionally more restricted law enforcement context.

There is a narrowing operational and normative gap between the conduct of hostilities and law enforcement paradigms as military forces are tasked with policing duties, or the police are required to conduct operations to counter IEDs, suicide bombers and hostage takers. With security forces frequently applying law enforcement based tactics, either as a matter of law or policy, there needs to be consideration of the limits of that body of law. Those limits are practical in nature, found in an overreach in application by courts, and caused by limitations of interpretation. The practical limits are evident in the Northern Ireland “shoot to kill” controversy, which raised questions regarding the point at which law enforcement may no longer be an effective, or appropriate framework to deal with armed conflict related violence. That conflict is often relied on to suggest contemporary terrorism is fundamentally a law enforcement matter. However, success in Northern Ireland was dependent upon a number of factors such as good governance, an established and responsive justice system, a capable functioning police force, an ability to exercise control in an area of operations, and an environment where cultural similarities facilitated rather than hindered operations. Those factors are not easily replicated in the failed States or ungoverned spaces where most contemporary operations take place. Further, the employment of police forces in a conflict role can lead to a militarization of the police. The development and use of police for “military” missions can undercut counterinsurgency and counterterrorism efforts leading to an increase in insecurity for the civilian population.

Despite the European Court of Human Rights recognition of

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that body of law to interpret human rights law during non-international armed conflict. There is also the question whether the European court will continue to apply human rights based principles when assess aerial bombing (e.g. *Kerimova Case*), which is clearly hostilities related. Further, by indicating humanitarian law will be applied “as far as possible” (*Hassan Case*, para 104) in interpreting the application of human rights treaty provisions during armed conflict, the court seems to suggest an overarching application for human rights law. This is a role that body of law is neither designed, nor intended to have. Interpretive limitations placed on the applicability of human rights law are evident in the German Constitutional Court 2006 **handling** of the shoot down of hijacked aircraft. While important principles such as human dignity were emphasized in striking down legislation permitting the military to counter such attacks by terrorist groups the decision did not provide a practical solution to a real-world threat. Further the Court avoided making the very value judgments that must be made by military personnel on a regular basis thereby providing support for an argument doubting that human rights law can adequately regulate these threats during hostilities. It is also important that a human rights based approach and its terminology not be used to mask when force is used as part of the conduct of hostilities. While the 2013 United States **drone policy** applies human rights principles it primarily remains a humanitarian law based endeavour.

Facing the unique and dangerous security threats of the 21st Century requires an approach based not on a “hybrid” model, but rather one that holistically encompasses law enforcement as well as conventional, and irregular armed conflict. It is this “holistic” approach that underpins the concept of “operational law”. Contemporary threats from non-State actors will require a re-assessment as to when armed conflict with non-State actors commences. This is particularly evident in respect of “one off” attacks where



violence does not reflect the nature of many security challenges facing States, or the type of response required to defeat it. Despite 15 years of comprehensive military action, it is law enforcement that has become a defining feature of many security operations. The challenge is determining when such a response is required by law, or is the preferred State response for meeting the goal of maintaining order.

In many cases the human rights based paradigm must be applied as a matter of law (e.g. dealing with criminal gangs, occupation, or addressing violence by civilians not taking a direct part in hostilities). However, it is also frequently adopted by States as a matter of policy, particularly within their own territory. Indeed, it is usually the default approach. This policy approach is frequently extended to external military operations such as counterinsurgency where the law enforcement model provides a less violent, but often very effective method for dealing with the security threat. It is not evident beyond a formalist limitation attached to national borders why States should not be required, consistent with their role as a “proper authority”, to demonstrate a special trust toward uninvolved civilians regardless of nationality during cross-border deployments against non-State actors. In what is often a battle for legitimacy a key indicator of success against non-State actors, and ultimately indicative of a return to normalcy, is the ability of a State to manage that threat with a law enforcement response. The result is that law enforcement should be privileged over the conduct of hostilities where it can effectively address the threat.

It will be an exceptional situation where some or all of the bodies of law impacting the conduct of counterinsurgency and counterterrorism operations do not have to be applied simultaneously. Hence a holistic approach, which includes the law enforcement option, provides States and their security personnel a full range of potential responses. It





violence, and allow security officials to make operational choices uniquely tailored to the nature of that threat. To be able to do so State legal advisors must be educated and trained not only in international humanitarian law, but also to a far greater extent in human rights law (international and domestic), the law governing the recourse to war, and international criminal law. Despite the need to re-calibrate after a decade and a half of counterinsurgency/counterterrorism operations neither States, nor their legal advisors can afford to return to a traditionally exclusive focus on inter-State conflict. At the same time, the academic community needs to work to reduce the overall lack of certainty compounded by numerous often diverse theories regarding foundational legal issues. Importantly, these theories must be capable of being applied in an effective manner, lead to success, and prioritize the protection of the civilian population. An emphasis needs to be placed on determining their practical effect. It is crucial that the boundaries of the various applicable bodies of law are not allowed to be barriers to maintaining law and order, and protecting civilians regardless of where they might live.

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# Proportionality and 150 Iranian Lives: Do They “Count”?

by **Kenneth Watkin**

August 16, 2019

CNN [reported](#) on Aug. 1 that Retired Admiral William McRaven, the former Navy SEAL who led the Bin Laden raid, weighed in on President Donald Trump’s claim that he called off a strike at the last minute in response to the Iranian shootdown of an unmanned U.S. drone when he learned of the likely number of casualties. The *New York Times* editorial board [reported](#) in late June that Mr. Trump had concluded that the possible deaths of 150 Iranians “would not have been proportionate to the Iranian downing of a robotic spy plane.” Admiral McRaven indicated that it was hard to believe the President only learned of the casualty count just prior to the strike commencing, since “the casualty count is almost always part of the military’s briefing when it comes to a strike on a target.” Further, “this idea that it was only through the President’s restraint that we got as far as we did, I think the bigger question is: Why did we get that far?” However, Admiral McRaven is reported to have been ultimately happy with the President’s decision not to carry out the strikes, and he agreed it would not have been a proportionate response. As *Newsweek* indicated, Admiral McRaven “explained that the response to an incident like a drone shoot down should be a proportional strike, one that does not [risk uncontrolled escalation](#).”

These comments over a month after the incident are of interest for a number of reasons. First, they highlight the now common practice by retired senior military officers to publicly critique the President’s national security processes and decisions. While Admiral McRaven expressed approval of this decision, the weight of this commentary has been far less favorable. This implicates the interface between the political and national security communities, highlighting the degree to which a rift has grown between a number of highly respected senior retired United States general/flag officers and their President regarding the use of military forces. For example, Retired General Stanley McChrystal is previously [reported](#) to have stated he believed President Trump was dishonest and immoral. This rift is obviously based on mistrust of the probity of the President’s

statements. For those in the military community, both serving and retired, for whom honesty and honor are sacrosanct principles, these comments about the Commander in Chief are undoubtedly sobering.

Second, the statements by Admiral McRaven also shows the degree to which his views and that of the President are ultimately aligned (assuming the President's rationale not to strike rested solely on a concern with proportionality). Their common ground centers on the issue of the proportionality of a defensive response to the use of force by an opposing State and the references to casualties in that analysis. This is noteworthy because there remains considerable disagreement amongst international lawyers regarding whether casualties, including civilian casualties, must be considered when assessing the proportionality of a State's recourse to force in response to an armed attack (the *jus ad bellum*). Given the continuing tensions in the Gulf and the high stakes involved, the lack of consensus amongst international lawyers deserves closer analysis.

There are two legal schools of thought on this issue. One concentrates on blunting the military capability of the attacking State. Mike Schmitt has argued in a recent [Just Security piece](#) regarding this incident that

“a [*jus ad bellum*] proportionality analysis would focus on the scale and scope of the forceful response that would be required to deprive Iranian forces of the ability to launch the pending attacks and/or convince Iranian authorities to refrain from conducting them.... However, in making such an assessment, it is essential to understand that the issue would not be the possible casualties that might result, but rather the effect of the strikes upon continued Iranian attacks.”

Assessing civilian casualties would be a matter for international humanitarian law (IHL), not a component of the initial *jus ad bellum* analysis, which is a separate inquiry. Others support this approach, as is reflected in past [commentary](#) by Laurie Blank reported in the Washington Post that “[i]mportantly, this [*jus ad bellum*] rule of proportionality does not address civilian casualties. That is the task of the law of war principle of proportionality.”

The alternate method of assessing the legality of State action in self-defense considers not only the force used in the attack and the response, but also the damage and casualties that can result. This view has perhaps been most broadly stated by Judith Gardam in her 2004 book, *Necessity, Proportionality and the Use of Force by States* (p.

168), where she indicates the requirements of self-defense proportionality regulate the means and methods of warfare and targets, and must consider “the anticipated overall scale of civilian casualties, the level of destruction of enemy forces, and finally damage to territory, the infrastructure of the target State and the environment generally.” These competing views point to a fundamental divide within the international legal community regarding the role of proportionality when assessing a State action in self-defense.

Which viewpoint is right? Do the Iranian lives not count (literally) as a State makes decisions that can lead to broader conflict? Is the consideration of civilian casualties truly best left to IHL, the law governing the conduct of hostilities (*jus in bello*), alone and not considered under self-defense law? What effect does the law governing the State recourse to war have on the actual conduct of hostilities? As it turns out the issue of whether casualties, and in particular civilian casualties, have to be considered as part of a recourse to the use of force by States raises a number of questions about how the *jus ad bellum* and the *jus in bello* interact with one another. It also highlights that a [traditional theoretical approach](#), which suggests these bodies of law operate separately from one another, does not reflect the reality of the practice of international law. Therefore, it will be helpful to look at the content of the self-defense “proportionality” rule and then address how the two bodies of law interact.

### ***Jus ad Bellum* Proportionality**

So, what is assessed under *jus ad bellum* proportionality? The analysis is complicated by their common roots in Just War theory with both bodies of law relying on the principles of “necessity” and “proportionality,” although interpreted differently for each body of law. Notwithstanding the narrower approach that concentrates on weighing the counterforce applied in response to an armed attack, there are strong arguments supporting a wider assessment of *jus ad bellum* proportionality extending to the consideration of damage and casualties. The “roots” of this broader assessment can be found in the iconic 1837 *Caroline Case* with Daniel Webster’s reference “local authorities of Canada” having to establish they “did nothing unreasonable *or excessive*” in seizing and destroying a rebel ship, the *Caroline*, located in American waters.

A more contemporary reference to excessiveness is found in the 2005 Chatham House, [Principles of International Law on the Use of Force by States in Self-defence](#), where Rule 5 states: “The force used, taken as a whole, must not be excessive in relation to the need

to avert or bring the attack to an end,” but also that “[t]he physical and economic consequences of the force used *must not be excessive* in relation to the harm expected from the attack.” Yoram Dinstein states in his latest edition of *War, Aggression and Self-defence* that assessing self-defense proportionality in situations other than a “war” between States (i.e. in a more limited “on-the-spot reaction” or what he terms a “defensive armed reprisal”) involves a comparison by means of “a rough calculation of the acts of force and counter-force used, *as well as the casualties and damage sustained.*” (p. 282) Notably, no indication is made as to whether those casualties are limited to military personnel.

Another source of support for the position that casualties are part of the proportionality assessment in assessing the lawfulness of a State’s defensive response can be found in the 1996 International Court of Justice (ICJ) *Nuclear Weapons Case*, where it was ruled “a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.” (para. 42). The nature of nuclear weapons inevitably raises the issue of their potentially indiscriminate effect on civilians. According to the ICJ’s ruling, a determination that a use of such weapons is “illegal” due to the excessive incidental loss of civilian life, injury to civilians, or damage to civilian objects (Article 51(5)(b) of *Additional Protocol I*) would certainly be relevant to whether the State self-defense response itself was excessive. Importantly, even if their use was not viewed as being excessive under IHL it might still be considered so under the *jus ad bellum*. This is because the role of the *jus ad bellum* is different. Those restrictions are very much a product of the 20th Century inter-war effort to limit the recourse to war, which was at its heart “anti-war.” Certainly, IHL, such as the then relatively recent 1907 Hague Regulations, had done little to limit the ravages of World War I.

As the 17.7 million combatant and 39 million civilian deaths during World War II again established, States are capable of incredible violence. It may be that the past two decades of concentrating on drone strikes against non-State actors under an ongoing, if frequently controversial, self-defense envelope has resulted in an over emphasis being placed on the protections provided for civilians by humanitarian law to the exclusion of other important legal considerations. Perhaps one of the outcomes of States now

focusing more on near peer, and peer to peer inter-State conflict, alongside ongoing conflicts against non-state actors, will be a deeper consideration by international lawyers of the broader role and principles of the *jus ad bellum*.

### **The Interaction Between *Jus ad Bellum* and *Jus in Bello* Proportionality**

The interaction between proportionality, as assessed under IHL, and the test for State self-defense analyzed under the *jus ad bellum* can occur in a number of ways. Certainly, the consideration of “casualties,” and in particular civilian casualties, has arisen *a posteriori*. That is almost inevitable since for observers outside the military planning process it provides the most concrete evidence of the results of a decision to act. *Jus ad bellum* proportionality may also be assessed during the planning stages of a State response and throughout its execution. A State decision to contemplate the use force must come first, and in making and executing such a decision an interaction with IHL is inevitable.

As explained in the ICJ *Oil Platforms Case*, a strike by the United States against Iranian assets on April 14, 1988, which included attacks on oil platforms and the destruction of two Iranian frigates, occurred four days after an American warship struck a mine. During U.S. operational planning leading up to that strike, the targeting process would have identified military objectives, considered the military advantage to be gained from an attack and assessed the potential for collateral civilian casualties and damage. At the same time, the *jus ad bellum* proportionality assessment could and should have looked at those potential civilian casualties and damage as well as the impact on Iranian military personnel and materiel before striking. Although civilian casualties may be justified when weighed against the military advantage to be gained from attacking a military objective, they may not be necessarily in the context of limiting the recourse to war. This could lead to the consideration of other possible available targets that obtain the required effect without the same level of accompanying casualties or damage. The process can become interactive with the *jus ad bellum* proportionality consideration encompassing a broader range of factors that includes assessing the outcome of the IHL-based targeting process. It is noteworthy that in notifying the Security Council of its actions under Article 51 of the United Nations Charter the United States government stated: “All feasible measures have been taken to minimize the risk of civilian damage or casualties” (*Oil Platforms Case*, para. 67). Compliance with IHL obligations regarding potential civilian casualties was incorporated into self-defense reporting obligations.

Another area of controversy in the legal community has been the degree to which the law governing self-defense remains relevant once a decision to act is made. Again, it should come as no surprise there are two general approaches. The first is an “overarching” application of that law such that State defensive action is constrained by the principles of necessity and proportionality throughout the existence of a conflict. The second is a more “limited” theory where a distinction is made between traditional warfare between States, and isolated defensive exchanges and border skirmishes. It exempts significant armed conflict between States from the continued influence of the *jus ad bellum* after the conflict commences.

However, the divide between these two interpretations of international law is not as significant as might initially be believed. The “overarching” theory accepts that as a conflict expands in scope and intensity the law governing self-defense has a lessening influence (e.g. during total war, geographic restrictions on where hostilities occur would not be controlled by a proportionality assessment). And under the “limited” approach, minor exchanges not rising to the level of “war,” such as the recent one arising from the Iranian shoot down of an unarmed drone, fall well within the type of situation where the self-defense principle of proportionality would continue to govern State action.

Distinct from the debate among the “limited” and “overarching” theories of the *jus ad bellum*’s continued application during armed conflict, the interaction between these two bodies of law was the subject of vigorous debate in the development of the 1995 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Disagreement “centered on whether the principles of necessity and proportionality are applicable in a strategic sense only, or also on a tactical level [Rule 4, p. 77].” Application of the *jus ad bellum* at the tactical level could directly restrict the choice of targets and the methods and means of warfare, a clear IHL role. However, the ICRC Customary International Humanitarian Law study notes many States take the view in respect of targeting that “they will consider the military advantage to be anticipated from an attack as a whole and not from parts thereof” (Vol. I, Rule 8, p. 31), and the 1998 Rome Statute refers to the “overall military advantage anticipated” (Article 8(2)(b)(iv)). This suggests a strategic level assessment under IHL, which provides the space for an interaction between the two bodies of law at that level rather than the *jus ad bellum* having a direct tactical impact. It is at the strategic level that the law governing the State self-defense response, and IHL, is best assessed.

Under the “strategic” approach described above, self-defense proportionality does not usurp the role of the law governing targeting, but it could still influence the boundaries of State action when acting in self-defense. The initial identification of lawful military objectives, the weapons used, and the assessment of expected civilian casualties and damage remain IHL issues. However, at the strategic level, the self-defense proportionality test may restrict which valid military objectives are struck, and the number of attacks. What remains under debate is whether the scale of anticipated civilian casualties affects whether those attacks take place at all, although clearly it is my view that it does. Added to this is the consideration of opposing military casualties. The self-defense test is different than, but not divorced from the IHL analysis.

### **Assessing Civilian Casualties in *Jus ad Bellum* Proportionality is the Right Approach**

One point is both clear and notable: all voices on this issue strongly agree that excessive civilian risk resulting from an action in self defense necessitates the state forego or modify an attack, even if they might not agree on the phase at which that consideration produces that effect. However, given that the right to life is a deeply held principle in both war and peace; and the United Nations (UN) Charter, which articulates the State right to self-defense, was intended “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,” it is difficult to see how civilian casualties would not be relevant to the question of whether a State use of force is “proportional.”

The United States unquestionably carries a proverbial big stick. Admiral McRaven, who knows better than most the benefits and costs of wielding that stick, offers an important reminder on why it is often more prudent to follow President Roosevelt’s [advice](#) to speak “softly.” Indeed, the past two decades have clearly established, once the “dogs of war” are unleashed they are difficult to bring back to heel. A broad legal interpretation that accepts potential casualties have to be considered in determining the proportionality of a response to an armed attack ultimately seems more in tune with UN Charter history, its principles, and its goals. I believe the result is that by considering the potential for 150 Iranian casualties when determining the appropriateness of the response to the shootdown of the unmanned drone, the approach apparently taken by the United States President, those who advised him, and Retired Admiral McRaven is firmly grounded in law.



*IMAGE: Iran's Ambassador to the United Nations Majid Takht Ravanchi holds up maps of the Strait of Hormuz while speaking to the media before a meeting with other UN members on the escalating situation with the United States at United Nation headquarters on June 24, 2019 in New York City. The Trump administration imposed fresh sanctions on the country following the shooting down by Iran of a U.S. surveillance drone over the Strait of Hormuz. (Photo by Spencer Platt/Getty Images)*

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# Accountability Fatigue: A Human Rights Law Problem for Armed Forces?

by **Kenneth Watkin**

November 1, 2018

Retired United States General David Petraeus added an important international voice to a chorus of senior United Kingdom political leaders, military commanders, veterans and retired soldiers who have expressed concern about the impact that investigations into alleged misconduct in Northern Ireland, Iraq and Afghanistan are having on the British military. General Petraeus' [comments](#) center on the “judicialization” of conflict; the increasing friction between human rights and humanitarian law; and the effect such developments will have on operational effectiveness if the United Kingdom cannot “reform the legal framework within which it fights, and restore the primacy of the law of armed conflict.” A particular concern is the European Court of Human Rights’ displacement of humanitarian law by human rights law.

Certainly, observing from the other side of the Atlantic it is easy to see that the British armed forces are undergoing accountability fatigue. The Defence website set up to help veterans indicates that serving and retired Army personnel are involved in legal processes arising “from legacy operations including criminal investigations under the Service Justice System (SJS), civilian criminal investigations, civil litigation, inquests and, when directed, public enquiries.” Reviews of military conduct have included the [Chilcott](#), [Gibson](#), [Al Sweady](#), [Baha Mousa](#), and [Saville](#) inquiries, as well as the [Iraq Fatality Investigations \(IFI\)](#). Investigations such as those undertaken by the [Iraq Historic Allegations Team \(IHAT\)](#) and the [Northern Ireland Historical Enquiries Team \(HET\)](#) and successor inquiries have been directed by the UK Government. Further, [United Kingdom courts](#), the [European Court of Human Rights](#) and the prosecutor of [International Criminal Court \(ICC\)](#) have become involved in aspects of the treatment of detainees.

The number of reported allegations, spanning both domestic and international operations, have been truly astonishing: over [3,500](#) and [551](#) allegations of abuse or torture of detainees for Iraq and Afghanistan respectively, and [354 incidents](#) of alleged unlawful killing associated with Northern Ireland. In the latter case some of these

allegations stretch back to the 1970s. The track record of the authorities in laying criminal charges is not good. By June 2018 the Service Police Legacy Investigations team, which inherited the IHAT caseload, closed 88 percent of the files without charges being laid, with only 143 allegations remaining under review. Clearly allegations must be properly vetted and investigated, however, these investigations, frequently set up to meet real and perceived requirements under the European Convention on Human Rights, appear to have adversely impacted individual soldiers and the military as a whole while achieving little. Maintaining confidence in military compliance with international legal obligations is essential. However, that goal may be at risk of being overshadowed by the [negative perceptions](#) these investigatory processes have created.

General Petraeus' reference to the two main governing legal frameworks, human rights law and international humanitarian law (IHL), highlights a complex strategic conflict for primacy that has been taking place between interpreters of both bodies of law since the early 1990s. It is a conflict made more difficult by a [human rights perspective](#) that exhibits little confidence in the independence and impartiality of the military investigatory or judicial process, and prefers oversight to be carried out almost exclusively by civilian actors. The challenge manifests itself in disputes regarding the role human rights law performs during armed conflict, and the degree to which States and their military forces can properly regulate their own activities.

The conflict between these bodies of law finds its roots in the failure of the human rights backed [1977 Additional Protocols](#) to the [1949 Geneva Conventions](#) to gain universal acceptance; that the *Protocols* did not apply to the lower intensity conflicts the human rights community was particularly interested in; and there was a renewed desire by that community to remain separate from its IHL counterpart, which ended a previous effort through the *Protocols* to harmonize the two bodies of law. In addition, the historic trend of a major reassessment of IHL treaties every 25 years had by the late 1990s been replaced with the view that the effort should be on implementing the existing humanitarian law.

At the same time international criminal law increasingly became a focus of the international legal community. This emphasis on accountability saw the development of ad hoc international criminal tribunals and the 1998 Rome Statute of the International Criminal Court (ICC). It also stands out as a particularly strong form of “naming and shaming”. At the same time the human rights community acted to inject human rights

law into the regulation of military operations that qualify as “armed conflict.” Debates erupted amongst human rights and humanitarian law advocates as to which body of law was the governing *lex specialis*, and as to the extent to which human rights treaty law had extra-territorial application to State armed forces engaged in complex contemporary armed conflicts. As General Petraeus notes, the United States has taken aggressive action to avoid such international oversight. It is a trend that is reflected in a backlash primarily, but not exclusively by African States against the ICC, and in the [failure of States](#) to arrest the indicted President of Sudan.

What makes this debate academically fascinating, but practically frustrating and potentially operationally dangerous is that concerted efforts to resist the application of human rights law are inconsistent with the tactical challenges facing military commanders. Many of those challenges require the application of human rights law, or norms. Obligations such as maintaining order as an occupying power, the rescue of hostages seized by criminal gangs and thwarting crime-based funding for terrorist groups mean that military forces frequently engage in human rights based law enforcement even during armed conflict. Importantly, the “law of armed conflict” itself is replete with human rights norms and obligations, and customary international human rights law has universal jurisdiction and therefore applies to all areas where military forces operate. Moreover, it forms the subject matter of many investigations. Indeed, the alleged abuse and torture of detainees is clearly prohibited under both bodies of law. The United States Army, Judge Advocate General, [Operational Law Handbook](#), which “provides references and describes tactics and techniques for the practice of operational law,” has a whole chapter dedicated to international human rights law. The question is not so much whether human rights law and norms must be applied, but rather how they should be interpreted and applied under the circumstances of armed conflict.

However, problems arise when advocates or courts seek to impose a unitary human rights-based solution in conflict situations, or fail to acknowledge that military investigatory bodies can meet international legal requirements of independence and impartiality. In the case of the UK there is good reason to be concerned. The European Court of Human Rights, to which that country is likely to remain subject following “Brexit,” has been at the forefront of the effort to impose a predominately human rights law based regulation of contemporary conflict. This can be most obviously noted regarding the use of force. In addition to the extra-territorial application of that Convention to external conflicts, the Court has, in respect of non-international conflict,

uniquely applied human rights law as a “*normal* legal background” even when dealing with the use of airpower and artillery to suppress an “[illegal armed insurgency](#).” However, there is nothing “normal” about tactical situations where insurgent forces turn towns into fortresses, seek to shoot down aircraft, or conduct large-scale military action. While the Court has incorporated some IHL concepts into its analysis of use of force situations this has been invariably [applied](#) within the restraining principles of human rights law: a strict necessity test, using no more force than absolutely necessary, and the requirement that the force used is strictly proportionate. These human rights principles were not developed to regulate the conduct of hostilities.

A partially dissenting opinion in the 2017 [Beslan School Case](#) perhaps best reflects that court’s strict adherence to human rights law. The judge stated he was satisfied the majority was faithful to the standards for the use of lethal force in large-scale anti-terrorist operations by “dealing with them as with *any other law-enforcement operation* and refusing to apply the paradigm of the law on armed conflicts to them.” This approach was applied to a hostage rescue operation involving the use of flamethrowers, grenade launchers and tank main gun rounds against Chechen insurgents. In contrast, the European Court of Human Rights has more recently directly relied on international humanitarian law when interpreting the application of human rights law during inter-State conflict. Yet even here it was also careful to include the modifying words “so far as is possible.” Both human rights and humanitarian law apply during armed conflict. However, this wording suggests a possible residual supervisory function for human rights law that is not justified by either the history or the widely accepted application of IHL.

In his excellent book on non-international armed conflict Sandesh Sivakumaran has noted “there should not be a rush to judgement that international human rights law holds the answer to all the problems.” It is not clear why the European Court could not, like its [Inter-American counterpart](#) does, apply humanitarian law when interpreting their human rights law mandate during non-international armed conflicts. Just as there is a contemporary concern over the militarization of the police, there should be a similar disquiet regarding human rights law overreach.

Operationally, General Petraeus has identified that an overemphasis on human rights law has made it challenging to operate with European nations in a Coalition environment. For example, different national approaches toward the detention of insurgents in Afghanistan were evident when General Petraeus [took action](#) in 2010 to end the

application to United States military forces of an ISAF rule requiring the release or transfer of detainees to Afghan authorities after 96 hours. The 96 hour authority to detain has since been the subject of litigation in the United Kingdom in the [Serdar Mohammed](#) case, which highlighted a divide between nations such as the United States and Canada that have relied on a customary IHL basis for such detention and European ones requiring a European Convention on Human Rights justification. The UK court rejected an IHL basis and relied instead on a United Nations Security Council Resolution authority. The requirement for a UNSCR prompted [Fiannoula Ni Aoiáin](#) to note that a fragmentation and confusion over legal regimes could result where there is no UNSC involvement, and while the Convention and its due process requirements should not be abandoned “it may mean being better prepared to engage the application of the law of armed conflict and for human rights courts to show some humility in engaging the interface between both legal systems.”

A clear majority of States are not subject to the European Convention on Human Rights. Importantly, judicial decisions that do not accurately reflect the operational situation faced by security forces or fail to recognize the need to engage an enemy with levels of violence best regulated by IHL run a very real risk of undermining the credibility of the court. By contrast, civilian courts in other States, such as [Canada](#), the [United States](#), and [Israel](#) have demonstrated a greater willingness to apply IHL in the present security context.

Issues have also arisen regarding the appropriate means of conducting judicial oversight. There has been a trend by some human rights advocates to equate adequate independence with civilian judicial actors. It has even been suggested that military tribunals be abolished, or their jurisdiction restricted to military offences that would not include the abuse and torture of detainees. This viewpoint may be influenced by the European context where [most civil law countries](#) use civilian courts to exercise jurisdiction over the military, at least during peace time. However, this is not the “international” standard. The prioritizing of civilian judicial oversight can be contrasted with the Israeli [Turkel Commission report](#) which, after reviewing the mechanisms for examining complaints of violations of IHL in mainly common law countries, supported the use of military judicial processes for such investigations.

There is an essential role to be performed by both civilian and military accountability mechanisms. However, in the UK experience there appears to have developed an unhealthy “us versus them” mentality, which can only further exacerbate the lack of confidence expressed by veterans and serving military personnel regarding legal oversight. The pushback extends to statements by the Prime Minister, Secretary of State, unionist and Conservative politicians that the Police Service of Northern Ireland investigation of legacy cases is wrongly focused on killings by the Army, even though [this appears to be factually incorrect](#). Such negative responses must be assessed against factors such as the findings of the Iraq related inquiries, a recent [civil court proceeding](#) accepting that there was wrongdoing, and the important role legacy investigations can play in reconciliation. While many allegations have been called into question it also seems evident there were systemic issues that need to be addressed regarding the military treatment of detainees.

The British armed forces are highly professional and widely respected. Their commanders and legal advisors know that allegations of misconduct must be addressed. Isolated criminal acts can occur in any organization, but large-scale allegations of abuse frequently reflect broader issues of leadership, military culture and ethics.

Unfortunately, during the post 9/11 period the torture and abuse of detainees has not been limited to the armed forces, with some civilian leaders, legal advisors and security agencies also being engaged in enabling or conducting such illegal activity. Civilian judicial systems have also struggled to hold perpetrators to account. That civilian engagement is not a panacea is evident from the havoc that has been created regarding the Iraq detainee investigations as a result of misconduct by a [lawyer](#) spearheading the identification of abuse claimants. The accountability solution cannot be found in a unitary application of human rights law or civilian judicial oversight. It also cannot be addressed through denying the applicability of such law or denying the necessity for civilian oversight such as through public inquiries.

What is required is a balanced approach that recognizes both human rights law and IHL apply, and that the armed forces themselves have an important, indeed, essential oversight role to perform. It is a role that can be enhanced by taking steps to increase confidence, both within and outside the armed forces, regarding the independence of investigatory bodies. Other States have addressed issues of independence by creating a statutorily empowered uniformed Director of Military Prosecutions, setting up joint civilian/military inquiries, and even appointing foreign observers. As stated, the problem

is not human rights law, it is the interpretation of that law in a manner that reflects the needs of all stakeholders operating in a very complex and challenging security environment.

*Photo: U.K. Ministry of Defence/Army*

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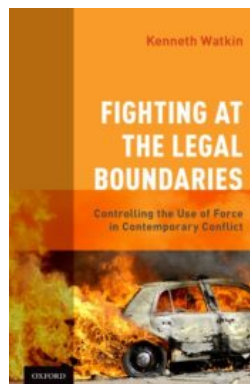
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# Drones, the Mullah, and legal uncertainty: the law governing State defensive action



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BY [KENNETH WATKIN \(https://blog.oup.com/authors/kenneth-watkin/\)](https://blog.oup.com/authors/kenneth-watkin/)

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**T**he 21 May 2016 [drone strike \(http://www.defense.gov/News/News-Releases/News-Release-View/Article/778259/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-against-taliba\)](http://www.defense.gov/News/News-Releases/News-Release-View/Article/778259/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-against-taliba) that killed Taliban leader Mullah Mansour riding in a taxi in Pakistan's Baluchistan province, raises questions about the law governing State defensive action. Fourteen years after the first US counterterrorist drone strike in Yemen, legal consensus remains elusive.

Possible analytical frameworks can be termed the restricted “Law Enforcement” theory, the permissive “Conduct of Hostilities” approach, and the “Self-Defense” option. The “Law Enforcement” theory applies traditional highly restrictive interpretations of State self-defense. While accepting drone use within existing “combat zones”, external action is limited to human rights law based policing and is largely reliant on territorial State consent. Drone strikes are seen as being incompatible with policing ([https://fas.org/irp/congress/2010\\_hr/042810oconnell.pdf](https://fas.org/irp/congress/2010_hr/042810oconnell.pdf)). “Terrorist” groups are viewed as small organizations using low levels of force ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654049)). This perspective applies a 20<sup>th</sup> Century view of terrorism that avoids the case law (<http://www.icj-cij.org/docket/files/70/6503.pdf>) threshold justifying State self-defense, or finding an armed conflict exists when applying the Tadić (<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>) based criteria of group organization and intensity of violence. For Afghanistan a variation (<http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf>) of this theory accepts a limited “spillover” into some of Pakistan’s border regions, but this would not include Baluchistan. Exceptionally, drone use in a law enforcement context is viewed as possible, but without permitting collateral casualties. The “Law Enforcement” model seeks to restrict drone use to “hot battlefields” spawning debate about the “geography of war”. Notably it runs afoul of Sun Tzu’s principle of knowing your enemy. Transnational terrorists are part of broader insurgencies organized as hierarchical, horizontal and cellular armed groups, rather than independent components of a “leaderless jihad”. “Law Enforcement” proponents rely on international boundaries to limit violence involving Salafi jihadists. Unfortunately, as recognized by the United Nations ([http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2249.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2249.pdf)), this enemy has more global aspirations.

The “Conduct of Hostilities” approach authorizes action ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1801179&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801179&download=yes)) where a State is “unwilling or unable” to police transnational threats emanating from within its borders. The historical “unwilling or unable” principle finds new life in contemporary debate. This theory depends on a post 9/11 recognition of the right to act in self-defense against non-State actors, an importation of neutrality law principles ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1971326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326)) to non-State conflict, and the use of hostilities rules against targets seen as directly participating in an armed conflict. The State self-defense principle of imminence and the humanitarian law concept of direct participation in hostilities (DPH) appear to blend with targets seen as continuously planning attacks. Unfortunately, the potential for overbreadth is enhanced by failing to fully address neutrality law requirements of considering feasible and timely alternatives, and only a strictly necessary use of force; consider the restraining impact State self-defense principles; or transparently articulate the DPH criteria applied. Finally, the “Self-Defense” option, whether described as “naked self” defense ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1824783](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783)) or a more robust ([http://law-wss-01.law.fsu.edu/journals/transnational/vol19\\_2/paust.pdf](http://law-wss-01.law.fsu.edu/journals/transnational/vol19_2/paust.pdf)) application of self-defense principles, appears as a form of “gap filling” where law enforcement rules are not applicable to drone strikes, and an armed conflict is seen technically not to exist. Effectively, humanitarian law based rules are applied under the rubric of self-defense.

Problematically, over-reliance on the territorial State under the “Law Enforcement” theory means non-State actors can gain impunity in poorly policed territory forcing the threatened State into a reactive mode enhancing the risk to its own citizens. A security “black hole” has to be avoided. Unfortunately, the more permissive “Conduct of Hostilities” and “Self-defense” approaches appear to exclude policing options and introduce a potentially broader use of force in otherwise “peaceful” territory. It also raises the legal issue of applying of hostilities rules outside of armed conflict.

What is the solution? One approach, the 2013 US Drone policy ([http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?\\_r=0](http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?_r=0)), applies the “unwilling or unable” test, but limits an armed conflict based approach through a restraining application of human rights principles, and a stricter test of “near certainty” than the “reasonable belief” standard applicable under either human rights (<http://hudoc.echr.coe.int/eng?i=001-57943>), or humanitarian law (<http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>). As seen in the Syria context (<https://www.justsecurity.org/28167/legal-map-airstrikes-syria-part-1>) States have started to embrace the “unwilling or unable” theory justifying defensive action. However, to gain wider acceptance it cannot be unfettered. It must include a holistic application of all available bodies of law including an overarching application of State self-defense principles; consideration of feasible alternatives (e.g. capture); applying law enforcement where required (e.g. non-DPH civilians), or when feasible; using appropriate DPH criteria, and demonstrating greater sensitivity to the strategic impact of collateral casualties. These criteria could readily be applied to the Mansour strike.

A May 2016 UK Parliamentary Committee report (<http://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>) demonstrates consensus on the law may be far off. That report accepted the UK right to act in self-defense against members of the Islamic State in Syria, but raised a number of questions including the basis for applying the “law of war” outside of an armed conflict, and whether such action was governed by the European human rights law. The European Court of Human Rights has previously sought to regulate aerial attacks (<http://hudoc.echr.coe.int/eng?i=001-104662>), however, this raises questions of human rights law overreach, whether a traditionally restrictive authority to use force can effectively counter group threats and attendant threats of violence; and the longer-term normative impact should human rights governing principles be expanded. Human rights law may be more effectively applied in situations of governance, such as in post invasion Iraq, than extended to areas beyond a State’s physical control by means of a Hellfire missile fired at threatening members of an organized armed group.

Meanwhile strikes are occurring, people are dying. Fundamental questions need to be asked about whether the threshold for armed conflict is properly set, how civilians can be effectively protected from "one off" non-State actor attacks, the limits of human rights law, and how best to win a conflict that is ultimately about governance and values.

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# Reflections on Targeting: Looking in the Mirror

by **Kenneth Watkin**

June 16, 2016

Questions about targeting the “money” of the self-styled Islamic State (IS) have been raised in this forum. Images of missile strikes on financial warehouses and money floating in the air, [literally scattered to the winds](#), provide tangible evidence of the efficacy of this aspect of the strategic air campaign being conducted by Coalition powers. In newspaper reports, government sources confirm the negative impact on IS by suggesting its fighters have had [their pay cut in half](#), and discontent is being sown amongst their ranks to the point some fighters are [seeking to defect](#).

As Marty Lederman has [recently highlighted](#) when introducing Ryan Goodman’s excellent [contribution](#) to the discussion, many questions remain, most notably, “does this mean that virtually all economic enterprises are legitimate targets, simply because of the indirect advantages they offer to the military arm of the state?” This is an issue also identified by Daphne Richmond-Barak in an earlier [post](#) when she noted:

I doubt we would accept an interpretation of the law that would regard states’ cash as a legitimate target because the funds are used to finance the military effort. We would likely object that the money also finances a plethora of other non-war related projects.

Money provides important “fuel” for the insurgent/terrorist efforts of IS, al-Qaeda, and myriad other non-State armed groups fighting States, with their military operations being funded through a variety of means including kidnapping, smuggling, extortion, and other criminal activity. As al-Qaeda theorist Abu Mus’ab al-Suri identified, it is “high financial capabilities” that enables cells to operate both inside and outside “Islamic” territory (against the “near” and “far” enemy).

However, what is different about the Coalition’s recent cash-targeting attacks is the use of kinetic force rather than law enforcement to physically destroy the money, as well as portions of the financial infrastructure of IS. The broadening of potential targets to those that are “war-sustaining” raises questions about the potential for overreach in terms of the targets struck, excessive collateral civilian death and injury, and adverse humanitarian effects for the vast majority of civilians who are not taking a direct part in hostilities.

### **“War-Sustaining” vs. “Military Action”**

Some of the current discussion has centered on whether the US’s substitution of the wording “war-sustaining” for “military action” in [Additional Protocol I](#)’s definition of military objective represents a broadening of the types of objects that can be lawfully attacked. The shift raises crucial questions, including: What are the limits on targeting under the “war-sustaining” approach? The legal framework introducing restrictions on targeting was largely developed in response to the horrific civilian casualties and widespread destruction during the “total war” of World War II. It is worth remembering strategic bombing played a significant role in that destruction.

While various arguments have been put forward suggesting “military action” encompasses “war-sustaining,” such an interpretation must be tempered with the contrary view found in the 1995 [San Remo Manual on International Law Applicable to Armed Conflicts at Sea](#). The manual’s accompanying Explanation states:

The Round Table [with many AP I country participants] considered whether or not it should include the expression ‘military action’ or some alternative expression such as ‘war effort’ or ‘war sustaining’ and eventually decided that these alternative expressions were too broad. (para. 40.12)

Ryan relies on the Bothe, Partsch, and Solf [New Rules for Victims of Armed Conflict](#) in reaching the conclusion that, under some circumstances, a revenue-generating object can make an effective contribution to military action. However, that 1982 publication does not appear to represent the views of most contemporary humanitarian law scholars, and he acknowledges a narrower view of military objects is reflected in the views of experts found in recent manuals on air and missile (2010) and cyber warfare (2013).

Even if the US did not feel the “war-sustaining” wording broadened the meaning of “military objective” when it was developed, it is still evident that was the “operationalized” effect. In discussions I have had over the years with practitioners, including from the US, that is exactly how it has been understood: a broader set of targets based on a unique US Civil War precedent.

One might even ask why, if “war sustaining” effectively means “military action,” was there a need to adopt US-specific wording? It might have been a reaction to the ICRC’s tactical [view](#) of targeting. However, the strategic aspects of targeting were recognized by States (i.e., “overall” anticipated military advantage wording of Article 8(2)(b)(iv) of the 1998 [Rome Statute](#)) long before the US specific “war-fighting, or war-sustaining” approach was transferred from national military doctrine into legislation through the [Military Commissions Act](#). While it is not clear this was consciously done to ensure a different standard for US operations, the effect appears to be one of solidly placing the country in an outlier position. This is not a unique position for the US to be in regarding AP I, although it has [recognized](#) the convention-based targeting provisions are generally reflective of customary international law.

### **Small Differences With Potentially Large Consequences**

It can be [argued](#) the “delta” between targeting in strategic air campaigns (particularly when combined with air or maritime blockades) conducted under a more limited AP I interpretation, and a broader “war-sustaining” approach is a narrow one. The “war-sustaining” concept has its roots in naval and air warfare, which historically invoke broader issues of economic warfare. However, a difference still exists, even if a limited number of States may be willing to target IS on this basis. As with the greater recognition of the right of a State to act in self-defense, renewed reliance on the historic “unwilling and unable” test, adoption of the *Hamdan v. Rumsfeld* non-international armed conflict categorization, and increasing emphasis on the intensity of violence standard under the *Tadić* criteria for armed conflict, traditional interpretations of international law have been forced to change as States react to 21st century non-State actor threats. Is this broadening of potential targets simply part of that trend?

One concern is it represents an importation of “Just War” principles where special/different rules are applied against “bad” actors. The question must be asked whether the use of a “war-sustaining” targeting standard against IS has largely escaped

critical comment because it is being carried out against such a reprehensible “terrorist” organization. What about the foundational “equal application principle” of IHL where the law is viewed as **applying equally** to all parties without consideration of the justness of their cause?

If Just War principles are creeping into the fight against IS, that represents yet another slippery slope that should be approached with caution. It might be argued these “terrorist” organizations constitute a different type of enemy, organizationally and operationally, making money an essential operational “center of gravity.” This argument appears to founder on the reality that jihadists have embraced revolutionary warfare doctrine with the third stage involving the adoption of semi-conventional military operations and State-like governance responsibilities over territory. Indeed, while strategic bombing traditionally has significantly less application to non-State actor conflict, revenue-generating targets are available to be struck exactly because IS governs territory.

### **Looking in the “War-Sustaining” Mirror**

What should cause pause is what this means for conflicts between States. If it is permissible to attack a revenue-generating industry of this non-State actor (e.g., oil production), as well as the warehouses and even private residences housing “cash,” does that mean these are also valid targets in inter-State conflict? What parts of a legitimate State’s economy, such as that of the United States, would be off limits in a “war-sustaining” targeting paradigm?

Ryan has identified one limiting factor might be “that the economic contributions should be confidently traced through a strong causal connection to an enemy’s military action.” It is not clear if that was done in the case of IS, or how confidently it could be assessed regarding warehouses of cash amassed not only by criminal activity, but also from forms of “**taxation**.” Were these targets repositories of money used exclusively, or even predominately, to pay fighter’s salaries and acquire weapons, or were they and the attendant storage sites associated with a governance function? As Daphne notes in her post, some of money “was likely destined for the civilian population either through subsidies, social work, judicial services, or school funding.” This is exactly what needs to

be established before strikes are conducted. A public accounting of the exact nature of the causal connection would be helpful legally, from a public relations perspective, and to properly situate future arguments concerning reciprocity.

In a world where States have increasing access to high-tech arsenals (including cyber weapons) capable of inflicting strategic damage, the possible targeting of economic engines of modern States — which ultimately fuel their security and military activities — should be looked at closely and soberly through the “cold stark mirror of reciprocity.”

## **Personnel Reflections**

This is not the only “reflection” that should be closely studied. What about the persons working in those industries and managing the economic affairs of a State? With the lawful targeting of persons being restricted to members of organized armed groups and individual civilians taking a direct part in hostilities (DPH), how is such membership and participation defined? Contrary to the narrower criteria identified in the ICRC *Interpretive Guidance on the Notion of Direct Participation*, many States recognize that targeting of members of an organized armed group should include persons performing a combat support and combat service support analogous to State armed forces. Individual civilians may also be at risk when providing direct logistics support. However, this “direct” support does not encompass the full breadth of the US concepts of providing “substantial” or “material” support to terrorism applied when detaining and trying persons during the post-9/11 conflict.

There is a significantly narrower legal authority to kill direct participants in hostilities than to detain or prosecute their “supporters” under international law. Key factors in meeting the international test can include the position a person holds within an organized armed group, and the causal connection between the function being performed and actual conduct of hostilities. Abu Sayyaf, the financier [killed in a 2015 Special Forces raid](#), was a lawful target because of his position and the function he performed within the IS armed group. However, it is not clear a person working in a “money” warehouse, like a worker at an oil field, is not simply a civilian performing an administrative role related to governance or participating in commerce rather than taking a direct part in hostilities. This matters in terms of the proportionality assessment applied during targeting.



Without positive evidence to the contrary, that worker’s anticipated death or injury would have to be assessed as a potential collateral casualty (see Beth Van Schaack’s [post](#) regarding oil tanker drivers for more on this point).

Reference in the 2015 Defense Department *Law of War Manual* to factory workers in rear areas not directly participating in hostilities (p. 228) goes some way in addressing this issue. However, the *Manual* (p. 1048) also relies on Daniel Bethlehem’s self-defense Principle 9 indicating the failure of a territorial State to prevent “material support” to terrorism underpins a threatened State’s right to act in self-defense. Daniel’s threshold [Principles](#) (p. 6, note c) seek to distinguish direct participation in a self-defense context from its humanitarian law meaning, although Principle 7 suggests armed action can be taken in defense against those taking “a *direct part* in ... [armed] attacks through the provision of *material support essential to the attacks*.” It is not clear what “material support” encompasses in these Principles, or its relationship to DPH. As outlined in [Humanitarian Law Project](#), “material support” is an exceptionally broad concept under US law. Given the limited public disclosure of US targeting standards, it is not clear whether this is another area where nation-specific terms might impact on targeting. If so, this would constitute a significantly broader interpretation of DPH, and will be at odds with the international consensus on this issue. To ensure clarity, it should be emphasized that the broader “substantial” or “material” support terms are not relied on when targeting in a self-defense or any other context.

\* \* \*

The use of airpower is an important element of the overall action being taken to defeat IS. History has shown that limits matter in terms of restricting the death and destruction associated with armed conflict. Demonstrating what those limits are, both by word and deed, can have an important humanitarian effect in existing and, as importantly, future conflict. In this regard treating others as you would want to be treated is an essential element of human conduct, especially in warfare.

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## Medical Care in Urban Conflict

*Kenneth Watkin*

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## Medical Care in Urban Conflict

*Kenneth Watkin\**

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

The provision of medical care to the sick and wounded during armed conflict is a foundational humanitarian law obligation. This can be seen in the genesis of the International Committee of the Red Cross (ICRC) with Henry Dunant's work following the 1859 Battle of Solferino.<sup>1</sup> Obligations regarding the collection, treatment, and care of the sick and wounded, both military and civilian, are firmly grounded in treaties such as the 1949 Geneva Conventions and their 1977 Additional Protocols.<sup>2</sup> During international armed conflict the First Geneva Convention provides a comprehensive regime for the protection of wounded and sick members of armed forces and other associated forces who have fallen into enemy hands, while Additional Protocol I expands these protections to civilians.<sup>3</sup> The protection provided in non-international armed conflict is rooted in Common Article 3 of the 1949 Geneva Conventions, as well as Additional Protocol II. Further, as was noted in the 2005 ICRC *Customary International Humanitarian Law* study, State practice establishes that the search for, collection, and treatment of the

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1. See *Founding and Early Years of the ICRC (1863-1914)*, ICRC (May 12, 2010), <https://www.icrc.org/en/document/founding-and-early-years-icrc-1863-1914>

The Red Cross came into being at the initiative of a man named Henry Dunant, who helped wounded soldiers at the battle of Solferino in 1859 and then lobbied political leaders to take more action to protect war victims. His two main ideas were for a treaty that would oblige armies to care of all wounded soldiers and for the creation of national societies that would help the military medical services.

2. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609.

3. GEOFFREY CORN, KENNETH WATKIN & JAMIE WILLIAMSON, *LAW IN WAR: A CONCISE OVERVIEW* 90 (2018); see also Additional Protocol I, *supra* note 2, art. 8(1) (“‘Wounded’ and ‘sick’ means persons, whether military or civilian, who . . . are in need of medical assistance or care and who refrain from any act of hostility.”).

wounded, sick, and shipwrecked is “a norm of customary international law applicable in both international and non-international armed conflicts.”<sup>4</sup>

However, in the twenty-first century States and other participants in conflict are facing new challenges in meeting these humanitarian obligations. One area of particular concern is the shift of contemporary operations to urban population centers, which themselves are undergoing dramatic growth. Most of these urban-based conflicts are occurring in the context of terrorism and insurgencies, challenging the ability of the State to govern, contain the violence, and ultimately control those populations with peacetime human rights-based rules. A focus on “counterterrorism”<sup>5</sup> that frequently includes a blend of policing and military responses has created a complex legal and operational situation in which medical care must be provided.

The following analysis of the provision of medical care in contemporary urban conflict will be addressed in five parts. Part II discusses the change in the operational environment to one increasingly taking place in urban areas. Part III addresses the determination of when an “armed conflict” actually exists and the impact of conflict characterization on the legal regime governing the provision of medical care. A particular focus will be the situation brought about by court rulings and State policy choices that frequently favor human rights-based law enforcement responses. The fourth Part addresses the availability of medical services to military personnel and civilians during armed conflict. Part V looks at the destructive impact of urban conflict, particularly on civilians found in that battlespace. Finally, Part VI provides an overview of the types of casualties that can result from urban combat.

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4. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 396 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL].

5. U.S. DEPARTMENT OF DEFENSE, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2018), <http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf> (“Activities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals.”).

## II. URBAN CONFLICT AND THE CHANGING NATURE OF WARFARE

While humanitarian law is universal, how it is applied is by necessity contextual.<sup>6</sup> From a treaty perspective, the requirement to provide medical care in armed conflict was primarily developed in the context of international armed conflict. However, even with respect to inter-State armed conflict, warfare has changed over the past century. As has been noted, “While statistics vary among studies, there is no question that beginning with World War II, the ratio of civilian to military casualties in war has steadily increased. Many experts believe that today 90 percent of casualties are civilian.”<sup>7</sup> Since the end of the Cold War, there has been a proliferation of “non-international armed conflicts” resulting in military forces being engaged in a wide range of military operations. Those operations have spanned a spectrum from high-end conventional style combat in urban environments, such as Fallujah and Mosul in Iraq, Raqqa and Damascus in Syria, and Marawi in the Philippines, to United Nations-mandated peace support operations in Mali.

Of note, the conflict in Mali is representative of a unique aspect of contemporary conflict. While the jihadist groups involved do not pose a monolithic threat, at its heart the violence in Mali is part of a complex transnational, and therefore international, insurgent threat against the governments of the Sahel region of Africa.<sup>8</sup> It was the threat of the seizure of the Malian capital of Bamako by jihadists that prompted French military intervention in 2013.<sup>9</sup> Since then, the city has witnessed periodic terrorist violence.<sup>10</sup>

It is the transnational threat posed by non-State actors, ranging from criminal groups challenging State governance to a complex web of jihadist

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6. Geoffrey S. Corn, *Humanitarian Regulation of Hostilities: The Decisive Element of Context*, 51 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 763, 765 (2018).

7. *Id.* at 764.

8. Firlie Davies & Alistair Leithead, *The War in the Desert: Why the Sahara Is Terror's New Frontline*, BBC NEWS (June 21, 2018), [https://www.bbc.co.uk/news/resources/idt-sh/war\\_in\\_the\\_desert](https://www.bbc.co.uk/news/resources/idt-sh/war_in_the_desert). For an overview of the jihadist threat in the Sahel, see CHRISTOPHER S. CHIVVIS, *THE FRENCH WAR ON AL QA'IDA IN AFRICA* 7–8 (2016).

9. CHIVVIS, *supra* note 8, at 93–111.

10. *See, e.g.*, Mamadou Tapily, Peter Walker & Charlie English, *Mali Attack: More Than 20 Dead after Terrorist Raid on Bamako Hotel*, BBC NEWS (Nov. 20, 2015), <https://www.theguardian.com/world/2015/nov/20/mali-attack-highlights-global-spread-extremist-violence>; *see also Mali Takes Terrorist Threat Seriously, Especially in Bamako*, APA NEWS (Aug. 16, 2017), <http://apanews.net/index.php/en/news/mali-takes-terrorist-threat-seriously-especially-in-bamako>.

organizations seeking to establish a global caliphate that has made the operational environment so complex.<sup>11</sup> The security situation is further complicated by the link between criminal activity and terrorism/insurgency, and the degree to which urban areas in some parts of the world have become an operational magnet for warlords and others challenging government authority.<sup>12</sup> Importantly, conflict with non-State actors, whether internal to a State or transnational in character, has increased the requirement not only to consider international humanitarian law obligations, but also obligations imposed by human rights law. As will be discussed, this development can have significant impact on obligations regarding medical care.

There is considerable merit to the theory that champions the approach that “war is war” regardless of whether an armed conflict is fought in an intra-State, inter-State, or transnational context.<sup>13</sup> This is particularly true regarding humanitarian obligations since human suffering is common to all types of conflict. Warfare conducted in the “regions of savagery” contemplated by jihadist doctrine<sup>14</sup> can be just as vicious and destructive as conventional inter-State conflict. Traditionally, terrorism and insurgency were most often associated with guerrilla groups operating from inhospitable wooded and mountainous areas of a country, and therefore, more difficult places for State security forces to operate. However, the regions of savagery of contemporary conflict now extend to “a city, or a village, or two cities, or a district, or part of a large city.”<sup>15</sup> There has been a dramatic shift over the past two decades to terrorists and insurgents operating in population centers.

The conduct of hostilities in these urban environments reflects the reliance on a three-stage guerrilla warfare strategy that culminates in a liberation stage where “guerrillas enter operations that are semi-regular and others that are regular, and they control some areas from which they launch operations

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11. KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 159–213 (2016).

12. ANTONIO GIUSTOZZI, *EMPIRES OF MUD: WARS AND WARLORDS IN AFGHANISTAN* 21 (2009).

13. HEW STRACHAN, *THE DIRECTION OF WAR* 207–09 (2013) (outlining the importance of a unitary vision of war).

14. ABU BAKR NAJI, *THE MANAGEMENT OF SAVAGERY: THE MOST CRITICAL STAGE THROUGH WHICH THE UMMA WILL PASS* [16] (William McCants trans., 2006), <https://azelin.files.wordpress.com/2010/08/abu-bakr-naji-the-management-of-savagery-the-most-critical-stage-through-which-the-umma-will-pass.pdf>.

15. *Id.*



to liberate the rest of the country.”<sup>16</sup> The combat that occurred in the streets of Mosul, Raqqa, and Damascus resembles urban fighting within conventional armed conflict. In Afghanistan, the long-term U.S. military strategy, which hinges on defending population centers while ceding much of the remote countryside to the Taliban, inevitably means that clashes will occur within urban areas. This was graphically demonstrated in August 2018 in Ghazni with the Taliban assault on that city. While Ghazni was ultimately left in the hands of the Afghan government, the Taliban claimed, “the conquest of this city signifies the failure of yet the latest American strategy,” and “[t]he experience of Ghazni has proven that no defensive belts of cities can withstand the offensive prowess of the Mujahideen.”<sup>17</sup> The war for the control of towns and cities of Afghanistan is far from over.

This increasing shift towards warfare in cities and towns is accelerated by a migration of the world’s population to urban environments. By 2008, 50 percent of the world population lived in cities.<sup>18</sup> It is estimated that by 2050, this amount will increase to 66 percent.<sup>19</sup> Further, a significant proportion of this population will live in less-developed countries.<sup>20</sup> For example, the Institute for Security Studies predicts that by 2030, “Lagos, Cairo and Kinshasa will each have to cater for over 20 million people, while Luanda, Dar es Salaam and Johannesburg will have crossed the 10 million mark.”<sup>21</sup> Likewise, Sullivan notes, “[c]ontemporary megacities may include global cities and global slums (neighborhoods where transnational gangs dominate

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16. BRYNJAR LIA, ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL-QAIDA STRATEGIST ABU MUS’AD AL-SURI 472 (2008); see also AL-QA’IDA’S DOCTRINE FOR INSURGENCY: ABD AL-AZIZ AL-MUQRIN’S “A PRACTICAL COURSE FOR GUERRILLA WAR” 12 (Norman Cigar trans., 2008); MICHAEL W. S. RYAN, DECODING AL-QAEDA’S STRATEGY: THE DEEP BATTLE AGAINST AMERICA 230 (2013); ALI SOUFAN, ANATOMY OF TERROR: FROM THE DEATH OF BIN LADEN TO THE RISE OF THE ISLAMIC STATE 286–87 (2017).

17. W. J. Hennigan, *Exclusive: Inside the U.S. Fight to Save Ghazni from the Taliban*, TIME (Aug. 23, 2018), <http://time.com/longform/ghazni-fight-taliban/>.

18. ANTHONY JAMES JOES, URBAN GUERRILLA WARFARE 1–2 (2007).

19. POPULATION DIV., U.N. DEP’T OF ECON. & SOC. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2014 REVISION HIGHLIGHTS, at 1, U.N. Doc. ST/ESA/SER.A/352 (2014), <https://esa.un.org/unpd/wup/Publications/Files/WUP2014-Highlights.pdf>.

20. *Id.* at 2.

21. Julia Bello-Schünemann, *Africa’s Future Is Urban*, INSTITUTE FOR SECURITY STUDIES (Dec. 2, 2016), <https://issafrica.org/iss-today/africas-future-is-urban>.

local turf and are globally connected to transnational criminal networks).”<sup>22</sup> This means warfare and associated insecurity occurring in cities and surrounding urban areas with up to three times the population of New York City.<sup>23</sup>

Adding to the complexity of this operating environment is the fact that most of these people live in littoral regions.<sup>24</sup> This means providing security to urban areas must involve all components of military and security forces: land, air, and naval military forces, police forces, and the coast guard. The threat to littoral urban centers was most graphically displayed in Mumbai in 2008 where military, paramilitary, and police units were required to deploy to counter an exceptionally destructive sea borne attack on that city by the Pakistan based LeT terrorist group.<sup>25</sup> During that attack ten terrorists “were able to hold the world’s fourth largest city to ransom, killing 166 and injuring more than 300 over three nights of horror.”<sup>26</sup>

Urban conflict in this century presents new challenges, while also resurrecting many old ones. In terms of new challenges, fighting among an urbanized civilian population means, “[m]edical intervention includes pre-hospital emergency medical services and in-hospital care. Responding to injuries caused by terrorism, insurgency, and war form a situation of ‘conflict disaster’ demanding new protocols such as tactical medics and ‘counterterrorism medicine.’”<sup>27</sup> Regarding the provision of medical care, State security forces must also interface with specific actors on the urban battlefield “where civil defense and non-governmental organizations—such as Médecins Sans Frontières (MSF), the International Committee of the Red Cross (ICRC), Syria’s

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22. John P. Sullivan, *The Urban Imperative: War, Terrorism, and Insecurity in Mega Cities*, STRATFOR (Feb. 13, 2018), <https://worldview.stratfor.com/horizons/fellows/dr-john-p-sullivan/13022018-urban-imperative-war-terrorism-and-insecurity-megacities>.

23. James Barron, *New York City’s Population Hits a Record 8.6 Million*, NEW YORK TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/nyregion/new-york-city-population.html>.

24. DAVID KILCULLEN, *OUT OF THE MOUNTAINS: THE COMING OF AGE OF THE URBAN GUERRILLA* 30 (2013) (noting that 75 percent of the world’s cities are coastal and that 80 percent of the population lives within sixty miles of the coastline).

25. *Id.* at 57–60.

26. CATHY SCOTT-CLARK & ADRIAN LEVY, *THE SIEGE: 68 HOURS INSIDE THE TAJ HOTEL 277* (2013).

27. Sullivan, *supra* note 22.

White Helmets, and Save the Children (which was recently attacked in Jalalabad)—provide aid and care to the besieged and threatened populations.”<sup>28</sup> Elsewhere the siege of cities, such as that of the port city of Al Hudaydah, Yemen,<sup>29</sup> air and naval blockades occurring off the coast of that country,<sup>30</sup> and the naval blockade of Gaza<sup>31</sup> are forcing participants to reassess older humanitarian law rules concerning the obligations of conflict participants towards the civilian population.<sup>32</sup> Among the challenges in this context is access to life-saving medication for besieged or blockaded civilians.<sup>33</sup>

### III. WHICH LEGAL FRAMEWORK GOVERNS THE PROVISION OF MEDICAL CARE?

An essential, indeed foundational, question is what body of law governs the provision of medical care to those in need arising from violence in urban areas. Of course, an armed conflict must exist for international humanitarian law—and with it the obligations regarding medical care—to apply. In the absence of such conflict, the provision of medical care is governed exclusively by human rights law.<sup>34</sup> As the second decade of the twenty-first century ends, there has been a renewed focus by major military powers, such as the United States, on near peer warfare between States. However, international armed conflicts are not occurring directly between those powers, and con-

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28. *Id.*

29. Mohammed Ali Kalfood & Margaret Coker, *Saudis Escalate Siege of Port in Yemen, Alarming Aid Groups*, NEW YORK TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/world/middleeast/yemen-saudi-hudaydah-missiles.html>.

30. *Yemen: Coalition Blockade Imperils Civilians: UN Should Sanction Senior Saudi Leaders*, HUMAN RIGHTS WATCH (Dec. 7, 2017), <https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians> [hereinafter *Yemen: Coalition Blockade*].

31. 1 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶¶ 48–64, at 53–69 (2011), <http://turkel-committee.gov.il/files/wordocs//8707200211english.pdf>.

32. See, e.g., PHILLIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT AND FUTURE (2017).

33. *Yemen: Coalition Blockade*, *supra* note 30.

34. Katherine H.A. Footer & Leonard S. Rubenstein, *A Human Rights Approach to Health Care in Conflict*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 167, 168 (2013) (“In some circumstances of political volatility or violence, attacks on health care providers, facilities, transports, and patients take place, but IHL does not apply at all, because no armed conflict exists.”).

flicts not of an international character remain the predominate form of warfare. This can be seen in *The War Report: Armed Conflicts in 2017*, which indicates that at least fifty-five armed conflicts occurred that year.<sup>35</sup> Thirty-eight of these were viewed as non-international ones, while ten of the remaining seventeen international armed conflicts between States were belligerent occupations, such as Israel's occupation of the Palestinian West Bank.<sup>36</sup> The international armed conflicts that occurred have included short-lived ones "between Libya and Egypt, Israel and Syria, as well as Turkey and Iraq."<sup>37</sup> As a result, it is non-international armed conflicts, many of which are protracted and transcend national borders, which continue to dominate the security dialogue.

The non-State actor threat encompasses a wide range of violence that can involve isolated terrorist incidents, insurgent groups engaging in guerrilla warfare, or armed conflict, such as has occurred with the Islamic State, which approximates conventional warfare. Not all non-State actor violence rises to the level of an armed conflict. One area of considerable debate in the post-9/11 security environment is when violence occurring between States and non-State actors crosses the armed conflict threshold. For much of the period following the attacks of 9/11 a segment of the international community focused on requiring a high threshold for the existence of an armed conflict in a non-international context. That threshold is primarily based on the *Tadić* criteria of "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>38</sup>

The debate has largely centered on limiting when a determination is made that a conflict exists, particularly in relation to transnational terrorist attacks. Terrorism is equated with criminal activity to be controlled by States exercising sovereignty over their own territory. This has included suggestions that "individual acts of terrorism that have been occurring around the world, in Mumbai, London, Madrid, Casablanca, Glasgow, or Bali, to name just a

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35. THE WAR REPORT: ARMED CONFLICTS IN 2017, at 17 (Annyssa Bella ed., 2018).

36. *Id.*

37. *Id.*

38. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

few places” would not meet the criteria for the application of Common Article 3.<sup>39</sup> However, this “individualized” approach towards assessing contemporary terrorism is significantly challenged by a transnational jihadist threat that is linked in a common cause to create its own system of governance.

Over-reliance on the *Tadić* threshold has at times seemed inconsistent with the broader interpretation applied to the applicability of Common Article 3 prior to 9/11. As was noted in *Abella v. Argentina*, a 1997 Inter-American Commission on Human Rights report,

[t]he most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the “lowest” level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.<sup>40</sup>

This interpretation seems at odds with one that seeks to set a high threshold for the existence of an armed conflict.

Further, in the post-9/11 period there has been a greater recognition of the transnational threat that jihadist groups can pose to international peace and security.<sup>41</sup> Indeed, the threat posed by Al-Qaeda, the Islamic State, and other jihadist groups in various locations transcends multiple geographic borders.<sup>42</sup> It is difficult to argue that the violence of these groups constitutes isolated or “individual” acts of terrorism when their linkage is perhaps more accurately being described as “Al Qaeda and Associated Movements (AQAM),”<sup>43</sup> or broadly as the “Jihadist Movement.”<sup>44</sup>

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39. Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 1, 8–9 (2011).

40. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 153 (1997), [http://hrlibrary.umn.edu/cases/1997/argentina\\_55-97a.html](http://hrlibrary.umn.edu/cases/1997/argentina_55-97a.html).

41. *See, e.g.*, S.C. Res. 2249, pmbl. (Nov. 20, 2015) (recognizing the global nature of the Islamic State threat).

42. WATKIN, *supra* note 11, at 295–98.

43. ABDEL BARI ATWAN, AFTER BIN LADEN: AL QAEDA, THE NEXT GENERATION 15 (2012).

44. *See* WATKIN, *supra* note 11, at 198–99, for a discussion of the “Jihadist Movement.”

As has been noted by the ICRC, the question of whether an armed conflict exists can “make a vital difference to the survival, well-being, and dignity of the victims of a conflict.”<sup>45</sup> This is because Common Article 3 “ensures that the Parties to that conflict are under an international legal obligation to grant certain fundamental protections to the victims of the conflict and to respect the rules on the conduct of hostilities. Humanitarian law binds all Parties to the conflict, State and non-State alike.”<sup>46</sup> Over the history of the development of international humanitarian law, protections regarding medical care “have become more extensive and detailed.”<sup>47</sup> However, their applicability as a matter of law requires the existence of an armed conflict.

This is not to suggest “all IHL [international humanitarian law] medical-care measures are universally applicable to all armed conflicts.”<sup>48</sup> While many rules applicable to international armed conflicts are viewed as being customary in nature and applicable to non-international conflicts, some differences remain. For example, in non-international armed conflict there are no humanitarian law limitations on the detention or retention of medical personnel.<sup>49</sup> That said, the international humanitarian law provisions provide a more detailed and comprehensive set of protections for those requiring medical care since, “[u]nlike IHL, which has rules designed specifically to address the respect and protection of health care in armed conflict, HRL [human rights law] instruments are formulated in more general terms.”<sup>50</sup>

It is widely accepted that human rights law protections regarding health do continue to apply during all types of armed conflict and other situations of violence. This includes Article 12 of the International Covenant on Economic, Social and Cultural Rights, which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental

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45. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION OF 1949: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, ¶ 388, at 141 (2016) [hereinafter 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION].

46. *Id.*

47. Footer & Rubenstein, *supra* note 34, at 168.

48. DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, MEDICAL CARE IN ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSES TO TERRORISM 6 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657036](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657036).

49. *Id.* at 7.

50. Footer & Rubenstein, *supra* note 34, at 171.

health.”<sup>51</sup> This has been interpreted to require the “equitable distribution [of] and access to health facilities, goods and services,” the provision of “essential medicines,” and the formulation of a “national health plan or policy.”<sup>52</sup> In this respect, “IHL does not generally cover these dimensions of health services, as it focuses on impartiality in responding to individuals in immediate need of care rather than on the structure and availability of services.”<sup>53</sup> The operational challenge is that not all States agree that international human rights treaty law has extraterritorial applicability, thereby limiting the extension of these rights for some participants during overseas operations.<sup>54</sup> Further, it is difficult to argue that customary human rights law, which does have universal application, encompasses this treaty right.

Questions regarding how human rights law is interpreted to ensure the provision of non-discriminatory and effective medical care also arise in “circumstances where no armed conflict exists, but where health workers, facilities, patients, and ambulances are subject to threats, attacks, and other forms

51. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

52. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CONFLICT ¶ 35, at 11 (2015), <https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf>; see also Footer & Rubenstein, *supra* note 34, at 180; U.N. Economic and Social Council, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social And Cultural Rights: General Comment No. 14, ¶ 34, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/C.12/2000/4](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.12/2000/4) (noting that among the obligations is for States to refrain from “limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law”).

53. Footer & Rubenstein, *supra* note 34, at 181.

54. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119, 141 (2005) (“The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict.”); U.N. Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) (noting that the United States maintains the position that the Covenant does not apply to individuals under its jurisdiction, but outside its territory); Human Rights Committee, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life, Comments by the Government of Canada, ¶ 7 (Oct. 23, 2017), <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (then follow “Canada” hyperlink) (setting forth the Canadian view that the “jurisdictional competence of a State is primarily territorial,” and that an expansion beyond the territory of the State “would impinge on well-established principles of sovereignty”).

of interference and denial, HRL fills an important gap.”<sup>55</sup> Of particular note, it is solely human rights law that applies in those situations. Examples include the 2011 political unrest in Bahrain, the situation in Syria before a determination there was an armed conflict, and in the volatile regions of Nigeria where vaccination workers have been attacked.<sup>56</sup>

However, setting a very high legal threshold for armed conflict can mean that State authorities are confronted with levels of violence that factually reach levels normally associated with warfare. In those situations, in order to provide proper medical care to the victims of that violence human rights law will likely have to begin to be interpreted in a fashion that approximates the more specific protective rules of international humanitarian law. The potential problem this creates is that important obligations regarding the provision of medical care integral to that body of law may not be incorporated. Acknowledging the existence of an armed conflict in circumstances where the levels of violence factually indicate one exists provides the most robust and best articulated protections for both civilian populations and the participants in the conflict.

More recently, there has been a greater recognition of a “totality of the circumstances” approach that expands the criteria to be considered when assessing if an armed conflict with non-State actors is in existence.<sup>57</sup> This has included looking towards the standard of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” found in Article 1(2) of Additional Protocol II as a dividing line between armed conflict and situations of ordinary crime that solely demand a human rights-based law enforcement response. Similarly, the requirement to deploy military forces, while not determinative on its own, provides another important factor that needs to be considered when assessing whether an armed conflict is occurring.

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55. Footer & Rubenstein, *supra* note 34, at 187.

56. *Id.* at 168.

57. *See* Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, Judgment, ¶ 257 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) [http://www.icty.org/x/cases/boskoski\\_tarculovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf) (referencing the totality of circumstances); *see also* Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 693, 731–45 (2013); Geoffrey S. Corn, *Legal Classification of Military Operations*, in U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 67, 74–75 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves eds., 2016); WATKIN, *supra* note 11, at 375–78.



The notion that an armed conflict can occur in a relatively short period of fighting is reflected in the 1997 *Abella v. Argentina* report, which found an armed conflict lasting only thirty hours.<sup>58</sup> It is an interpretation that has once again gained prominence as the world has struggled with transnational terrorism in the post-9/11 period. Applying a “totality of the circumstances approach” to incidents such as the 2000 Sierra Leone hostage rescue (4 hours), the 2008 Mumbai attack (68 hours), the 2012 assault on U.S. facilities in Benghazi (13 hours), and the 2013 Westgate Mall attack in Nairobi (80 hours) all point towards the existence of armed conflicts, either as part of a broader conflict, or as a “one-off” attack of a relatively short duration.<sup>59</sup>

A more flexible approach towards conflict characterization is also reflected in the ICRC’s 2016 *Commentary on the First Geneva Convention* where it is noted that “hostilities of only a brief duration may still reach the intensity level of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of a sufficient intensity to require and justify such an assessment.”<sup>60</sup> This *Commentary* incorporates the earlier Pictet *Commentary* reference to the use of State military forces as one of the criteria to be considered in assessing if an armed conflict exists.<sup>61</sup> The 2016 *Commentary* indicates that “the requisite degree of intensity may be met . . . when the government is obliged to use military force against the insurgents, instead of mere police forces.”<sup>62</sup> While some States, such as Canada, may also use their military forces in a domestic law enforcement role,<sup>63</sup> it remains that the use of military forces to counter threats posed by non-State actors is a relevant

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58. *Abella v. Argentina*, *supra* note 40, ¶ 1.

59. WATKIN, *supra* note 11, at 293, 367–68; *see also* KILCULLEN, *supra* note 24, at 52–66 (outlining the Mumbai assault); MITCHELL ZUCKOFF, 13 HOURS: THE INSIDE ACCOUNT OF WHAT REALLY HAPPENED IN BENGHAZI 254–80 (2014); Daniel Howden, *Terror in Nairobi: The Full Story behind al-Shabaab’s Mall Attack*, *GUARDIAN* (London), (Oct. 4, 2013), <https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>.

60. 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 45, ¶ 440.

61. *See* OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR GENEVA 35 (1958) (noting specifically paragraph 1.A.2).

62. 2016 COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 45, ¶ 431.

63. BERND HORN, NO ORDINARY MEN: SPECIAL OPERATIONS FORCES MISSIONS IN AFGHANISTAN 59–62 (2016) (setting out the history of Joint Task Force 2 and its taking over the domestic hostage rescue role from the Royal Canadian Mounted Police in 1993).

factor in determining if an armed conflict is in existence.<sup>64</sup> The ICRC Commentary, in effect, supports the “totality of the circumstances” approach that additional and more flexible factors should be applied when assessing whether an armed conflict exists.

Despite this move towards a more flexible interpretation of the armed conflict threshold, there are additional conflict categorization issues that could have significant impact on the provision of medical care during contemporary conflict. In this context, viewing terrorism as a criminal matter can have a particularly important consequence in two ways.

The first is the degree to which “states penalize—during wartime (as well as peacetime)—diverse forms of support, sometimes including medical care, to terrorist organizations,” such that “counterterrorism policies recast medical care as a form of illegitimate support to the enemy,” or “reject the corollary proposition that a terrorist organization may assign a medical corps to work under its authority.”<sup>65</sup> The counterterrorism approach can often “prevent donors from affiliating with, funding or providing support to any NSAG-provided health activities,” and reduce “the ‘risk appetite’ of many faith-based humanitarian organizations to engage with certain armed groups.”<sup>66</sup> This outcome is entirely inconsistent with humanitarian need. As has been clearly stated in a study of humanitarian obligations, “no one may be harassed, harmed, prosecuted, convicted, or punished for having provided medical care to the wounded and sick, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care.”<sup>67</sup> What is required is an approach “for all armed conflicts: that once out of the fight, all wounded and sick fighters (and all wounded and sick civilians) should be cared for, and no one should be penalized for giving that care. In short, medical care should be above the conflict.”<sup>68</sup>

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64. *See also* Prosecutor v. Boškoski and Tarčulovski, *supra* note 57, ¶ 190 (emphasis added) (noting that the Court references the armed forces’ engagement with terrorists as a factor in determining whether an armed conflict exists).

65. LEWIS, MODIRZADEH & BLUM, *supra* note 48, at ii.

66. LOUIS LILLYWHITE, CHATHAM HOUSE, NON-STATE ARMED GROUPS, HEALTH AND HEALTHCARE 5 (2015), <https://www.chathamhouse.org/event/non-state-armed-groups-health-and-healthcare> (follow “Meeting Summary” hyperlink).

67. DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT ¶ 86, at 33 (2016), <https://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>.

68. LEWIS, MODIRZADEH & BLUM, *supra* note 48, at 146.

Second, there is the impact of both legal and policy approaches that treat threats by non-State actors to States as a “normal” criminal matter, often when States are being faced with robust insurgencies involving large-scale violence. Focusing on this second issue is especially important since the decision to apply human rights law, either as a matter of law or policy, can have a significant impact on the scope of medical care obligations and the degree of clarity with which they are articulated during counterterrorism and counterinsurgency operations. In practical terms, the legal source for the provision of medical care is not always immediately evident in the contemporary security environment. There are numerous situations, which, due to the nature of the groups and the intensity of the violence involved, can qualify as armed conflicts. This would suggest that humanitarian law, supported by human rights law would govern the provision of medical care. However, courts and States frequently assess these situations of violence solely through a human rights-based law enforcement lens.

The application of human rights law, particularly regarding the use of force can, and frequently should, be the preferred State approach from a policy perspective.<sup>69</sup> This preference is logical because a law enforcement response has the advantage of lowering the levels of violence, as well as maintaining an atmosphere of “normalcy” that ultimately serves as a key indicator of success in a struggle against groups seeking to undermine State governance.<sup>70</sup> The challenge is that at times the desire to maintain a human rights law/law enforcement response does not match the threat posed by the non-State actor, the overall levels of violence, or the nature of the State response. The levels of violence and the suffering experienced by the civilian population are not “normal” at all. This leads to the question of how, or even whether, in those situations the more protective international humanitarian law provisions regarding medical care could be applied during situations that qualify as armed conflict, but which may be viewed by a court or the State exclusively through a human rights lens.

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69. See WATKIN, *supra* note 11, at 592–95, for a discussion of the policy choice frequently made by States to apply a law enforcement approach.

70. Adrian Gueleke, *Secrets and Lies: Misinformation and Counter-Terrorism*, in ILLUSIONS OF TERRORISM AND COUNTER-TERRORISM 95, 99 (Richard English ed., 2015) (noting that “criminalization” is identified as one of the phases of a State’s response to politically motivated violence. It is also noted that “[t]he attraction of this strategy in the context of internal challenge to the state is the implication that the state is sufficiently legitimate that the problem can be dealt with in the context of normal policing.”).

The best examples of a strict adherence to a human rights law approach can be found in the European Court of Human Rights (ECtHR) jurisprudence dealing with internal insurgencies and terrorist threats. While that Court has relied on international humanitarian law “as far as possible” to interpret its human rights law mandate regarding international armed conflict,<sup>71</sup> it has chosen not to do so in respect of hostilities internal to its member States. Rather than overtly relying on humanitarian law when confronted with situations of internal armed conflict, it has chosen to apply a more expansive interpretation of human rights law.

For example, it has applied human rights law to military operations during the Chechen conflict, although in terms of the use of force, the Court has had to significantly increase the tolerance that body of law has traditionally displayed towards violence and civilian casualties. This has been done by borrowing humanitarian law concepts without actually applying that body of law. The Court applied this approach during the protracted Chechen-Russian conflict. Those hostilities had clearly crossed the threshold of armed conflict, including two highly destructive battles between 1994 and 1996 for the control of the city of Grozny. During a 1995 assault on that city “the intensity of artillery fire reached the level of World War II battles”<sup>72</sup> and “Russian military actions displayed an almost complete indifference towards casualties.”<sup>73</sup> These elevated levels of violence continued into the twenty-

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71. *See Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 13, ¶ 185 (2009), <http://hudoc.echr.coe.int/eng/?i=001-94162> (noting that in a case arising from the 1974 Turkish invasion of Cyprus, the Court ruled Article 2 of the European Convention on Human Rights, the Right to Life, must be interpreted as far as possible in light of international humanitarian law provisions applicable during international armed conflict); *see also Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, ¶ 101–02, <http://hudoc.echr.coe.int/eng/?i=001-146501>. The *Hassan* decision dealt with the occupation of Iraq. By adopting the modifying words “as far as possible,” the Court appears to be suggesting that human rights law might perform a supervisory function altering the application of international humanitarian law during armed conflict. There is simply nothing in the development of those two bodies of law, or in respect of their practical application that suggests this to be the case. *See id.*

72. JOES, *supra* note 18, at 145.

73. *Id.* (citing RAYMOND FINCH, WHY THE RUSSIAN MILITARY FAILED IN CHECHNYA 7 (1998)).

first century as demonstrated by Russian military operations involving air and artillery strikes,<sup>74</sup> as well as the Moscow and Beslan hostage incidents.<sup>75</sup>

Notably, the ECtHR has consistently dealt with State military and other security forces engaged in what can readily be described as combat as a “law enforcement body in a democratic society.”<sup>76</sup> Indeed, the Court assessed its actions against a “normal legal background.”<sup>77</sup> The Court took this position even for situations where the force included airpower and artillery employed to suppress an “illegal armed insurgency.”<sup>78</sup> Clearly, these military means and methods are most readily associated with the conduct of hostilities; they are not “normally” applied in law enforcement operations.

While sometimes relying on humanitarian law concepts, such as those found in the targeting proportionality test,<sup>79</sup> the Court has applied them within the restraining principles of human rights law: a strict and compelling test of necessity, using no more force than necessary, and the requirement that the force used be strictly proportionate.<sup>80</sup> This blending of principles, without acknowledging their grounding in the law governing hostilities, is also evident in the acceptance by the Court of significant levels of collateral casualties (129 hostages) that occurred during the 2002 Moscow theater hostage rescue.<sup>81</sup> In contrast, the traditional human rights law approach has been very reluctant to accept any collateral casualties during a policing operation.

The ECtHR also incorporated the humanitarian law concept of indiscriminate weapons into its 2016 judgment regarding the 2004 Beslan school siege.<sup>82</sup> The weapons used during this “counter-terrorist” operation included

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74. *See* *Isayeva v. Russia*, App. Nos. 57947/00, 57948/00, 57949/00 (2005) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-68379>; *Isayeva v. Russia*, App. No. 57959/00 (2005) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-68381> [hereinafter *Isayeva II*].

75. *See* *Finogenov v. Russia*, 2011-VI Eur. Ct. H. R. 365; *Tagayeva v. Russia*, App. No. 26562/07 and 6 other applications (2017) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-172660>.

76. *Finogenov*, *supra* note 75; *Tagayeva*, *supra* note 75, ¶ 600 (emphasis added).

77. *Kerimova v. Russia*, App. Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, ¶ 253 (2011) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-104662> (emphasis added).

78. *Id.* ¶ 246; *see also* *Isayeva II*, *supra* note 74, ¶¶ 190–91.

79. *See, e.g.*, *Isayeva II*, *supra* note 74, ¶ 176.

80. *Id.* ¶ 173; *see also* *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 59, ¶ 79, <http://hudoc.echr.coe.int/eng?i=001-58200> (noting that a restrictive application of human rights law in an anti-terrorism context had been clearly articulated.).

81. *Finogenov*, *supra* note 75, ¶¶ 231–36.

82. *Tagayeva*, *supra* note 75, ¶ 609.

flamethrowers, grenade launchers, large-caliber machine guns, and tanks firing high-fragmentation shells.<sup>83</sup> However, in confirming a reluctance to view these incidents as occurring in an armed conflict, one judge noted in his partial dissent: “I am satisfied that the majority remained faithful to the Court’s standards on the use of lethal force in large-scale anti-terrorist operations, dealing with them as with *any other law-enforcement operation* and refusing to apply the paradigm of the law on armed conflicts to them.”<sup>84</sup> The result of this jurisprudence is that there is now significantly greater authority for the use of force than was traditionally authorized under the human rights paradigm, but a far more restrictive approach to the use of force than would ordinarily be authorized under the law governing the conduct of hostilities.

On one level, the approach of the ECtHR could be said to track the unique threat posed by many non-State actors. From a practical perspective, the normative gap between humanitarian and human rights law—particularly as it relates to use of force by State actors—is often significantly reduced during counterinsurgency and counterterrorism operations. When fighting “among the people” military forces frequently have to limit their use of force. For example, military forces may apply a threat-based response rather than one based on the status of the individual. In contrast, police agencies are often confronted with situations demanding a greater use of lethal force than ordinarily required. Moreover, other common counterinsurgency principles, such as adopting a police primacy approach<sup>85</sup> and privileging capture over killing insurgents/terrorists, reflect a different operational approach in which the use of lethal force is minimized.

However, as Sandesh Sivakumaran noted after his review of efforts by courts to use human rights law to directly regulate non-international armed conflict, “there should not be a rush to judgement that international human rights law holds the answer to all the problems.”<sup>86</sup> A particular challenge presented by this jurisprudence is the lack of flexibility that accompanies legal rulings such as those of the ECtHR. When a State makes a policy choice to adopt a police primacy approach during its counterterrorism operations it retains the option of conducting more traditional hostilities when warranted. What is left unaddressed in the jurisprudence of the Court is whether this

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83. *Id.* ¶ 608.

84. *Id.* ¶ 1, at 168 (partial dissent by Pinto De Albuquerque, J.) (emphasis added).

85. DAVID H. BAYLEY & ROBERT M. PERITO, *THE POLICE IN WAR: FIGHTING INSURGENCY, TERRORISM, AND VIOLENT CRIME* 68–69 (2010).

86. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 99 (2012).

blended form of law can effectively address the full range of security threats posed by many non-State actors.

The more permissive international humanitarian law rules governing hostilities, including during non-international armed conflicts, and the humanitarian obligations enshrined in that body of law were developed out of necessity. It is difficult to see how the ECtHR approach could adequately address the violence that occurred in cities such as Grozny, Mosul, Fallujah, or Raqqa. With its individualized approach, human rights law is not well suited to address widespread and intensive violence, the nature of military operations, or the use of force frequently associated with armed conflict. At times, the Court's adherence to restrictive human rights principles appears to be disconnected from the realities of the security situation involved and the threat facing States, particularly during urban conflict. One commentator, noting the challenges caused by the ECtHR approach towards detention in non-international armed conflict, concludes that while due process requirements flowing from the European Convention on Human Rights cannot be abandoned, "it may mean being better prepared to engage the application of the law of armed conflict and for human rights courts to show some humility in engaging the interface between both legal systems."<sup>87</sup>

If the decisions of courts are disconnected from the situation on the ground, there is a very real danger that the credibility of the legal paradigm involved, and its ability to control the violence, will be undermined. It could also have an adverse impact toward establishing and enforcing obligations on the provision of medical care. If what is needed is compliance with international humanitarian law rules, over reliance on human rights law could adversely affect the provision of humanitarian relief. In contrast, while a State may choose to apply a more restrictive policing approach during armed conflict, it will still be bound by its more protective legal obligations toward the victims of the conflict set out in international humanitarian law. The human rights law-dominate approach of the ECtHR can be contrasted with the example set by the Inter-American Court of Human Rights and the Inter-

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87. Fionnuala Ni Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SECURITY (Feb. 2, 2017), <https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/>; see also Kenneth Watkin, *Accountability Fatigue: A Human Rights Law Problem for Armed Forces?*, JUST SECURITY (Nov. 1, 2018), <https://www.justsecurity.org/61318/accountability-fatigue-human-rights-law-problem-armed-forces-petraeus-united-kingdom/>.

American Commission on Human Rights, both of which relied on international humanitarian law to interpret their human rights law mandate in assessing non-international armed conflict.<sup>88</sup>

Applying human rights law to address the use of force by States during exceptional circumstances also raises the possibility of “human rights overreach.” Here, human rights law, developed to regulate society in peacetime, is applied to acts of violence associated with armed conflict. In doing so human rights law is altered to the point that it begins to reflect its humanitarian law counterpart.<sup>89</sup> In effect, the “militarization” of human rights law is like the contemporary militarization of police forces in that it has the potential to have a long-term negative impact on both the law and society.<sup>90</sup>

What is not clear is how the ECtHR would rule regarding obligations for the provision of medical services in a conflict like Chechnya, which was internal to Russia. Fortunately, the consequence of militarizing this aspect of human rights law is less problematic than questions arising from the use of force. A key issue is one of clarity, and whether a court will go far enough to ensure the same level of protection under human rights law as is available for victims of conflict under international humanitarian law. In other words,

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88. *See, e.g.*, *Bámaca Velásquez v. Guatemala*, Judgment, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 208–09 (Nov. 25, 2000), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_70\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf)

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.

Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.

89. See WATKIN, *supra* note 11, at 252–59, for a more detailed discussion of “human rights overreach.”

90. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 333–36 (2013); *see also* AMERICAN CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* (2014), [https://www.aclu.org/sites/default/files/field\\_document/jus14-warcomeshome-text-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf).



can it meet the humanitarian need? It is also not certain that medical services grounded in a human rights law-focused model would place the same obligations on all participants in the conflict. The traditional view is that international human rights law does not bind non-State actors, although arguments have been presented that it does, or at least should.<sup>91</sup> The simplest approach, and one realistically grounded in the scope and scale of violence, as well as the degree of suffering of the victims of the conflict, would be to acknowledge the existence of an armed conflict and apply humanitarian law.

It is not, however, only judicial scrutiny of security operations that has highlighted the application of a human rights law-based response when addressing levels of violence more readily associated with armed conflict. It frequently arises with States deciding to apply a human rights-based law enforcement response to “terrorism” and other challenges to their authority. This approach may be motivated by a variety of considerations, including the traditional reluctance exhibited by States to acknowledge an armed conflict exists within its borders, a desire to demonstrate a successful strategy through the maintenance of an aura of normalcy and control, or a conscious decision by a State to apply a law enforcement response because it can, in the prevailing circumstances, limit the overall violence. To be certain, there are significant advantages from a policy perspective in adopting a law enforcement response to non-State actor threats, even when an armed conflict is in existence. States should be encouraged to default to this approach whenever possible.<sup>92</sup> However, such an approach is only sustainable when a human rights law-based approach is feasible and effective in countering the threat actually being posed.

The iconic example where such a strategy was successfully applied over a significant period was the nearly thirty-year Northern Ireland “Troubles.” The United Kingdom consistently adopted the position that this complex security situation, which rose to the level of an insurgency,<sup>93</sup> was a criminal

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91. See SIVAKUMARAN, *supra* note 86, at 95–97.

92. WATKIN, *supra* note 11, at 616.

93. See Mark Cochrane, *The Role of the Royal Ulster Constabulary in Northern Ireland*, in POLICING INSURGENCIES: COPS AS COUNTERINSURGENTS 107, 108 (C. Christine Fair & Sumit Ganguly eds., 2014); WILLIAM MATCHETT, SECRET VICTORY: THE INTELLIGENCE WAR THAT BEAT THE IRA 7 (2016) (“No one called it an insurgency, but it was.”); Steven Haines, *Northern Ireland 1968–1998*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 117, 135 (Elizabeth Wilmshurst ed., 2012) (acknowledging the existence of an insurgency in Northern Ireland).

matter.<sup>94</sup> The UK's ability to do so was the direct result of robust and effective mechanisms of government, including police, lawyers, courts, and prisons, as well as reliance on local intelligence personnel.<sup>95</sup> While there was considerable controversy regarding the use of force, it continued to be assessed under a human rights law paradigm. In contrast, it has proven extremely difficult to replicate that success in seeking to counter insurgencies elsewhere, such as in Iraq and Afghanistan, where State governance is not as strong.<sup>96</sup>

The relationship between a State's choice to apply a law enforcement or armed force approach can be complex for both legal and political reasons. For example, the UK's domestic experience can be contrasted with that of Colombia, which, with a change in government in 2011, altered its characterization of its engagement with the FARC to one of an "armed conflict" from an approach that did not recognize "drug dealing terrorists as belligerents."<sup>97</sup> For some States, the character of the conflict is masked behind a generic reference to "counterterrorism operations." The terrorists are treated as criminals, but the operations against them are frequently conducted as hostilities. In Turkey, efforts since 2015 to deal with a decision by the Kurdistan Workers' Party (PKK) to shift from rural guerrilla tactics to urban operations was initially addressed with counterterrorism operations using "police special operations units, Gendarmerie special operations units, commandos, and other special operations teams, as well as armored Army units."<sup>98</sup> A failure to restore order resulted in a shift "to mirror traditional military doctrine for urban warfare: besiege and isolate a city before an as-

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94. Haines, *supra* note 93, at 130; TONY GERAGHTY, *THE IRISH WAR: THE MILITARY HISTORY OF A DOMESTIC CONFLICT* 74 (1998) (outlining how the "Irish Strategy" became one of treating acts of paramilitary violence as the scene of a crime); KIERAN MCEVOY, *PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND: RESISTANCE, MANAGEMENT AND RELEASE* 15 (2001).

95. FRANK LEDWIDGE, *LOSING SMALL WARS: BRITISH MILITARY FAILURE IN IRAQ AND AFGHANISTAN* 219–21 (2011); MATCHETT, *supra* note 93, at 85–97; Cochrane, *supra* note 93, at 112; RICHARD DOHERTY, *THE THIN GREEN LINE: THE HISTORY OF THE ROYAL ULSTER CONSTABULARY GC 1922–2001*, at 216–18 (2012).

96. LEDWIDGE, *supra* note 95, at 164–65; MATCHETT, *supra* note 93, at 251–66.

97. Vanessa Paz Lecompte, *Santos, Uribe Clash over Colombia Conflict*, INSIGHTCRIME (May 5, 2011), <https://www.insightcrime.org/news/brief/santos-uribe-clash-over-colombia-conflict/>.

98. Anna Ronell, *Urban Warfare in the Turkey-PKK Conflict and Beyond*, CENTER FOR STRATEGIC STUDIES, THE FLETCHER SCHOOL, TUFTS UNIVERSITY (Feb. 26, 2018), <https://sites.tufts.edu/css/urban-warfare-in-the-turkey-pkk-conflict-and-beyond/>.

sault to cut logistical support to the enemy inside, undercutting their capabilities and will to continue fighting.”<sup>99</sup> These forms of mixed approaches can create confusion as to what principles of law are governing State action in terms of the use of force, as well as the extent of State obligations regarding the provision of humanitarian assistance.

Uncertainty can develop in other contexts. In December 2017, the Iraq government claimed final victory over the Islamic State,<sup>100</sup> which would ordinarily suggest the establishment of normalcy and peace. However, that non-State organization is far from defeated, with Iraq facing continued insurgent attacks<sup>101</sup> from an estimated 15,500 to 17,100 Islamic State fighters.<sup>102</sup> Likewise, Nigeria has been engaged in an armed conflict with Boko Haram from possibly as early as 2009,<sup>103</sup> with the government seeking to defeat the terrorist group militarily, while at the same time endeavoring to bring prosecutions against its members and supporters under criminal terrorism legislation.<sup>104</sup> In July 2018, the President of Nigeria announced that the northeast of the country was in a post-conflict stabilization phase, which again implies “a total end to hostilities.”<sup>105</sup> However, hostilities continue in a region beset with insecurity from various armed groups.<sup>106</sup> These situations

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99. *Id.*

100. Ahmed Aboulenein, *Iraq Holds Victory Parade after Defeating Islamic State*, REUTERS (Dec. 10, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-parade/iraq-holds-victory-parade-after-defeating-islamic-state-idUSKBN1E407Z>.

101. GLENN A. FINE, STEVE A. LINICK & ANN CALVARESI BARR, OVERSEAS CONTINGENCY OPERATIONS: OPERATION INHERENT RESOLVE, OPERATION PACIFIC EAGLE—PHILIPPINES 19–21 (2018), [https://media.defense.gov/2018/Aug/07/2001951441/-1/-1/1/FY2018\\_LIG\\_OCO\\_OIR3\\_JUN2018\\_508.PDF](https://media.defense.gov/2018/Aug/07/2001951441/-1/-1/1/FY2018_LIG_OCO_OIR3_JUN2018_508.PDF).

102. *Id.* at 3.

103. THE WAR REPORT, *supra* note 35, at 83 (indicating the armed conflict has been occurring since at least 2013.). *But see* ANDREW WALKER, U.S. INSTITUTE FOR PEACE, WHAT IS BOKO HARAM? 3–6 (2012), <https://www.usip.org/sites/default/files/SR308.pdf> (outlining the history of Boko Haram violence, including significant acts as early as 2009).

104. Paul Carsten, *Nigeria Jails 45 Boko Haram Suspects in Mass Trial Held in Secret*, REUTERS (Oct. 13, 2017), <https://www.reuters.com/article/us-nigeria-security/nigeria-jails-45-boko-haram-suspects-in-mass-trial-held-in-secret-idUSKBN1CI2BN>.

105. *Buhari Says Boko Haram-Hit NE Nigeria Now 'Post-Conflict'*, DAILY MAIL (London) (July 6, 2018), <http://www.dailymail.co.uk/wires/afp/article-5926209/Buhari-says-Boko-Haram-hit-NE-Nigeria-post-conflict.html>.

106. Jane Flanagan, *Boko Haram Fighters Take Back Town from Military*, TIMES (London), (Sept. 10, 2018), <https://www.thetimes.co.uk/edition/world/weakened-boko-haram-captures-town-56jg858nv>; Emmanuel Akinwotu, *Deadly Lack of Security Plagues Nigeria as Buhari*

raise the question of at what point normalcy returns and whether State obligations, including the provision of medical care to victims of the violence, will or should be governed exclusively by human rights law.

For many Western States, the response to the jihadist threat outwardly reflects a bifurcated approach with the reliance on a human rights or humanitarian law framework being geographically dependent. For example, the French President declared the November 13, 2015 terrorist attacks in Paris to be “an act of war that was committed by a terrorist army, a jihadist army, Daesh, against France.”<sup>107</sup> However, the response, while including a call of military forces, invoked domestic emergency powers.<sup>108</sup> Externally, while already engaged in airstrikes in Iraq and Syria, the French military immediately retaliated by conducting increased bombing attacks against jihadist targets in Syria.<sup>109</sup> As has been noted by Gilles Kepel, “The struggle against ISIS in Syria and Iraq certainly requires military means—notably, the navy and the air force. But the fight against terrorism on French, Belgian, German or any other Western territory is first of all a matter for the police.”<sup>110</sup>

The reason France and other Western States are able to adopt this approach domestically is that their mechanisms of governance are robust and capable, albeit frequently with the assistance of emergency powers and the use of military forces,<sup>111</sup> and the threat remains at a level where such a response is effective. That they cannot do so internationally reflects the fact

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*Seeks Re-Election*, NEW YORK TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/world/africa/nigeria-zamfara-violence-buhari.html>.

107. Adam Nossiter, Aurlien Breeden & Katrin Bennhold, *Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS*, NEW YORK TIMES (Nov. 14, 2015), <https://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html>.

108. *Id.*; see also Samuel Osborne, *France Declares End to State of Emergency Almost Two Years after Paris Terror Attacks*, INDEPENDENT (London) (Oct. 31, 2017), <https://www.independent.co.uk/news/world/europe/france-state-of-emergency-end-terror-attacks-paris-isis-terrorism-alerts-warning-risk-reduced-a8029311.html>.

109. Alisa J. Rubin & Anne Barnard, *France Strikes ISIS Targets in Syria in Retaliation for Attacks*, NEW YORK TIMES (Nov. 15, 2015), <https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html>.

110. GILLES KEPÉL, *TERROR IN FRANCE: THE RISE OF JIHAD IN THE WEST*, at xviii (2015).

111. Robert Booth, Vikram Dodd, Sandra Laville & Ewen MacAskill, *Soldiers on UK Streets as Threat Raised to Critical after Manchester Bombing*, GUARDIAN (London) (May 23, 2017),

that these States, and those they support, do not exercise the same level of control in the safe havens from which the threats are being generated.

While it might be tempting to dismiss President Hollande's declaration that the 2015 Paris attacks were an act of war as being merely rhetorical in nature, it has been posited that involvement in the Coalition fighting against ISIS in Iraq and Syria extends the application of international humanitarian law to the territory of the participating States.<sup>112</sup> In this regard, it has been suggested by the ICRC that international humanitarian law applies in the territory of assisting States involved in an extraterritorial non-international armed conflict since they "should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders."<sup>113</sup> However, as noted previously, the State policy choice of remaining within a human rights law-based paradigm when it is feasible and effective has been the preferred option.

The threats to State security that potentially engage a human rights law and international humanitarian law interface extend beyond traditional insurgencies and jihadist terrorism to transnational criminal gangs. As noted by Ioan Grillo regarding the security situation in Central and South America,

the cartels spent their billions building armies of assassins who carry out massacres comparable to those in war zones and outgun police. They have diversified from drugs to a portfolio of crimes including extortion, kidnapping, theft of crude oil, and even wildcat mining. And they have grown to control the governments of entire cities and states in Latin America.<sup>114</sup>

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<https://www.theguardian.com/uk-news/2017/may/23/salman-abedi-police-race-to-establish-if-manchester-suicide-bomber-acted-alone> (discussing the deployment of British troops during Operation Temperer following a terrorist attack in Manchester.).

112. Vaïos Koutroulis, *The Fight Against the Islamic State and Jus in Bello*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 827, 848–49 (2016) ("Thus, it is plausible to consider attacks by ISIL in the territory of one of these states as falling within the context of the on-going armed conflict between the coalition and ISIL and, therefore, as regulated by IHL.").

113. INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY: CONCLUDING REPORT 14 (2015), <https://www.justsecurity.org/wp-content/uploads/2015/11/2015-ICRC-Report-IHL-and-Challenges-of-Armed-Conflicts.pdf>.

114. IOAN GRILLO, GANGSTER WARLORDS: DRUG DOLLARS, KILLING FIELDS, AND THE NEW POLITICS OF LATIN AMERICA 6 (2016).

Although an estimated two hundred thousand persons were killed in Mexico between 2006 and 2017,<sup>115</sup> the Mexican government has overtly asserted that it is not facing an insurgency<sup>116</sup> even while periodically employing military forces in a manner that suggests the existence of an armed conflict. Indeed, although not all analysts would agree,<sup>117</sup> the 2017 *War Report* concluded, “Mexico’s security forces were arguably engaged in non-international armed conflicts with at least the Sinaloa Cartel and the Jalisco Cartel New Generation.”<sup>118</sup> If that analysis is correct, it is international humanitarian law that would directly govern the provision of medical care and services.

Ultimately, a State’s characterization of the response to violence within its borders will have a powerful impact on the legal framework under which the provision of medical care will be assessed. Where it has acknowledged an armed conflict is in existence humanitarian law clearly can be relied on. In other situations, either because of legal interpretation or because of a State decision to treat the conflict exclusively as a law enforcement matter, human rights law will govern. In this regard, the ECtHR has demonstrated it will not consider the applicability of international humanitarian law unless the State effectively raises the issue. This can be seen in case law dealing with the Chechen conflict. In its second *Isayeva* judgment, the Court stated that when determining if “a normal legal background” applies, “[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention.”<sup>119</sup> In similar fashion, the applicability of humanitarian law in the *Hassan* case dealing with international armed conflict was only ruled upon “where this is specifically pleaded by the respondent State.”<sup>120</sup>

Not all courts will necessarily demonstrate such deference to the State position regarding their characterization of a conflict. Indeed, in respect of the Chechen conflict the ECtHR could have acknowledged that an armed

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115. *Mexico Violence: Six Bodies Found Hanging from Bridges Near Resort*, BBC NEWS (Dec. 21, 2017), <http://www.bbc.com/news/world-latin-america-42439421>.

116. IOAN GRILLO, *EL NARCO: INSIDE MEXICO’S CRIMINAL INSURGENCY* 204 (2011).

117. *See, e.g.*, EMILY CRAWFORD, *IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT* 180–89 (2015).

118. *THE WAR REPORT*, *supra* note 35, at 83. However, the authors stress the controversial nature of this determination, stating, “It is important to note that this classification is controversial.” *Id.*

119. *Isayeva II*, *supra* note 74, ¶ 191.

120. *Hassan*, *supra* note 71, ¶ 107.

conflict was in existence notwithstanding the position of the Russian government, and then apply “the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict.”<sup>121</sup> However, given the complex political and legal factors, for many contemporary struggles between States and non-State actors it is likely that the provision of medical services will have to rely, in whole or in part, on a human rights law basis for such activities.

In situations where a State has well developed medical infrastructure and services (most frequently in urban areas), and the violence is relatively well contained by the security forces, the provision of medical care under a human rights paradigm is likely not problematic. For example, while the medical services in Northern Ireland were confronted with a horrific human toll in the aftermath of significant incidents of violence, and at times were challenged by the number and types of injuries, it effectively provided the required medical care throughout the three decades of conflict.<sup>122</sup> The same is true for Canada, the United States, the United Kingdom, France, Germany, Belgium, and other sufficiently developed States periodically facing jihadist attacks on their own soil. It would be expected that the medical services delivered under a human rights paradigm could meet the challenge, although adjustments may have to be made to provide effective care in terms of the number of injured and types of injuries.<sup>123</sup> However, the same cannot be said for the violence arising from external operations, such as those in Iraq and Syria, where humanitarian law would ordinarily have to be relied on.

When confronted with conflict in geographically remote areas or when experiencing higher levels of violence, States with less robust medical ser-

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121. *Id.* ¶ 102.

122. See *Bloody Friday: How the Troubles Inspired Belfast’s Medical Pioneers*, BBC NEWS (July 20, 2012), <https://www.bbc.com/news/uk-northern-ireland-18886867>; Peter Froggatt, *Medicine in Ulster in Relation to the Great Famine and “the Troubles”*, 319 BRITISH MEDICAL JOURNAL 1636 (1999), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1127095/>

On 17 May 1974 Alan Crockard, then a registrar at the Royal Victoria Hospital, Belfast, holding a Hunterian professorship, delivered his valedictory lecture on ‘Bullet injuries of the brain.’ He reviewed over 80 patients, most from Belfast, treated in his unit over 44 months. One has to go to Chicago—in fact to the whole of Cook County, in which Chicago stands—to find so large a peacetime series.

123. Pierre Carli et al., *The French Emergency Medical Services after the Paris and Nice Terrorist Attacks: What Have We Learnt?*, 390 THE LANCET 2735 (2017).

vices can be significantly more challenged to provide medical care. For example, the Nigerian representative to the UN indicated in May 2017 “that to prevent the commission of violations of international humanitarian law in armed conflict, the critical element to achieving that objective is the respect for international human rights and humanitarian law.”<sup>124</sup> Further, the Nigerian government established a presidential commission “to enhance the security conditions in the northeast of the country, facilitate the work of health personnel and ease the movement of medical equipment and supplies.”<sup>125</sup> This reliance on both human rights and international humanitarian law to address contemporary conflict is increasingly becoming a standard position adopted by States and the UN.

With many States relying exclusively on human rights-based law enforcement responses to violence, not clearly indicating an armed conflict is in existence, using a geographical basis for the application of each body of law, or suggesting both bodies of law apply, the legal basis for the provision of medical care and services in contemporary conflict will frequently be framed in terms of human rights law. Due to the more general provisions of human rights law and its focus on State rather than non-State actor responsibility, humanitarian advocates are presented with a challenge when seeking to provide the necessary medical support to victims of the conflict. It is a challenge that increases exponentially when the violence experienced in urban warfare resembles that of conventional armed conflict. Since these situations are factually, and could legally be assessed as, armed conflict, the human rights dialogue will increasingly have to be framed in terms of humanitarian legal norms to be effective. This is particularly the case if the existing medical infrastructure and services cannot address the need.

#### IV. THE PROVISION OF MEDICAL CARE

Reflecting the battlefield roots of the humanitarian movement, the law concerning the provision of medical care has historically placed special emphasis on the collection and care of injured soldiers. For many State armed forces medevac and the ability to evacuate soldiers within what has been described as the “golden hour” from injury to treatment in a well-equipped medical

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124. *Nigeria Reaffirms Commitment to Protect Civilians in Armed Conflicts*, VANGUARD (Lagos) (May 26, 2017), <https://www.vanguardngr.com/2017/05/nigeria-reaffirms-commitment-protect-civilians-armed-conflicts/>.

125. *Id.*



facility is frequently a condition precedent for the conduct of military operations. As Major-General David Fraser noted in respect of Canadian operations in Afghanistan in 2006:

No soldier ever went outside the wire without ensuring that we had a med-evac helicopter within the golden hour. If that was not in the concept of operations . . . I wouldn't approve it. Every man or woman had to know that they or their fellow soldiers would be taken care of in the event they were injured.<sup>126</sup>

This does not mean all States are capable of providing this level of medical care. In the same conflict, Afghans “were flown to Afghan medical centers with little equipment and comparatively abysmal standards of trauma care.”<sup>127</sup> Similarly, deployment on UN operations is often conditioned on the quality of medical services available to troop contributing countries, with some countries even bringing their own medical facilities rather than relying on those provided by the UN.<sup>128</sup> However, particularly problematic is that receiving medical care within the “golden hour” is not the reality for many civilians caught up in the violence of urban conflict.<sup>129</sup>

The obligation that military forces provide non-discriminatory care to enemy wounded and sick, with treatment being based on urgent “medical reasons” alone, is clearly established.<sup>130</sup> However, in the context of counter-insurgency/counterterrorism operations, the reliance on paramilitary and police forces to conduct operations presents its own set of challenges since

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126. DAVID FRASER, OPERATION MEDUSA: THE FURIOUS BATTLE THAT SAVED AFGHANISTAN FROM THE TALIBAN 156 (2018); *see also* Howard R. Champion et al., *A Profile of Combat Injury*, 54 THE JOURNAL OF TRAUMA INJURY, INFECTION, AND CRITICAL CARE S13, S17 (2003) (“Evacuation times for the IDF to medical facilities compare extremely favorably with urban American Level I trauma centers: an average of 53 minutes.”).

127. C. J. CHIVERS, THE FIGHTERS: AMERICANS IN COMBAT IN AFGHANISTAN AND IRAQ, at xxii (2018).

128. LESLEY CONNOLLY & HÅVARD JOHANSEN, MEDICAL SUPPORT FOR UN PEACE OPERATIONS IN HIGH-RISK ENVIRONMENTS 12 (2017), <https://www.ipinst.org/wp-content/uploads/2017/04/IPI-Rpt-Medical-Support-Final.pdf>.

129. INTERNATIONAL COMMITTEE OF THE RED CROSS, “I SAW MY CITY DIE”: VOICES FROM THE FRONT LINES OF URBAN CONFLICT IN IRAQ, SYRIA AND YEMEN 47 (2017), [https://reliefweb.int/sites/reliefweb.int/files/resources/4312\\_002\\_Urban-Warfare\\_web\\_new\\_EN.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/4312_002_Urban-Warfare_web_new_EN.pdf) [hereinafter I SAW MY CITY DIE] (noting that a thirteen-year-old who was shot trying to flee Mosul could not be evacuated for three to four hours).

130. Geneva Convention I, *supra* note 2, art. 12.

these forces may not be trained or equipped to implement these obligations.<sup>131</sup> The lack of training and equipment in turn places a particular demand on States to ensure that all security forces are properly trained to either provide or facilitate the provision of medical care to victims of the conflict before they are employed.

Even when military and other security forces are trained and equipped to address the humanitarian needs related to the wounded and sick, implementing these obligations can present an immense challenge to military commanders due to the concentration of civilians in urban environments. While steps may be taken to encourage the evacuation of most of the civilian population from a city, as happened in 2004 in Fallujah,<sup>132</sup> this may not always be possible or desirable. For example, in Mosul in 2016, the Iraqi government told civilians to stay within the city in order to avoid a humanitarian crisis,<sup>133</sup> although by August 2017, an estimated 140,000 families had fled, with 100,000 families remaining in the city.<sup>134</sup>

Security forces inevitably will have to conserve medical resources in any fight to retake a city. Accordingly, this conservation “may result in the prioritization of collection, care, and treatment of military wounded and sick,” although in respect of civilians “intervening in extreme cases, where failing to do so will result in loss of life, limb, or sight will almost always be an authorized action.”<sup>135</sup> In turn, this discrepancy raises the issue of what care and treatment is available to civilian wounded and sick.

The existence of a functioning medical infrastructure in urban areas can mitigate the inability of military forces to treat the civilian wounded and sick.

131. ANTONIO GIUSTOZZI & MOHAMMED ISAQZADEH, *POLICING AFGHANISTAN* 41 (2012) (noting that by 2007, “it was estimated that 70 per cent of Afghan National Police time was spent fighting the insurgency as opposed to law and order tasks”).

132. THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 398–99 (2007) (finding that an estimated four hundred civilians remained in the city out of a population of 250,000).

133. Tim Arango, *Iraq Told Civilians to Stay in Mosul. Now They’re Paying with Their Lives*, *NEW YORK TIMES* (Nov. 24, 2015), <https://www.nytimes.com/2016/11/24/world/middleeast/iraq-mosul-isis-civilians.html>.

134. Lucy Rodgers, Nassos Stylianou & Daniel Dunford, *Is Anything Left of Mosul?: The Battle to Save the City and Its People*, *BBC NEWS* (Aug. 9, 2017), <https://www.bbc.co.uk/news/resources/idt-9d41ef6c-97c9-4953-ba43-284cc62ffdd0>.

135. CORN, WATKIN & WILLIAMSON, *supra* note 3, at 90; *see also* UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* ¶ 7.3.2, at 123 (2004) (“There is no absolute obligation on the part of the military medical services to accept civilian wounded and sick—that is to be done only so far as it is practicable to do so.”).

Those facilities might also be used to treat military casualties. What is not guaranteed, however, is that during combat operations civilian hospitals and clinics will be functioning, or even remain in existence. As the ICRC reported in December 2016, “only one of eastern Aleppo’s nine hospitals remains fully functional, and four are completely out of service. Medical staff are exhausted and stocks severely depleted.”<sup>136</sup> Compounding the problem can be the migration of civilians towards urban areas as the conflict unfolds. For example, in 2018 one Yemeni family fled to Mokha, which had a hospital. However, the hospital “had no surgeon, nor a proper intensive-care unit, oxygen or essential medicines.”<sup>137</sup> Care was finally provided by a MSF facility six hours away in Aden. There, civilians were “crowding into ill-equipped hospitals and clinics with diseases, malnourished babies and injuries from land mines and unexploded munitions.”<sup>138</sup>

Accordingly, military commanders must understand and embrace the requirement to facilitate access to civilian facilities, prioritize cooperation with the ICRC, and permit the deployment of humanitarian assistance and non-governmental organization support in order to meet the needs of the wounded and sick. However, coordination with non-governmental organizations and other humanitarian entities can present challenges. As was reported in one study looking at the provision of medical services in the 2016–2017 battle for Mosul, the Iraqi military had limited capacity and the coalition States “were unable to supply medical teams to care for civilians.”<sup>139</sup> Further,

[i]nternational non-governmental organizations (NGOs), stung by recent attacks on health facilities and workers, initially struggled to find their footing amid the security risks and other programming; moreover, many argued that their role has not and is not to provide frontline care, which should

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136. *Everyone Wounded or Sick During Armed Conflict Has the Right to Health Care*, ICRC (Dec. 9, 2016), <https://www.icrc.org/en/document/everyone-wounded-or-sick-during-armed-conflict-has-right-health-care>.

137. Sudarsan Raghavan, *Running on Empty: Could Yemen’s Humanitarian Crisis—the Most Dire in the World—Be about to Get Dramatically Worse?*, WASHINGTON POST (June 14, 2018), <https://www.washingtonpost.com/news/world/wp/2018/06/14/feature/yemen-crisis-saudi-led-attack-on-rebel-held-city-could-worsen-human-exodus-and-famine/>.

138. *Id.*

139. JOHN HOPKINS CENTER FOR HUMANITARIAN HEALTH, MOSUL TRAUMA RESPONSE: A CASE STUDY QUALITY AND EFFECTIVENESS EXECUTIVE SUMMARY – PART 2: QUALITY AND EFFECTIVENESS 2 (2018), [http://www.hopkinshumanitarianhealth.org/assets/documents/Executive\\_summary\\_mosul\\_technical\\_Feb\\_15\\_2018\\_FINAL.PDF](http://www.hopkinshumanitarianhealth.org/assets/documents/Executive_summary_mosul_technical_Feb_15_2018_FINAL.PDF).

remain the responsibility of warring factions as set out in the Geneva Conventions and Additional Protocols.<sup>140</sup>

Support was not available from Doctors Without Borders or the ICRC, and “[u]ltimately, WHO contracted other NGOs and a private medical company to manage the TSPs [trauma stabilization points] and field hospitals, drawing upon its experience dispatching emergency medical teams,” with funding provided by U.S., European and UN sources.<sup>141</sup>

One of the issues identified in the study regarding the use of frontline non-military medical services to treat civilians was “concern among many humanitarian NGOs that the WHO frontline strategy undermined the perceived independence and neutrality of all humanitarian groups, thereby eroding the protections conveyed by humanitarian principles.”<sup>142</sup> Further, the insertion of the “trauma referral pathway,” which places humanitarian workers at substantial risk and may interrupt the provision of humanitarian aid, created a concern that more people could have ultimately been killed “[b]ecause most deaths in conflict settings are due to long-term, indirect, rather than direct trauma causes.”<sup>143</sup> An unwillingness by humanitarian groups to participate complicates the ability of States to ensure adequate medical care is provided during urban conflict since those groups have become a fixture on the modern battlefield. This highlights the need for broader consultation between States and humanitarian groups prior to conducting operations.

## V. THE IMPACT OF THE CONCENTRATION OF CIVILIANS IN URBAN ENVIRONMENTS

The more civilians there are concentrated in an area of combat operations, the more likely that security forces will have to contend with civilian casualties. Of course, military commanders in such situations must implement all

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140. *Id.*

141. *Id.*

142. JOHN HOPKINS CENTER FOR HUMANITARIAN HEALTH, MOSUL TRAUMA RESPONSE: A CASE STUDY APPLICATION OF HUMANITARIAN PRINCIPLES EXECUTIVE SUMMARY – PART 1: APPLICATION OF HUMANITARIAN PRINCIPLES 5 (2018), [http://www.hopkinshumanitarianhealth.org/assets/documents/Executive\\_Summary\\_Mosul\\_Hum\\_Principles\\_Feb\\_15\\_FINAL.PDF](http://www.hopkinshumanitarianhealth.org/assets/documents/Executive_Summary_Mosul_Hum_Principles_Feb_15_FINAL.PDF).

143. *Id.*

feasible precautions to mitigate this risk. Such steps were taken by commanders in battles such as the 2004 retaking of Fallujah<sup>144</sup> and the 2016–2017 assault on Mosul,<sup>145</sup> although the same cannot be said in other situations of urban combat, such as Damascus.<sup>146</sup> Nonetheless, military assaults in urban centers remain very destructive.<sup>147</sup> For example, in Marawi it was reported that six months after Filipino and foreign fighters claiming allegiance to the Islamic State had stormed that urban area “[t]he heart of the city ha[d] been bombed and burned beyond recognition, its domed mosques pierced by mortar fire. Homes . . . [were] roofless, blackened.”<sup>148</sup> The combat left 200,000 inhabitants scattered across the southern Philippines.<sup>149</sup> In respect of Mosul, there have been claims of casualties ranging from 5,805 to 40,000 killed.<sup>150</sup> Elsewhere little or no concern was demonstrated. The six-week Russian assault on Grozny in December 1994 resulted in an estimated 27,000 to 35,000 civilians killed and close to one hundred thousand wounded.<sup>151</sup> In Syria, during a forty-eight hour period in February 2018, it is reported that

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144. Dick Camp, OPERATION PHANTOM FURY: THE ASSAULT AND CAPTURE OF FALLUJAH, IRAQ 152 (2009) (explaining the progression of force used to attack insurgent defenders).

145. Jackson Diehl, *There’s Good News in Mosul — for Now*, WASHINGTON POST (Dec. 25, 2016), [https://www.washingtonpost.com/opinions/global-opinions/theres-good-news-in-mosul--for-now/2016/12/25/265ad37a-c876-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/theres-good-news-in-mosul--for-now/2016/12/25/265ad37a-c876-11e6-85b5-76616a33048d_story.html).

146. Brent Eng & José Ciro Martínez, *Why the Syrian Regime Has Been Targeting Civilian Infrastructure*, WASHINGTON POST (Apr. 16, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/16/why-the-syrian-regime-has-been-targeting-civilian-infrastructure/>.

147. Margaret Coker, *After Fall of ISIS, Iraq’s Second-Largest City Picks Up the Pieces*, NEW YORK TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/world/middleeast/iraq-isis-mosul.html> (estimating that in the nine month battle for Mosul one million persons were displaced, 60,000 homes were made uninhabitable, and 20,000 commercial and government buildings were destroyed); Susannah George & Lori Hinnant, *Few Ready to Pay to Rebuild Iraq after the Islamic State Group Defeat*, MILITARY TIMES (Dec. 28, 2017), <https://www.militarytimes.com/flashpoints/2017/12/28/few-ready-to-pay-to-rebuild-iraq-after-islamic-state-group-defeat/> (noting that in Ramadi “more than 70 percent of the city remains damaged or destroyed”).

148. Emily Rauhala, *Liberated and Angry*, WASHINGTON POST (Dec. 9, 2017), <https://www.washingtonpost.com/sf/world/2017/12/09/liberated-and-angry-in-marawi/>.

149. *Id.*

150. Rodgers, Stylianou & Dunford, *supra* note 134.

151. LOUIS DIMARCO, CONCRETE HELL: URBAN WARFARE FROM STALINGRAD TO IRAQ 187 (2012).

250 civilians were killed in the Damascus suburbs, including fifty-eight children, and another 1,000 wounded. In addition, “[a]t least 10 hospitals in eastern Ghouta were damaged by airstrikes or shelling.”<sup>152</sup>

The danger posed to civilians has led to humanitarian efforts to limit the use of explosive or “wide area effect” weapons in urban areas,<sup>153</sup> although it has been noted, “explosive weapons—like bombs, rockets and shells—are not prohibited as such under humanitarian law.”<sup>154</sup> The increased risk to civilians associated with the use of high explosive munitions in urban operational environments must be included in targeting assessments. Further, the use of wide area effect weapons can raise concerns regarding the potential for indiscriminate targeting,<sup>155</sup> although certain multiple launch rocket systems can fire precision guided munitions.<sup>156</sup> Nonetheless, it is unrealistic to expect States to readily accept blanket restrictions or prohibitions. Advocating for this “remedy”<sup>157</sup> without addressing the potentially critical military value of the weapons systems being considered, their accuracy, the effect of

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152. Philip Issa & Bassam Mroue, *Government Bombing of Damascus Suburbs Kills More Than 100*, AP NEWS (Feb. 20, 2018), <https://apnews.com/b286b967a78d4b2ab2bfb18369387b8c>.

153. See, e.g., ICRC *Q&A on the Issue of Explosive Weapons in Populated Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 97 (2016).

154. Vincent Bernard, *Editorial: War in the Cities: The Spectre of Total War*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 1, 7–8 (2016).

155. PROTECTION OF CIVILIANS IN MOSUL: IDENTIFYING LESSONS FOR CONTINGENCY PLANNING, A CENTER FOR CIVILIANS IN CONFLICT (CIVIC) AND INTERACTION ROUNDTABLE 3 (2011), [https://www.interaction.org/sites/default/files/civic-interaction-protection-of-civilians-in-mosul-october-2017\\_final.pdf](https://www.interaction.org/sites/default/files/civic-interaction-protection-of-civilians-in-mosul-october-2017_final.pdf).

156. MOSUL STUDY GROUP, U.S. ARMY, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE, NO. 17-24 U (2017), <https://www.armyupress.army.mil/Portals/7/Primer-on-Urban-Operation/Documents/Mosul-Public-Release1.pdf>.

157. *World at a Turning Point: Heads of UN and Red Cross Issue Joint Warning*, ICRC (Oct. 30, 2015), <https://www.icrc.org/en/document/conflict-disaster-crisis-UN-red-cross-issue-warning> (reporting on a joint appeal by the UN Secretary General and the President of the Red Cross to take concrete and urgent action to address human suffering, including stopping “the use of heavy explosive weapons in populated areas”); see also Hannah Bryce, *Stopping the Use of Explosive Weapons in Populated Areas*, CHATHAM HOUSE (Nov. 5, 2015), <https://www.chathamhouse.org/expert/comment/stopping-use-explosive-weapons-populated-areas> (referencing specifically the use of wide impact explosive weapons such as multi-barrelled rocket launchers).

targeting precautions, and the actual tactical situation in which they are intended to be used is a potential recipe for operational failure.<sup>158</sup> This is because the conduct of military operations in an urban environment is another area where “context” matters. As Geoffrey Corn has noted, banning certain weapons does not change what can be gained by an enemy operating in an urban environment, to the contrary, it will incentivize the “enemy use of such areas to gain tactical and strategic advantage.”<sup>159</sup>

It is nearly certain that urban conflict will become more prevalent over time and that explosive weapons will have to be used during such conflicts, however, measures to limit the collateral effects of operations will be required. The motivation on the part of security forces to limit civilian casualties can be particularly evident in situations of counterinsurgency where mitigating civilian risk can itself provide a military advantage.<sup>160</sup> However, casualties in those situations will not be reduced to zero, nor are these counterinsurgency operations likely to be amenable solely to a human rights-based analysis even when conducted with a police primacy approach.

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158. MOSUL STUDY GROUP, *supra* note 156, at 16 (discussing the effectiveness of artillery, mortar, and multiple launch rockets as counterfire against ISIS indirect fire). Although effective, these tactics require considerable planning.

The close fight required detailed planning to integrate and deconflict surface fires with aerial platforms. Counterfire in the dense urban environment required meticulous planning, with an emphasis on intelligence preparation of the battlefield (understanding the physical environment) and predictive and pattern analysis. In dense urban terrain, counterfire radar systems were cued with other intelligence, surveillance, and reconnaissance systems, such as MQ-1 and MQ-9, to be effective.

*Id.*

159. Corn, *supra* note 6, at 782.

First, enemy forces—often less capable than their opponents—gain a natural defensive advantage from the cover, concealment, maneuverability, and access to resources in urban terrain. Second, by increasing the perception of indifference to civilians resulting from the destructive effects of urban combat, the enemy is able to exploit the civilian population in the knowledge that the infliction of casualties and the destruction of civilian property will undermine the legitimacy of the legitimate opponent’s efforts.

*Id.*

160. WATKIN, *supra* note 11, at 254–58; *see also* LAURENT GISEL, INTERNATIONAL COMMITTEE OF THE RED CROSS, THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 61–62 (2018), <https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality> (follow PDF icon under “Download the Report”) (noting that this report resulted from an international expert meeting hosted by the University of Laval on June 22–23, 2016).

Urban centers not only present operational challenges due to the sheer numbers of civilians located there, they also are unique in terms of the interconnected nature of city life. As one senior U.S. military officer has noted, “preparing for operations in dense urban areas includes not only training [to improve] the ability to fight in cities, but also to better understanding [the] ‘flow’” of “people, resources, information, or things in and out of the city.”<sup>161</sup> This means understanding “the social infrastructure, demography, governance, economics, power hierarchies, and security systems of how a city works.”<sup>162</sup> Services vulnerable to the effects of destruction associated with military operations “include electricity, *health care*, water, waste-water collection and treatment, and solid waste disposal.”<sup>163</sup> For example, the destruction of the water supply infrastructure “is likely to have a domino effect on other services (e.g., health).”<sup>164</sup> In the context of pre-planned attacks, it makes sense for military commanders “to consult experts prior to the attack, such as their medical or engineering branch, in order to estimate the incidental damage of the attack.”<sup>165</sup> Indeed, such consultation should be expanded to all aspects of mission planning in order to avoid damage to the greatest extent possible to the infrastructure crucial to civilian survival, or, if necessary, be prepared to rehabilitate those services.

In addition, “medical units,” military or civilian, “must be protected at all times” and must never be deliberately attacked.<sup>166</sup> The only exception to this rule is when medical personnel forfeit their protection. For example, civilian medical units being used to commit acts harmful to the enemy, but even then a cease and desist warning is required.<sup>167</sup> Such units can include “hospitals and other similar units, blood transfusion centres, preventative

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161. Claudia ElDib & John Spencer, *Commentary: The Missing Link to Preparing for Military Operations in Megacities and Dense Urban Areas*, ARMY TIMES (July 20, 2018), <https://www.armytimes.com/opinion/commentary/2018/07/20/commentary-the-missing-link-to-preparing-for-military-operations-in-megacities-and-dense-urban-areas/> (statement of Lt. Gen. Stephen J. Townsend, Commander of Operation Inherent Resolve).

162. *Id.*

163. Mark Zeitoun & Michael Talhami, *The Impact of Explosive Weapons on Urban Services: Direct and Reverberating Effects Across Space and Time*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 53, 56 (2016) (emphasis added).

164. *Id.* at 63.

165. Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 107, 139 (2016).

166. Additional Protocol I, *supra* note 2, art. 12(1).

167. *Id.* art. 13(1).



medicine centres and institutes, medical depots and the medical and pharmaceutical stores of units.”<sup>168</sup> In an urban context, the marking of medical units and transports can provide a particularly important means of helping to ensure their protection. However, “[p]ractice has shown that the failure to wear or display the distinctive emblem does not of itself justify an attack on medical or religious personnel and objects when they are recognized as such.”<sup>169</sup> The protection is provided by the function that is performed, the symbols only facilitate identification.<sup>170</sup> In any event, even if a medical unit is “unauthorized,” it must be “regarded as being protected according to the rules on the protection of civilian objects.”<sup>171</sup>

Unfortunately, the Syrian conflict has witnessed numerous allegations of attacks on medical facilities.<sup>172</sup> A commission established by the UN Human Rights Council reporting in June 2018 found

[a] rise in attacks against official and makeshift hospitals throughout eastern Ghouta also markedly increased during the period under review. As hostilities escalated in February, reports emerged that 28 health facilities had been attacked, destroying vital lifesaving equipment. Near constant bombardment often rendered the transport of victims impossible, which compounded their suffering, and, in some cases, led to preventable deaths.<sup>173</sup>

One of the challenges for participants in urban conflict is the location of medical facilities. As Additional Protocol I indicates, whenever possible they should be located so that “attacks against military objectives do not imperil their safety.”<sup>174</sup> This has obvious applicability to temporary medical facilities. Among the challenges of providing medical care in an urban environment is the level of destruction, the unclear separation between the warring factions, quickly changing front lines, and the need to operate as close as possible to

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168. CIHL, *supra* note 4, at 95.

169. *Id.* at 103–04.

170. *Id.*

171. *Id.* at 95.

172. *Syria War: Hospitals Being Targeted, Aid Workers Say*, BBC NEWS (Jan. 6, 2018), <https://www.bbc.com/news/world-middle-east-42591334>.

173. Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Human Rights Council, *The Siege and Recapture of Eastern Ghouta*, ¶ 44, U.N. Doc. A/HRC/38/CRP.3 (June 30, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/IICI/Syria/Pages/Documentation.aspx> (follow “Conference Room Paper (A/HRC/38/CRP.3)” hyperlink under “Reports 2018”) [hereinafter Syria Commission of Inquiry].

174. Additional Protocol I, *supra* note 2, art. 12(4).

areas where combat is taking place. For security reasons, temporary medical facilities may have to be co-located with military personnel, including locations that are in the immediate vicinity of lawful targets, thereby increasing the risk to those facilities.

It has also been noted that “[i]n low-intensity urban conflict, it is difficult to identify a casualty and get immediate qualified care.”<sup>175</sup> Further, medical facilities and transports may not be marked for tactical reasons. This can make the identification of the injured, medical facilities, and transports difficult. However, this alone does not account for the troubling tendency of attacks on such facilities and transports. As the UN Independent Commission on Syria noted, the “pattern of attack strongly suggests that pro-Government forces systematically targeted medical facilities, repeatedly committing the war crime of deliberately attacking protected objects, and intentionally attacking medical personnel.”<sup>176</sup> What needs to occur is the investigation of all incidents for which credible allegations are made that such targeting has taken place.

On occasion, an investigation may not be able to reach definitive conclusions, or multiple investigations may result in different conclusions concerning the same incident. One investigation carried out by a UN Board of Inquiry looked at a September 19, 2016 aerial attack that killed ten, injured twenty-two, and destroyed \$650,000 worth of humanitarian supplies being transported by a joint UN-Syrian Arab Red Crescent [SARC] humanitarian convoy near Urem al-Kubra, Syria.<sup>177</sup> A summary of that investigation indicates that the Board of Inquiry did not have access to the data that would allow it to definitively identify the party responsible for conducting the strike.<sup>178</sup> However, the Board summary also indicated it “did not have evidence to conclude the incident was a deliberate attack on a humanitarian target,”<sup>179</sup> and, at least in that instance, “[d]espite initial reports that a medical clinic had been destroyed, the Board found no evidence of a medical clinic neighbouring the SARC compound.”<sup>180</sup>

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175. Champion et al., *supra* note 126, at S17.

176. Syria Commission of Inquiry, *supra* note 173, ¶ 50.

177. U.N. Secretary-General, Letter dated 21 December 2016 from the Secretary-General addressed to the President of the Security Council, Annex, ¶¶ 30–32, U.N. Doc. S/2016/1093 (Dec. 21, 2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/N1645820.pdf>.

178. *Id.* ¶¶ 35–40.

179. *Id.* ¶ 41.

180. *Id.* ¶ 33.

In contrast, a subsequent investigation of this incident by the Independent International Syria Commission determined that the munitions used, area attacked and duration “strongly suggest that the attack was meticulously planned and ruthlessly carried out by the Syrian air force to purposefully hinder the delivery of humanitarian aid and target aid workers, constituting the war crimes of deliberately attacking humanitarian relief personnel, denial of humanitarian aid and targeting civilians.”<sup>181</sup>

Despite the potential in some instances for differences in result it remains essential that the accountability process is invoked. Investigations may confirm or absolve liability. Where the existence of a war crime is established, appropriate enforcement action needs to be taken. They also heighten public awareness of the actions taken by conflict participants. Even if no crime is believed to have occurred, an investigation may identify changes to operational decision making, tactics, techniques, and procedures, or doctrine that can reduce future incidents.

It is also important to note that medical facilities and equipment may be misused by participants to a conflict. Protection provided to medical units ceases only if “they are used to commit, outside their humanitarian function, acts harmful to the enemy.”<sup>182</sup> Allegations regarding the misuse of hospital facilities arose in the context of the 2014 conflict between Israel and Hamas where it was reported the Shifa Hospital in Gaza City had “become a de facto headquarters for Hamas leaders, who can be seen in the hallways and offices.”<sup>183</sup> Israel also alleged that that “Hamas commandeered ambulances and launched attacks from hospital compounds during the conflict.”<sup>184</sup>

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181. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 88, U.N. Doc. A/HRC/34/64 (Feb. 2, 2017), <https://undocs.org/A/HRC/34/64>.

182. Additional Protocol I, *supra* note 2, art. 13(1).

183. William Booth, *While Israel Held Its Fire, the Militant Group Hamas Did Not*, WASHINGTON POST (July 15, 2014) [https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d\\_story.html](https://www.washingtonpost.com/world/middle-east/while-israel-held-its-fire-the-militant-group-hamas-did-not/2014/07/15/116fd3d7-3c0f-4413-94a9-2ab16af1445d_story.html).

184. Helena Kennedy, *The 2014 Conflict Left Gaza's Healthcare Shattered. When Will Justice Be Done?*, GUARDIAN (London) (June 29, 2015), <https://www.theguardian.com/comment/isfree/2015/jun/29/2014-conflict-gaza-healthcare-hospitals-war-crime-israel-hamas>.

During the conflict, “17 hospitals, 56 primary healthcare facilities, and 45 ambulances were damaged or destroyed.”<sup>185</sup> Still, even when harmful acts are carried out by civilian medical units, their protection only ceases “after a warning has been given setting, where appropriate, a reasonable time limit, and after such warning has remained unheeded.”<sup>186</sup> Further, when targeting a military object near a medical facility careful consideration needs to be given to the proportionality assessment of incidental loss of civilian life, injury to civilians, or damage to civilian objects.<sup>187</sup>

## VI. TYPES OF INJURIES IN URBAN ENVIRONMENTS

Combat in urban centers also raises the issue of whether the injuries suffered by military and civilians are greater or different from those occurring in a more rural setting. As has been noted recently, the focus of humanitarian groups has been on limiting the use of explosive weapons in urban settings. It does appear that the nature of armed conflict within urban settings, including the concentration of fighters and civilians, is such that greater casualties are likely to result. For military forces, cities present complex areas within which to operate. They traditionally demand a greater involvement of infantry forces and present difficult terrain to use the heavily armored vehicles that have been developed to protect those forces.

As one 2003 report noted, “[m]odern urban combat continues to be highly lethal.”<sup>188</sup> The result can be a higher number of infantry casualties with one 1997 study reporting on the 1982 battle for Beirut indicating “[t]he chances of being injured in this operation was 49 times higher than any other operation.”<sup>189</sup> At that time artillery was seen as the greatest single cause of injury,<sup>190</sup> with death by sniper fire being greater in non-urban environments

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185. *Id.*; see also Charlotte Alfred, *Hospitals Are Supposed to be for Healing. In Gaza, They're Part of the War Zone*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.ca/entry/hospitals-bombed-gaza\\_n\\_5630606](https://www.huffingtonpost.ca/entry/hospitals-bombed-gaza_n_5630606).

186. Additional Protocol I, *supra* note 2, art. 13(1).

187. *Id.* art. 57(2).

188. Champion et al., *supra* note 126, at S17.

189. RA LEITCH, HR CHAMPION & JF NAVEIN, ANALYSIS OF CASUALTY RATES & PATTERNS LIKELY TO RESULT FROM MILITARY OPERATIONS IN URBAN ENVIRONMENTS 29 (1997) (unpublished U.S. Marine Corps Commandant Warfighting Laboratory study: CWL/TechMed/11/97), <http://smallwarsjournal.com/documents/urbancasstudy.pdf>.

190. *Id.*; see also Andrew J. Schoenfeld & Philip J. Belmont, *Traumatic Combat Injuries, in MUSCULOSKELETAL INJURIES IN THE MILITARY* 11, 15 (Kenneth L. Cameron & Brett D.

due, it was argued, to the cover provided by the “three dimensional” less open terrain of cities.<sup>191</sup> Later studies witnessed a change: “Compared with previous IDF [Israel Defense Forces] urban combat in Lebanon, the recent IDF data . . . show an increase in the number of bullet wounds from 13% to 48% and a decrease in the number of shrapnel wounds from 74% to 17% of all injury types.”<sup>192</sup>

Consistent with more recent studies, overall advances in protective equipment reduced the types of injuries with shrapnel injury more prevalent in lower extremities and other exposed areas.<sup>193</sup> As the authors of another study of traumatic muscular skeletal combat injuries indicate, at least with respect to those injuries: “advances in personnel protective equipment, medical evacuation, and surgical care have culminated in the fact that besides being survivable, most battle injuries can be treated to the point where there is at least the possibility of a return to duty.”<sup>194</sup>

As with military casualties, the loss of civilian life resulting from combat operations in urban areas is significantly greater than in rural areas.<sup>195</sup> Those civilian injuries result from artillery fire, aerial bombing, and crush injuries from collapsing buildings and urban infrastructure. As one resident of Mosul stated, “[w]e could die either by ISIS sniper or IED [improvised explosive device] or shelled or buried by bombs.”<sup>196</sup> Doctors working in Syria are reported to have “described patient injuries consistent with the use of bombs, shrapnel from mortars, artillery, IEDs, and gunshots.”<sup>197</sup> Civilians also suffer from a particular disadvantage in comparison to military personnel. They do

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Owens eds., 2016) (noting that this finding is consistent with the finding that “[e]xplosive mechanisms of injury, including improvised explosive device (IED), explosively formed projectiles, rocket-propelled grenade, and landmine, have been found to account for 75–81 % of all musculoskeletal casualties incurred in Afghanistan or Iraq”).

191. Leitch, Champion & Navein, *supra* note 189, at 29.

192. Champion et al., *supra* note 126, at S17.

193. Leitch, Champion & Navein, *supra* note 189, at 29.

194. Schoenfeld & Belmont, *supra* note 190, at 11.

195. I SAW MY CITY DIE, *supra* note 129, at 12 (“Civilian casualty rates are notably high: according to some estimates, they represent 92% of the deaths and injuries caused by the use of explosive weapons in populated areas, compared to 34% when these are used in other areas.”).

196. *Id.*

197. Sahr Muhammedally, *Lessons from Mosul: How to Reduce Civilian Harm in Urban Warfare*, JUST SECURITY (July 20, 2017), <https://www.justsecurity.org/43382/lessons-mosul-reduce-civilian-harm-urban-warfare/>.

not have the same level of personal protection (e.g., body armor) available to soldiers of well-equipped armed forces.

Finally, as has been noted, the reverberating effects of explosive weapons on urban services can have considerable effect on the civilian population.<sup>198</sup> In this respect,

the greatest impact of explosive weapons on urban services is a function of the extent of the damage to upstream or midstream infrastructure (i.e., that which produces or delivers the bulk of the service), the nature and extent of the reverberations downstream of the elements of any service component, the “domino effect” onto other services, and the time required to restore the service.<sup>199</sup>

The effect on the physical and mental health of civilians has the potential to be significantly longer term than might traditionally be thought of by military planners and commanders.<sup>200</sup> This means the requirement to provide medical care and other health services to civilians impacted by urban combat will extend far beyond the end of hostilities.

## VII. CONCLUSION

As the world’s population continues to migrate towards cities, the potential for urban violence, including armed conflict, will increase. This can already be seen with insurgent groups seizing—or attempting to seize—control of cities such as Damascus, Raqqa, Mosul, Marawi, Ramadi, and Fallujah. Urban conflict against non-State actors covers a wide range of violence from ordinary crime, to terrorism and transnational crime, to near conventional military operations. In addition, urban areas have become the site of violent attacks carried out by, or on behalf of, transnational terrorist groups as part of an effort to extend the conflict into countries its perpetrators see as a “far enemy.”<sup>201</sup> At its most violent, urban conflict has proven to be especially deadly for combatants and the civilians impacted by the violence. Inevitably, it becomes necessary to consider whether that violence has risen to the level

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198. See sources cited *supra* notes 163–65 and accompanying text.

199. Zeitoun & Talhami, *supra* note 163, at 68.

200. I SAW MY CITY DIE, *supra* note 129, at 61 (“In nearly all the cities undergoing conflict, the collapse of local economies or increasing demands have also affected mental health services. These are normally under-resourced at the best of times, but conflict exacerbates the problem as professionals are among those forced to flee the fighting.”).

201. FAWAZ GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 1 (2005).

of an armed conflict. Such a determination forms the basis for the application of international humanitarian law, which has a particular protective focus on the provision of medical care and humanitarian relief to those in need.

Characterizing a security operation as an armed conflict will determine whether international humanitarian law will apply. This characterization is rarely straightforward, especially outside the context of inter-State conflicts. The challenge may be somewhat reduced by the trend away from the post-9/11 debate that initially focused on setting a high threshold definitional standard for armed conflict towards a broader “totality of the circumstances” standard, which appears better suited to address legal classification in an era of complex non-State security threats. However, even where an armed conflict appears to exist, consideration must also be given to human rights law. This can occur for a number of reasons, including its general continued applicability during armed conflict, rulings by a court that view that body of law solely applicable to counterterrorism operations, a State’s refusal to acknowledge the existence of an armed conflict, or a policy decision that a law enforcement approach will be exclusively applied to counter the terrorist or insurgent threat. The complexity of the current threat environment confronted by many States has increasingly resulted in an acknowledgement of the applicability and relevance of both bodies of law.

One downside to relying on a human rights framework is that humanitarian law provides a more comprehensive and specific body of rules governing the provision of medical care that is non-discriminatory and applies to all parties to a conflict. This does not mean that human rights law does not have a role to play, particularly since it better addresses the broader dimensions of health care. In addition, in situations where the State has robust medical services, and a law enforcement approach can be effectively applied, victims of what is in reality an armed conflict are likely to be well cared for under a human rights law paradigm. The prevalence of States using a human rights-based law enforcement approach to address non-State actor violence means that there likely will be a trend towards incorporating humanitarian-based obligations into human rights law considerations, including the provision of medical care in urban conflict.

Ideally, State military forces will be trained and equipped to provide effective medical care regardless of which legal framework they apply, or whether they are operating in an urban or rural environment. However, the challenge of dealing with civilians who are increasingly finding themselves the victims of urban conflict and other security operations will remain. While ordinarily it could be expected that medical facilities in urban areas would be

able to meet the need, there is no assurance those facilities will be functioning or that health care professionals will be available during highly destructive combat operations. This is particularly true given the mounting evidence that such facilities and services are being purposely targeted. These attacks, and the nature of urban combat, have led to a paucity of humanitarian groups operating in some areas of conflict. As a result, States have sometimes contracted with private medical service providers for the provision of front line trauma care. This, in turn, has raised questions concerning the impact on the neutrality and independence principles relied on by humanitarian groups.

There can be no doubt that the concentration of civilians in urban environments will lead to an increase in collateral injuries and death as military operations extend into the world's cities. This has led to calls for limiting the use of explosive weapons in that environment, as well as consideration being given by military commanders to the reverberating effects of damage to infrastructure such as water and electrical facilities. However, the desire to limit the collateral effects of these weapons cannot ignore their continuing relevance to military operations in urban environments.

The large number of attacks that appear to have been directed against hospitals, clinics, and medical personnel have also led to calls for investigations of these possible war crimes. Further, injuries to military personnel operating in urban environments appear to have changed over the years to an increasing percentage of bullet wounds rather than shrapnel wounds. Civilians are even less protected and are at considerable risk of suffering injuries from bombing, artillery and mortar rounds, IEDs, and gunshot wounds. With the effects of these wounds on civilians, and the general destruction of civilian infrastructure in cities likely to have a long-term effect, it is more important than ever to reinforce the detailed international humanitarian law obligations for the provision of medical care. Whether these rules are applied under that body of law or through the interpretation of human rights law, the focus should be on ensuring both military personnel and civilians are equally protected under the law.