

# Basic Principles of International Humanitarian Law

Vikas H. Gandhi

Professor of Law, Gujarat National Law University

## Abstract:

International Humanitarian law [IHL] is a body of regulations that attempts to reduce the detrimental effects of armed conflict for humanitarian reasons. It confines the means and methods of combat while safeguarding those who choose not to participate in hostilities. It is a component of international law, the body of regulations directing relations between States, and may be referred to as the law of war or the law of armed conflict. Certain principles apply to armed conflicts, such as humanity, military necessity, proportionality, etc. This article examines the sources of law and circumstances in which those cardinal principles apply. Further, the article analyses the legal rules and provisions to apply to GCs and APs during armed conflicts.

**Keywords:** Principle of Humanity, Military Necessity, Proportionality, Distinction, Armed Conflict.

## 1. Introduction:

One of the areas of international law known as IHL, aims to set limitations on the destruction of property owned by civilians and the suffering of people inflicted on by armed conflict.<sup>1</sup> Article 22 of the Hague regulations specifies that “the right of belligerents to adopt means of injuring the enemy is not limitless.” In order to minimize the effects of armed conflicts, more than a few comprehensive and fundamental concepts are expected.<sup>2</sup> The sources of the law governing armed conflicts are discussed in this article, along with the concept and applications of four main, related principles namely; proportionality, distinction, humanity, and military necessity. (from which flows the prohibition of superfluous injury and unnecessary suffering).<sup>3</sup>

## 2. The Legal Sources:

Both customary international law and treaty law are the sources of international law. Written conventions, like the four Geneva Conventions of 1949, allow States to legitimately impose certain rules.<sup>4</sup> States are only required to do so if they have shown that they agree to be bound by a treaty, usually through

---

<sup>1</sup> Fundamental Principles of IHL, How does law protect in War?, ICRC case book, published by ICRC; see on [https://casebook.icrc.org/a\\_to\\_z/glossary/fundamental-principles-ihl#:~:text=the%20principle%20of%20distinction%20between,superfluous%20injury%20and%20unnecessary%20suffering.,](https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl#:~:text=the%20principle%20of%20distinction%20between,superfluous%20injury%20and%20unnecessary%20suffering.,) accessed on 14<sup>th</sup> October 2023

<sup>2</sup> ibid

<sup>3</sup> ICRC

<sup>4</sup> <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law#:~:text=Customary%20international%20law%20consists%20of,the%20protection%20offered%20to%20victims.,> accessed on 14<sup>th</sup> October 2023

ratification.<sup>5</sup> The "Geneva Law" and the "Hague Law" are merely two legislative additions to the treaty law that regulate the conduct of hostilities in armed conflicts between states.<sup>6</sup> Both in Geneva and Hague, a large number of additional treaties were also ratified; however, some of these were unconnected to the "Hague Law" or the "Geneva Law".<sup>7</sup> Customary law, on the other hand, comes from "a general practice accepted as law".<sup>8</sup> This practise is reflected in official documents such as national laws, military manuals, and case law, as well as official reports of military operations.<sup>9</sup> Furthermore, "*Opinio Juris*" describes the need for this practise to be "accepted as law."

### 3. About Treaty Law:

IHL is a set of rules intended to mitigate the consequences of armed conflict. It is centered on the 1949 Geneva Conventions and the two additional protocols added in 1977.<sup>10</sup> Many nations in the world are signatories to the Geneva Conventions. IHL applies to non-state parties to armed conflicts, in particular through customary IHL, common Article 3 of the Geneva Conventions, and, where relevant, Additional Protocol II of 1977.<sup>11</sup> States are also bound by customary IHL even in cases where they have not ratified IHL treaties, such as the 1977 Additional Protocols.<sup>12</sup> IHL's acknowledgment of the role of impartial humanitarian organizations forms the basis of fundamental humanitarian principles and continues to guide humanitarian action across the globe.<sup>13</sup> Over the years, customary law has consolidated to include the majority of the Law of International Armed Conflicts regulations governing the conduct of hostilities.<sup>14</sup> In situations where there is "evidence of a general practice accepted as law," customary law becomes authoritative. (Article 38(1) (b) of the Statute of the ICJ).<sup>15</sup> In response to emerging new battle tactics, Additional Protocol I of 1977 added new regulations for international armed conflict while also confirming the pre-existing ones.<sup>16</sup> Furthermore, as non-international armed conflicts have been common since World War II, States ratified Additional Protocol II in 1977 to reinforce the provisions of Article 3 and provide enhanced protection for individuals impacted by these conflicts.<sup>17</sup> States approved a new supplementary instrument in 2005 to address the problem of the recognized emblems (the Red Cross and the Red Crescent) being inadvertent viewed in certain circumstances as having religious, cultural, or political overtones and not being respected as neutral distinguishing marks.<sup>18</sup> The Red Cross and Red Crescent

---

<sup>5</sup> *ibid*

<sup>6</sup> The Conduct of Hostilities under the law of international armed conflicts, Yoram Dinstein, cambridge university press, 2004, p. 11

<sup>7</sup> *Ibid.*

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

<sup>10</sup> ICRC What is International Humanitarian Law?; [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf), 4<sup>th</sup> August 2022

<sup>11</sup> ICRC, <https://ihl-databases.icrc.org/en/customary-ihl/v1/in>, accessed on 14<sup>th</sup> October 2023.

<sup>12</sup> *ibid*

<sup>13</sup> A Guidance Document For Medical Teams Responding To Health Emergencies In Armed Conflicts And Other Insecure Environments Report Author(s): World Health Organization Published by: World Health Organization (2021) Stable URL: <https://www.jstor.org/stable/resrep40717.12>, 4<sup>th</sup> August 2022

<sup>14</sup> *ibid.*

<sup>15</sup> Statute of the International Court of Justice, Annexed to Charter of the United Nations, 1945, 9 *Int.Leg.* 510, 522., See also: The Conduct of Hostilities under the law of international armed conflicts, Yoram Dinstein, cambridge university press, 2004, p. 6

<sup>16</sup> [file:///F:/old%20open%20drive/2021\\_lectures/2022\\_lectures/2023/Research%20Paper\\_%20WoS/handout\\_2\\_-the\\_main\\_sources\\_of\\_international\\_humanitarian\\_law.pdf](file:///F:/old%20open%20drive/2021_lectures/2022_lectures/2023/Research%20Paper_%20WoS/handout_2_-the_main_sources_of_international_humanitarian_law.pdf), accessed on 14<sup>th</sup> October 2023.

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

emblems offer a higher level of protection than the red crystal, a new emblem introduced by Additional Protocol III.<sup>19</sup> In addition to the four 1949 Geneva Conventions and their three Additional Protocols from 1977 and 2005, multiple agreements and other legal instruments address the conduct of hostilities and the protection of civilians.<sup>20</sup> They include rules that cover the use of particular weapons, safeguarding cultural property, keeping kids safe, and prosecuting and redressing criminal offenses. These regulations apply to both international and non-international armed conflicts.<sup>21</sup>

#### 4. Customary law:

A set of regulations known as customary law is recognized by states as enforceable under international law.<sup>22</sup> International law holds that customary law is legally binding on states. These regulations can be found by looking at the way States have conducted themselves (including official records, national laws, military manuals, and official accounts of military operations and other records).<sup>23</sup> It is important to distinguish between these laws and practices that States do not consider mandatory, such as policies followed out of policy rather than a sense of legal obligation.<sup>24</sup> Customary law may augment certain protections for victims of armed conflict that are not provided by treaty law.<sup>25</sup>

#### 5. Interaction between the two sources:

Certain provisions of treaties aim to achieve an accurate codification that reflects customary law.<sup>26</sup> In other words, the authors of the pertinent texts aim to elevate customary law to the status of *lex scripta* without changing its core principles, and the international community recognizes that this has been a fruitful endeavour that has been crowned with success.<sup>27</sup> Consequently, the standards contained in the treaty will also bind a non-contracting Party, not because they are a part of the treaty (which inherently binds only contracting Parties), but rather because they express customary law.<sup>28</sup>

Certain provisions of treaties are enacted to establish new laws that openly deviate from the body of customary law. Generally speaking, customary law can be changed by treaty.<sup>29</sup> The only exception is when a treaty conflicts with the jus cogens norm of international law, in which case the treaty is nullified or becomes void. There aren't many standards that are unquestionably pre-emptive. However, it is difficult to modify a norm by treaty (or custom) once it has acquired that hallmark, such as freedom from torture (see *infra*, V).<sup>30</sup> The treaty will deviate from the customary norm, assuming that it is not peremptory (*jus dispositivum*). It is understood to apply exclusively in the relations between contracting States *inter se*. Then, either a permanent divide between the legal system established by the treaty's contracting parties

---

<sup>19</sup> *ibid*

<sup>20</sup> ICRC

<sup>21</sup> *ibid*.

<sup>22</sup> [file:///F:/old%20pen%20drive/2021\\_lectures/2022\\_lectures/2023/Research%20Paper\\_%20WoS/handout\\_2\\_-the\\_main\\_sources\\_of\\_international\\_humanitarian\\_law.pdf](file:///F:/old%20pen%20drive/2021_lectures/2022_lectures/2023/Research%20Paper_%20WoS/handout_2_-the_main_sources_of_international_humanitarian_law.pdf), accessed on 14<sup>th</sup> October 2023.

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

<sup>26</sup> *The Conduct of Hostilities under the law of international armed conflicts*, Yoram Dinstein, cambridge university press, 2004, p. 7

<sup>27</sup> *ibid*

<sup>28</sup> *Ibid*.

<sup>29</sup> *ibid*.

<sup>30</sup> *The Conduct of Hostilities under the law of international armed conflicts*, Yoram Dinstein, cambridge university press, 2004, P. 96-98

and that which applies under customary law to the legal relations between non-contracting parties will occur, or over time, States' customs will become more and more aligned with the treaty provisions, turning them into a true reflection of customary law, that is, not the law as it was when the treaty was first ever drafted.<sup>31</sup>

## 6. The Principle of Humanity:

The International Red Cross and Red Crescent Movement succeeds in preventing and relieving human suffering wherever it may be found on a national and international level. It was founded out of a desire to provide aid to the injured on the battlefield without regard to their race. Its objectives are to protect life and health as well as human dignity. It promotes harmony, friendship, collaboration, and understanding among all peoples.<sup>32</sup> The necessity to take action in order to prevent human suffering is what the Movement principles overall, and it is expressed in the principle of humanity. Helping people, no matter who they are or where they are, and respecting their human dignity are fundamental to everything we do.<sup>33</sup> Humanitarian principles, established customs, public conscience, and principles of international law continue to protect and have jurisdiction over civilians and combatants in situations not covered by this Protocol or other international agreements.<sup>34</sup>

## 7. Principle of humanity and its implications:

Its fundamental conflicts center on particularism and universality, inclusion and exclusion, and inequality and equality.<sup>35</sup> Humanity as an operating principle has been far less explored. It can be used to support military action in support of foreign policy or national security objectives due to its persuasive nature and expansive meaning.<sup>36</sup> Humanity is a fundamental concept in international law and the Geneva Conventions, according to scholars of international law, including human rights law and IHL.<sup>37</sup> By decreasing the probability of conflict and restricting the use of force in other ways, international law pertaining to arms control and disarmament advances humanity.<sup>38</sup> The focus of human rights law is on individual and personal security. By preserving people's health and safety during armed conflict, IHL

---

<sup>31</sup> Ibid.

<sup>32</sup> <https://www.ifrc.org/who-we-are/international-red-cross-and-red-crescent-movement/fundamental-principles#:~:text=The%20principle%20of%20humanity%20expresses,paramount%20to%20everything%20we%20do.,> accessed on 16<sup>th</sup> October, 2023.

<sup>33</sup> Ibid.

<sup>34</sup> Protocol I, The Conduct of Hostilities under the law of international armed conflicts, Yoram Dinstein, Cambridge University Press, 2004, P. 6

<sup>35</sup> Unpacking the principle of humanity: Tensions and implications, by Larissa Fast, International Review of the Red Cross (2016), 97 (897/898), 111–131. Principles guiding humanitarian action, ICRC, P. 111

<sup>36</sup> Ibid. See, for example, Taylor Teaford, "Helping Humanity and Advancing American Interests", War on the Rocks, 2 October 2014, available at: <http://warontherocks.com/2014/10/helping-humanity-andadvancing-american-interests/#>. In the blog post, the author advocates for expanding US military presence in West Africa through its Ebola response.

<sup>37</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)., [https://international-review.icrc.org/sites/default/files/irc\\_97\\_1-2-24.pdf](https://international-review.icrc.org/sites/default/files/irc_97_1-2-24.pdf), accessed 16<sup>th</sup> October 2023.

<sup>38</sup> Unpacking the principle of humanity: Tensions and implications, by Larissa Fast, International Review of the Red Cross (2016), 97 (897/898), 111–131. Principles guiding humanitarian action, ICRC, P. 117

unites the two and advances humanity.<sup>39</sup> In the words of the 1868 St. Petersburg Declaration, the challenge is to determine "the technical limits at which the necessities of war ought to yield to the requirements of humanity" whenever a LOIAC norm is crafted.<sup>40</sup> The additional references to "the dictates of public conscience" and "principles of humanity" are what make the Martens Clause so compelling.<sup>41</sup> The International Court of Justice applied the term "elementary considerations of humanity" in the 1949 Corfu Channel case,<sup>42</sup> which has overtones of the Martens Clause. Regarding the Martens Clause, the Court stated in 1996 that there is no reason to question its relevance or continued existence.

## 8. Humanitarian Consideration and Military Necessity:

The delicate balance between two diametrically opposed impulses—military necessity and humanitarian concerns—forms the basis of LOIAC.<sup>43</sup> No restrictions would have been placed on the belligerent States' freedom of conduct if military necessity had prevailed: *à la guerre comme à la guerre*. In addition, there would have been no violence, destruction, or suffering of people in the conflict; in other words, it would not have been a war if benevolent humanitarianism had been the only motivation for the armed forces.<sup>44</sup> LOIAC is a check-and-balance mechanism that reduces suffering without jeopardizing military operations' efficacy. Military commanders are often the first to comprehend that their duties can be discharged without causing futile pain.<sup>45</sup> The phrases "military necessity" and "law of war" are incompatible with one another. Certain international lawyers view military necessity as the ultimate threat to international jurisprudence, negating all legal constraints and permitting unbridled physical force to run amok over the battlefield or any other area under military authority.<sup>46</sup>

The various definitions of military necessity have never been fully clarified and explained in legal cases; therefore, the following definition of military necessity has been prepared, entirely based on decided cases of the US Supreme Court and various military tribunals: "*Military necessity is an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy through regulated violence, and which are not forbidden by the laws and customs of war.*"<sup>47</sup>

Article 14's general definition of military necessity was exemplified by Lieber, who provided examples of both military necessity-justified and prohibited measures "according to the modern law and usages of war."<sup>48</sup> According to Article 15, military necessity in armed conflicts or war permits the taking of an armed enemy's life or limb as well as the death of other people whose demise is unavoidable; it also permits the capture of all armed enemies and all enemies significant to the opposing government.<sup>49</sup> Article 16: The necessity of military action forbids the use of cruelty, which includes inflicting pain for the purpose of

<sup>39</sup> Ibid.

<sup>40</sup> Protocol I, The Conduct of Hostilities under the law of international armed conflicts, Yoram Dinstein, Cambridge University Press, 2004, P. 17

<sup>41</sup> Ibid.

<sup>42</sup> *Corfu Channel case (Merits)*, [1949] *ICJ Rep.* 4, 22

<sup>43</sup> Yoram Dinstein, *The Conduct of hostilities under the law of international armed conflicts*, Cambridge University Press

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> William Gerald Downey, Jr., 'The Law of War and Military Necessity', *The American Journal of International Law*, Apr., 1953, Vol. 47, No. 2 (Apr., 1953), p. 251 of pp. 251-262

<sup>47</sup> Ibid., p254

<sup>48</sup> Burrus M. Carnahan, *Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, *The American Journal of International Law*, Apr., 1998, Vol. 92, No. 2 (Apr., 1998), P. 216 of pp. 213-231

<sup>49</sup> Ibid.

pain or retaliation, injuring someone other than during combat, and torturing someone in order to force them to confess.<sup>50</sup> It acknowledges deceit but denounces acts of betrayal; generally speaking, military necessity excludes any act of hostility, making the peace return needlessly challenging.<sup>51</sup> Lincoln's decisions exposed the most basic restriction on military necessity: it could only be used to achieve military objectives, or goals that could affect the battlefield, and never political ones.<sup>52</sup>

## 9. Principle of Distinction [Combatants and Civilians]:

Under LOIAC, combatants in an international armed conflict can be divided into two different categories: (i) Military personnel of a belligerent Party, with the exception of medical and religious personnel, even if their particular duty is unrelated to ongoing hostilities. (ii) Any additional individuals who take part in the hostilities actively.<sup>53</sup> A basic tenet of LOIAC is the division of combatants and non-combatants (civilians).<sup>54</sup> The intention is to guarantee to the greatest extent possible, that only the belligerent Parties' legitimate combatants participate in international military operations. Attacks by legitimate combatants on opposing combatants or military targets have the potential to result in casualties, damage, and death.<sup>55</sup> On the other hand, citizens are prohibited from actively taking part in the hostilities; should they do so, their status as citizens is forfeited. However, civilians "enjoy, protection against dangers arising from military operations" as long as they maintain that status.<sup>56</sup> Determining what constitutes active involvement in hostilities is not always simple. Usually, the reference is to 'direct' participation in hostilities.<sup>57</sup> When using information and communications technologies, parties to an armed conflict are required by the principle of distinction to always distinguish between combatants and civilians, as well as between civilian objects and military objectives.<sup>58</sup>

Cyber-attacks are restricted to targeting military targets or combatants. Cyber-attacks must not be directed against civilians or civilian objects. Indiscriminate cyber-attacks are prohibited.<sup>59</sup> It's critical to make sure that cyber-attacks targeting ICTs in armed conflicts are limited to attacking military targets, not people or civilian property. Any object not a military target is considered a civilian object under IHL.<sup>60</sup> "*Objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*" are the only things that can be considered military objectives.<sup>61</sup>

The principle of distinction prohibits attacks that are indiscriminate, including those that use cyber warfare tools and tactics. Indiscriminate attacks are those that seek to cause equal harm to military and

---

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> A. P. V. Rogers and P. Malherbe, Model Manual on the Law of Armed Conflict 29, (ICRC, 1999).

<sup>54</sup> Yoram Dinstein, The Conduct of hostilities under the law of international armed conflicts, Cambridge University Press

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Article 51(3) of Protocol I,

<sup>58</sup> THE PRINCIPLE OF DISTINCTION, ICRC; [https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/03\\_distinction-0.pdf](https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/03_distinction-0.pdf), accessed on 28/10/2023

<sup>59</sup> Ibid.

<sup>60</sup> Additional Protocol I (1977), Article 52(1); ICRC, Study on Customary International Humanitarian Law, 2005, Rule 9.

<sup>61</sup> Additional Protocol I (1977), Article 52(2); ICRC, Study on Customary International Humanitarian Law, 2005, Rule 8

civilian targets.<sup>62</sup> This includes cyber-attacks that use means or methods of warfare that cannot be directed at a specific military objective.<sup>63</sup> Many IHL rules on the conduct of hostilities, including several restrictions stemming from the principle of distinction, apply to and limit only cyber operations that qualify as ‘attacks’ under IHL.<sup>64</sup> During armed conflict, cyber operations that do not amount to ‘attacks’ under IHL have limits, too. For example, the necessity principle applies to all military operations; there is an obligation to always attempt to prevent harm to civilians and civilian property; medical facilities and properties used for humanitarian relief must be respected and protected; and regulations regarding the protection of property vital to the existence of the civilian population must be followed.<sup>65</sup>

#### 10. Principle of Proportionality:

It does not follow that civilians or civilian-related objects cannot be struck, even if a military target has been sufficiently recognized and is the only target of the attack.<sup>66</sup> *First*, “civilians may be located inside the target” (e.g., civilian dependents or employees in a military base).<sup>67</sup> *Secondly*, “civilians may reside near a military target, work next to a shopping mall, or even pass by car or on foot near its perimeter, thereby exposing themselves to what may be described as the side effects of an attack.”<sup>68</sup> *Thirdly*, “due to a technical malfunction, inclement weather, faulty intelligence, a human error in navigation, etc., a bomb can fall short of a military objective – or a missile may go off course – wreaking civilian losses instead.”<sup>69</sup> It is typical that the most modern technology was utilized during the US air campaign in Afghanistan in the year of 2001, ‘although the airstrikes were against military targets, collateral civilian casualties did occur, with bombing mistakes reported almost every day of the campaign’ (counting a erroneous bombing of a Red Cross complex in Kabul on two distinct events).<sup>70</sup> Nevertheless, a belligerent may be fully aware that the only way to achieve the destruction of a specific military goal is to harm or kill civilians or their property.<sup>71</sup> In the words of Judge Higgins, in her dissenting Opinion in the *nuclear weapons Advisory opinion*:

“The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus, even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”<sup>72</sup>

---

<sup>62</sup> Additional Protocol I (1977), Article 51(4); ICRC, Study on Customary International Humanitarian Law, 2005, Rules 11 and 12.

<sup>63</sup> THE PRINCIPLE OF DISTINCTION, ICRC; [https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/03\\_distinction-0.pdf](https://www.icrc.org/sites/default/files/wysiwyg/war-and-law/03_distinction-0.pdf), accessed on 28/10/2023

<sup>64</sup> Additional Protocol I (1977), Article 49. Note that IHL rules that provide specific protection for certain objects, such as medical facilities, impartial humanitarian organizations, or objects indispensable for the civilian populations enjoy protection against cyber operations beyond those qualifying as ‘attacks’. See also: *ibid*.

<sup>65</sup> See, in particular, First Geneva Convention (1949), Article 19, Additional Protocol I (1977), Articles 12, 54(2), 57(1), and 71, Additional Protocol II (1977), Articles 13(1), 14; ICRC, Study on Customary International Humanitarian Law, 2005, Rules 15, 25, 28, 29, 32, 54. See also: *ibid*.

<sup>66</sup> Yoram Dinstein, *The Conduct of hostilities under the law of international armed conflicts*, Cambridge University Press

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> S. D. Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 96 *AJIL* 237, 247 (2002)., see also: *ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> Advisory Opinion on *Nuclear Weapons*, *supra* note 16, at 587.

It is important to understand that disproportionate collateral civilian casualties do not make an objective purely military. The principle of proportionality imposes an additional limitation by prohibiting attacks on military objectives that are deemed perfect because of the possibility of disproportionate harm or destruction to civilians or property.<sup>73</sup> Protocol I do not use ‘disproportionate’, preferring the term ‘excessive’.<sup>74</sup> Article 51(5)(b) of the Protocol prohibits an indiscriminate attack, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>75</sup> According to Article 57(2) (a) (iii) of the Protocol and Article 8(2) (b)(iv) of the Rome Statute of the ICC, launching an attack that is anticipated to result in "excessive" harm to civilians (relative to the actual and direct military benefit anticipated) is prohibited.<sup>76</sup>

## 11. Conclusion:

Still, legal issues regarding the usage of explosive arms with a wide influence area in populous areas<sup>77</sup> exist. In addition to the direct effects of the attack, its indirect or echoing impact must also be taken into consideration when evaluating the probable related non-combatant injury when applying the rule of proportionality in attack, provided that they are reasonably foreseeable under the circumstances. This is a result of the inaccuracy of certain explosive weapon systems, including many of the weapons, grout, and multiple-rocket launcher systems currently in use. This is particularly true when employing untraced weapons and unmanned aerial vehicles to deliver missiles and rockets.<sup>78</sup>

---

<sup>73</sup> E. Rauch, ‘Conduct of Combat and Risks Run by the Civilian Population’, 21 *RDMDG* 66, 67 (1982).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Rome Statute,

<sup>77</sup> For further analysis see ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, October 2015, pp. 49 ff and ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, October 2019, pp. 11 ff., <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/ICRC-IHL-Written-Paper-Submission---10-February-2020.pdf>, accessed on 28/10/2023.

<sup>78</sup> *Ibid.*