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THE OBLIGATION TO TAKE FEASIBLE PASSIVE PRECAUTIONS AND THE PROHIBITION OF THE USE OF HUMAN SHIELDS: CAN MILITARY CONSIDERATIONS, INCLUDING FORCE PROTECTION, JUSTIFY NOT RESPECTING THEM?

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Résumé

Dans cette présentation, Marco Sassòli s'est penché sur le thème des précautions à prendre dans la mesure de ce qui est « pratiquement possible », en se concentrant ensuite sur la question des boucliers humains. Dans un premier temps, il est revenu sur les termes de l'article 58 du Premier protocole additionnel de 1977, soulignant la différence entre les obligations « actives » que la partie attaquante doit prendre dans la conduite des hostilités – notamment pour assurer le respect du principe de distinction entre civils et combattants (article 57(2)(a)(i) du Premier protocole additionnel) – et les précautions « passives » qui doivent être prises par le défenseur dans le cadre de ce qui est « pratiquement possible », en « s'efforçant » d'éloigner les objectifs militaires de la population civile et en « évitant » de placer ces objectifs à proximité de zones fortement peuplées. Ainsi, cet article laisse une marge de manœuvre au défenseur quant au choix des précautions à prendre en cas d'attaque, tout en offrant une certaine protection pour empêcher les parties d'utiliser les personnes civiles dans la réalisation d'un avantage militaire : en effet, toutes les précautions nécessaires doivent être prises pour protéger la population civile « contre les dangers résultant des opérations militaires ». Par ailleurs, Marco Sassòli a démontré que la même interprétation du terme « feasible » était retenue, pour l'article 57 et l'article 58, à la fois par le Comité international de la Croix-Rouge (CICR) et de nombreux Etats, tels que le Canada, les Etats-Unis ou le Royaume-Uni. Si l'obligation générale pour les parties au conflit de protéger la population civile et les biens de caractère civil soumis à leur autorité est indiscutablement considérée par le CICR comme une norme de droit international coutumier applicable dans les conflits armés tant internationaux que non internationaux, un certain nombre de réserves furent mentionnées par Marco Sassòli sur ce point. Concernant l'interdiction (absolue) d'employer des boucliers humains, conformément à l'article 51(7) du Premier protocole additionnel de 1977, Marco Sassòli a notamment rappelé que l'emploi de boucliers humains exige la présence délibérée en un même lieu de personnes civiles et d'objectifs militaires, « associée à l'intention spécifique » d'essayer d'empêcher que ces objectifs militaires soient pris pour cible. Cette interdiction couvre l'emploi des boucliers humains tant volontaires qu'involontaires. Sur ce point, il a notamment

1 I would like to thank Mr. Christopher Booth, research assistant at the University of Geneva, for his preliminary research and for having drafted the first version of this presentation.

mentionné qu'un civil qui servira volontairement et délibérément de bouclier humain pour tenter de protéger un objectif militaire ne perdra pas nécessairement sa protection contre les attaques directes. Pour continuer, il s'est demandé dans quelle mesure les considérations militaires doivent être prises en compte pour déterminer ce qui est « pratiquement possible » en matière de précautions « passives », prenant pour exemple les mesures de « force protection ». En outre, il reste à savoir s'il serait possible pour des combattants de se déguiser en civils, dans le cas où ils chercheraient à éviter de se faire attaquer, en rendant leur identification par l'attaquant plus difficile. Quoiqu'il en soit, les règles du droit international humanitaire seront violées, dans l'hypothèse où des combattants se mêlant aux personnes civiles dans le but de gêner des opérations militaires, parviendraient à faire suspendre ou annuler l'attaque engagée par l'autre partie au conflit.

Introduction

This contribution focuses on the obligations faced by a party to an armed conflict which is subject to an attack (i.e. an act of violence in offence or defence²). In order to adhere to International Humanitarian Law (IHL), a defending force must not only refrain from using civilians as human shields to 'protect' potential military targets, but must also take 'feasible' passive precautions in order to protect the civilian population under its control. It remains unclear, however, whether and to what extent the concept of feasibility of precautionary measures stretches to allow a defending force to draw upon the need to protect its military forces.

1. The obligation on behalf of the defender to take passive precautions

The general obligation on the part of the attacker to distinguish between civilians and civilian objects on the one hand, and military objectives on the other, implies that only military objectives may be targeted and that, even if this is adhered to, an attack on a military objective is unlawful if the anticipated incidental effect on civilians is disproportionate to any military advantage expected to be derived from the attack. In addition to this obligation, Additional Protocol I, applicable to international armed conflicts, details the obligation on the part of States party to the Protocol to take precautions not only as an attacker, but also as a defending force in order to mitigate the effects of attacks.³

Consequently, parties to a conflict, in adherence to Article 58, must

'to the maximum extent feasible (a) endeavour to remove the civilian population (...) from the vicinity of military objectives; (b) avoid locating military objectives within or

2 Article 49 (1), Additional Protocol I.

3 Article 58, Additional Protocol I.

near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations’.

The wording of Article 58 already clearly indicates that these obligations are to be weaker than those of an attacker. These measures have to be taken only ‘to the maximum extent feasible,’ and the defender need only ‘endeavour to remove’ the civilian population and ‘avoid’ locating military objectives nearby.

As well as being found within the text of a treaty, the rules contained within Article 58 correspond with customary law found in the International Committee of the Red Cross (ICRC) Customary Law Study in rules 22-24.⁴ Under customary law, the general duty on the part of the defender to protect the civilian population and civilian objects under its control is unquestionably considered by the ICRC to apply in both international and non-international armed conflicts. Meanwhile, the duty to avoid locating military objectives within or near densely populated areas and the duty to remove civilian persons and objects under its control from the vicinity of military objectives only arguably extend to non-international armed conflicts, even in the view of the ICRC.

The customary nature of such obligations may, however, be subject to serious doubts, in particular bearing in mind the *Travaux préparatoires* which preceded the Protocol and the practice of States (which also has an impact on the interpretation of the treaty rule). In the competent working group of the Diplomatic Conference, ‘many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas’.⁵ Indeed, France, Switzerland, Austria, South Korea and Cameroon all declared that such a provision, in particular the obligation regarding the location of military objectives, must not prevent a State from organising its national defence as it considers necessary.⁶

4 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, Rules 22-24, pp. 68-76.

5 Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Martinus Nijhoff, 1982, p. 372.

6 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, vol. VI, pp. 213/214 (France, Switzerland, Austria), p. 232 (Italy), p. 234/235 (South Korea), 239 (Cameroon).

Upon accession to Protocol I Belgium, Italy, the Netherlands, and Algeria made declarations that the term 'feasible' be understood to take available means or military considerations into account. Switzerland and Austria made reservations subjecting Article 58 to the 'exigencies dictated by the defence of the national territory'. Switzerland however has since withdrawn this reservation.

In addition to such express hesitancy on the part of States, State practice is also somewhat lacking. To elaborate further on this point, the UK Military Manual, for example, states that 'it is not prohibited to use urban terrain for military purposes, in particular the location of military headquarters in urban areas, when military necessity so dictates, but the potential danger to the civilian population is an important factor to be considered in making decisions'⁷. As for the practice of other States, if they did indeed recognise an obligation to separate military objectives from civilian population concentrations, it follows that this obligation would already have to be implemented into their respective planning laws in peacetime, since fixed military objectives such as Ministries of Defence, headquarters of armed forces, army barracks and weapons industries cannot be removed from cities once an armed conflict breaks out. I am not aware of such rules in planning laws.

2. The prohibition against using human shields

A. The distinction between the duty to take passive precautions and the prohibition against using human shields

Article 51(7) of Protocol I provides a prohibition of the use of human shields. Here, it is elaborated that 'the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations', in particular providing prohibition of any 'attempts to shield military objectives from attacks or to shield, favour or impede military operations'. In addition, the Parties to the conflict 'shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'

The decisive factor distinguishing the use of human shields by a defending force from a mere violation of their aforementioned obligation to take passive precautions is whether the intermingling of military forces and the civilian population is a result of an effort of the defender to obtain 'protection' for its military forces and objectives, or simply of a lack of care for the civilian population.

⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, paragraph 5.36.2.

It is therefore the intent of the defender which distinguishes the two concepts, a violation of the duty to take passive precautions and a violation of the prohibition of human shields.⁸

It is also important to note the subtle, but crucial, distinction that the prohibition of the use of human shields is to only apply to the 'civilian population or individual civilians', and not to encompass civilian objects within its prohibition. Camouflage, indeed, effectively consists of making combatants and military objectives look like civilian objects and to use civilian objects such as barns and trees for that purpose. Camouflage is not prohibited.

B. An absolute prohibition

Contrary to the doubts the ICRC expresses regarding the customary character of the obligation of the defending force to take certain passive precautions equally in non-international armed conflicts, the rule on the prohibition of the use of human shields is considered by the ICRC as customary IHL in both international and non-international armed conflicts.⁹

Similar prohibitions already exist outside of Protocol I in the 1949 Geneva Conventions concerning protected civilians (i.e. those who are in enemy hands) and for prisoners of war.¹⁰ During recent armed conflicts the United Nations (UN) condemned the use of human shields¹¹, the use of which has today been elevated to the status of war crime in the International Criminal Court (ICC) Statute, which prohibits 'utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations'¹². Astonishingly, however, the ICC Statute only makes reference to this crime in regard to international armed conflicts.

I have argued elsewhere that even where a civilian serves voluntarily as a human shield for a military objective, he or she is not to be labelled as participating directly in hostilities, except if he or she physically hinders enemy military operations¹³ – an opinion which has been shared

8 Jean-Marie Henckaerts & Louise Doswald-Beck, *op. cit.*, note 3, vol. 1, p. 340; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2003, pp. 344-348; Bothe, Partsch and Solf, *op. cit.*, note 4, p. 316 even refer to the 'subjective intent of [the] military commander'.

9 Jean-Marie Henckaerts & Louise Doswald-Beck, *op. cit.*, note 3, vol. 1, p. 337, Rule 97.

10 Art. 28 of Convention IV and Art. 23 (1) of Convention III.

11 For example, see for the 1991 Gulf War, U.N. General Assembly, 'Situation of Human Rights in Iraq' A/RES/46/134, December 17, 1991.

12 See Art. 8 (2) (b) (xxiii) of the ICC Statute.

13 See Marco Sassòli, "Human Shields and International Humanitarian Law", in: Fischer-Lescano, Gasser, Marauhn, Ronzitti (eds.), *Peace in Liberty, Festschrift für Michael Bothe zum 70. Geburtstag*, Baden-Baden and Zürich, Nomos and Dike, 2008, pp. 567-578, with further references.

by the ICRC.¹⁴ What is less controversial still is that civilians implicated involuntarily as human shields who are thereby forced to join combatants or military objectives, or civilians who are joined by combatants,¹⁵ do not lose their protection, including the benefit of precautionary measures by the attacker.¹⁶

In any case, what it is uncontroversial is that the absolute prohibition against using human shields covers both voluntary and involuntary human shields. Nevertheless, while civilians do indeed lose protection against attack if and for such time as they directly participate in hostilities, a party does not, in my view, violate IHL if it *allows* civilians to directly participate in hostilities it is engaged in. Here again, intent is the decisive criterion: a party allowing civilians to directly participate in hostilities does not look to protect its military objectives against attacks, but to increase its fighting capacity.

We see a clear divergence between the differing degrees of obligation on the part of the defender: on the one hand there is the strict obligation not to use human shields, even where the shield is a civilian who has volunteered, and on the other a duty to take passive precautions which is diluted by the concept of ‘feasibility’, a concept which shall now be discussed.

3. Evaluating the feasibility requirement for passive precautions

A. Feasibility in the case of active precautions

Upon accession to Protocol I, several countries including Algeria, Belgium, Germany, Italy, Spain and the United Kingdom made declarations clarifying their respective understandings of the word ‘feasible’ in relation to both Articles 57 and 58. A common theme to these assertions is that feasible precautions are largely to be taken as signifying what is *practicable or practically possible*, taking into account all circumstances *at the time*, including those *relevant to the success of military operations*.

It is clear, at least in the case of active precautions to be taken by the attacker, that military considerations may play a part in determining the feasibility of any given precaution to mitigate damage to civilians. Indeed, this view is shared by national practice. Returning to the UK

14 See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law*, Geneva, ICRC, 2010, pp. 58-60 (in particular footnote 141), available at: <<http://www.icrc.org/eng/resources/documents/publication/p0990.htm>>

15 Art. 50(3) of Protocol I clarifies that ‘[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character’. Article 50(3) is an application of the proportionality principle, a general principle of law, to the definition of the civilian population, and its customary character does therefore not need to be analysed separately (See Bothe, Partsch, Solf, *op.cit.*, note 4, p. 296).

16 UK Manual, *op. cit.*, note 6, paragraph 5.22.1.

Military Manual, it details that: '[a] commander should have regard to the following factors: (...) g. the risks to his own troops of the various options open to him'.¹⁷ Here, we can see more specifically that 'the success of military operations' entails that force protection is to be considered when assessing the feasibility of precautions.

B. Does the same concept of feasibility apply in the case of passive precautions?

Several arguments support the idea that the concept of feasibility incorporates military considerations within the scope of both active and passive precautions.

It is a general principle of treaty interpretation that a well-drafted international legal convention ought to provide the same interpretation for any given word throughout its text. Within the *Travaux préparatoires* to Protocol I, several States supported the view that 'feasible' be taken to have the same meaning throughout the text of the Protocol. In particular, the anglophone States were explicit that the word 'feasible' have the same meaning in Article 57 (then draft Article 50) and Article 58 (then draft Article 51). The delegations of the United Kingdom¹⁸, Canada¹⁹ and the United States²⁰ all made statements that the word 'feasible' must refer to that which is practicable or practically possible, taking into account all circumstances at the relevant time, including those relevant to the success of military operations.

This corresponds to the opinion of the ICRC. After a discussion of the word 'feasible' in relation to Article 57 on an attacking force's obligations, the ICRC's Commentary on Additional Protocol I discusses what the word 'feasible' signifies in the following Article 58 in relation to the defending force's obligations. It simply states that 'once again the term "feasible" is used' and refers in a footnote '[o]n the meaning of these words' to their discussion in the Commentary of Article 57.²¹ The ICRC therefore appears to retain the exact same meaning of feasibility under Article 58 as under Article 57 and, as follows, the same meaning of feasibility under both active and passive precautions. Likewise, this appears to be the opinion of the United States (US). The new US Department of Defence Law of War Manual details, while considering precautions to be taken by the defender, that 'parties to a conflict should also take feasible precautions to reduce the risk of harm to protected persons and objects from the effects of enemy attacks'. It adds that 'what precautions are feasible depends greatly on the context, including

¹⁷ *Ibid.*, paragraph 5 32.5.

¹⁸ Official Records, *op.cit.*, note 5, Vol. VI, p. 214, paragraph 59.

¹⁹ *Ibid.*, p. 224.

²⁰ *Ibid.*, p. 241.

²¹ Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht/Geneva, Martinus Nijhoff/ICRC, 1987, paragraph 2245.

operational considerations', referring to the earlier discussion on when active precautions by the attacker are feasible.²² In this earlier discussion it explains that 'feasible precautions are those that are practicable or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations'. These circumstances may include: '(...) whether taking the precaution poses a risk to one's own forces or presents other security risks'.²³ The State practice of the United States therefore seems to indicate that a defending force may take into account military considerations, mitigating the protection of civilians, when making feasible precautions against the effects of attack.

Difficulties in omitting military considerations from a discussion of feasibility of passive precautions arise prominently when one bears in mind non-conventional aspects of modern warfare, for example when considering the feasible precautions to be taken by a guerrilla force defending themselves from attack. By their very nature, the practice of guerrillas requires that the whereabouts of their forces be unknown, often entailing a high degree of intermingling with civilians, or at least locating themselves within civilian objects. Such a force will be composed largely of militia, comprising a force so irregular that many of its subscription will be voluntary civilians. A group comprising civilians cannot take the precaution to protect civilians without taking into account the protection of its military.

4. Does the feasibility evaluation need to be qualified?

Against this backdrop of support that the concept of feasibility is taken to have the same meaning throughout the text of Protocol I, there remain doubts as to what extent military considerations can be brought into an argument of which passive precautions are feasible.

In particular, to what extent can the defending force carry out measures of force protection (i.e. measures which are taken to mitigate damage to military targets), in neglecting its obligation to protect the lives of civilians?

It is possible to imagine a scenario in which a force, in defending itself from attack, decides to station its military units among civilians and civilian objects, because not to do so would render their soldiers 'sitting ducks', easily targeted by the enemy out in the open.

Within the aforementioned concept of feasible precautions, this action should be permitted, since the defending force is seeking to limit severe damage to its military units. The ICRC Commentary indeed states that 'a Party to the conflict cannot be expected to arrange its

22 US Department of Defence Law of War Manual 2015, paragraph 5.14.

23 *Ibid.*, paragraph 5.3.3.2.

armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary'.²⁴

The military advantages of placing or keeping military targets within the proximity of civilians and civilian objects for the purposes of force protection are apparent. Such a measure will clearly mitigate damage to the defending force because the enemy may not attack due to its own obligations as an attacking force under IHL. However, by such a move the defending party is intentionally using civilians as human shields which, as discussed earlier, is always prohibited and may therefore not be a factor in the evaluation of feasibility.

It may be that the force protection is employed in a way other than by trying to 'protect' combatants and military objectives through the presence of civilians. To make an important distinction here, the advantage of positioning military units in a way that merely makes it difficult for an enemy to *identify* combatants and military objectives may indeed be a factor which may be taken into account in the feasibility evaluation.

While this factor does not bar defending combatants from taking shelter in civilian objects, the feasibility criterion does not allow the combatants of a defending force to disguise themselves as civilians while they are engaged in an attack or a military operation preparatory to an attack. The latter prohibition results indirectly from the fact that such combatants, when making their identification difficult in these circumstances by disguising themselves as civilians, would forfeit combatant status²⁵, in addition to directly violating the prohibition of perfidy (if the purpose is to kill, injure or capture an adversary).²⁶ This nonetheless leaves open, at least under Protocol I, the possibility for combatants to disguise themselves as civilians if the intent of such an action is not to engage in an attack, but merely to avoid being attacked, by making their identification more difficult for the attacker. Conversely, IHL is violated if the intent of combatants intermingling with civilians is to hinder an attack in the hope that the adversary will ultimately call it off under its obligation to spare civilians incidentally affected by an attack directed against combatants it has identified. The latter indeed would constitute a prohibited use of human shields.

24 Sandoz, Swinarski and Zimmermann, *op.cit.*, note 20, paragraph 2246, in French 'on ne peut attendre d'une Partie au conflit qu'elle dispose ses forces armées et leurs installations de telle manière qu'elles soient signalées à l'adversaire'.

25 Additional Protocol I, Art. 44 (2) and (3).

26 *Ibid.*, Art. 37 (1) (c).

Conclusion

The obligations placed upon a defending force under IHL may be considered weaker than those placed upon an attacking force. Article 58 of Protocol I is clearly hesitant to intrude on a defending force's ability to organise its military strategy, affording it a great deal of leeway in choosing which precautions to take when facing attack. This has great implications for civilians as victims of conflict, but affords some protection against the malicious use of human shields for military gain. This prohibition of the use of human shields in my view represents the absolute limit to the inclusion of force protection considerations into the evaluation of whether passive precautions are feasible.