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CONTEMPORARY CHANGES IN ARMED CONFLICT AND THE NEED FOR RECONSIDERATION OF INTERNATIONAL HUMANITARIAN LAW

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Abstract

Law is a dynamic phenomenon particularly in terms of its response to new and emerging situations. International Humanitarian Law is not an exception in this regards. The paper analyses new developments in International Humanitarian Law arising from the arcane and complex conflict situations such as the use of new and advanced technologies like Autonomous Weapon System (AWS)

Introduction

New developments in armed conflicts (ACs) have put adequacy of International Humanitarian Law (IHL) into question. These specifically, the characters of contemporary armed conflicts (ACs), the nature of the parties and the progress in technology will be the subject of analysis in this essay which shall highlight on some challenges they pose that calls for reconsideration of IHL. First, contemporary AC is characterised with urban warfare, the nature of parties has brought on private military and security companies (PMSC) and terrorism whereas the progress of technology has ushered in cyber warfare (CW) and the use of autonomous weapon systems (AWS), these will be analysed one after the other clearly showing the challenges they pose which merit reconsideration of IHL.

Characteristics of contemporary ACS

(1) Urban warfare.

Cities have always been an important factor in the power game, and in an armed conflict the taking or destruction of them can become a symbol or an end in itself. This can result in the parties ignoring basic principles of IHL, in particular the obligation to distinguish between military objectives and civilian objects¹. In this context, there are still practical difficulties of implementing the principles of IHL (especially distinction proportionality and precautions) in today's conflicts, particularly in urban areas, as demonstrated here under.

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¹ Nathalie Duhin, protecting civilians in urban areas. A military perspective on the application of international humanitarian Law page 181, international review of the Red cross (2016), 98(1), 177-199. War in cities do; 10.1017/51816383117000029

The principle of distinction -objects

The very nature of cities makes it complicated for armed forces to apply the principle of distinction in respect of object.² Cities are made up of countless civilian objects (dwellings, shops, schools, hospitals etc.) however , military objectives (barracks, air bases, headquarters , etc.) are sometimes interwoven in the fabric of the city, whether as a result of urban extension or by design in non-international armed conflicts(NIACs)in which regular state armed forces fight organized armed groups(OAGs), the military infrastructure of the latter tend to be very difficult to identify, because. They are often pragmatically located in originally civilian buildings. the first difficulty for armed forces deployed in a conflict in which the adversary or operation a city or therefore, the exact location of enemy military facilities and the objects that by their nature, could be considered essentially military objectives.³

Armed forces are immediately confronted with the problem of dual –use faculties that are civilian by nature but are useful for both military and civilian purpose and can therefore be regarded as military objectives. These maybe, for examples, bridges, roads, power stations and electricity distribution and transmission networks. The challenge for the armed forces in terms of the intelligence function is to gather as much information as possible on what use is being made the facilities and true to determine, as accurately as possible the civilian population and the precise impact the destruction of the object would have on the he conduct of the enemy’s operation . The analysis would also involve the direct and indirect risk that the loss of the object would have on the civiliansso as to reveal whether the object is indispensable to th survival of the population and if so it would be entitled to special protection under IHL.⁴ Furthermore, the finding of the analysis would be taken into account in determining proportionality of the attack.

The principle of distinction-individuals.

Distinction between individuals and identifying the adversary, particularly in NIAC situation is harder As the nation of “combatant” is absent in NIACS, the solution lies solely in determining the direct participation of Individuals in hostilities.⁵ The challenge is that the nation of DPH is not. Properly defined in the APs though the consequences are clear, civilians lose the protection accorded to them for the duration of their DPH. The international committees of the red cross (ICRC) provides some insight in 2009⁶., which explains that it refers to specific acts meeting tree cumulative criteria: **threshold of harm, a direct usual link between the act and the harm likely**

² AP (1) , **Article 52(2)**; “attacks shall be limited strictly to military objectives.

³ Nathalie Durhin, protecting civilians in urban areas. A military perspective on the application of international humanitarian law, page 179, international Review of the Red cross (2016), 98(1), 177-199. War in cities doi: 10.1017/51816383117000029

⁴ See, API, **Article 54(2)**;

⁵ AP (ii), **Article 13(3)**, “civilians shall enjoy the protection afforded by this part in hostilities”

⁶ See Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under international Humanitarian Law, ICRC, Geneva, 2009 (interpretive Guidance).

to result from it, and the belligerent nexus (the act must be carried out in support of a party to the conflict and to the detriment of another)

In spite of these clarifications, however, the definition of DPH remains unsatisfactory. It is for example, accomplished and after to draw a clear line between direct and indirect participation, particularly in conflicts in urban areas, where the precise characterization of activities can be complex. A case point in for example, according to the interpretive guidance, supplying weapons to OAGs is not an act amounting to DPH, unless they are directly delivered to the zone where armed operations are taking place⁷. In urban warfare it can be difficult to establish the facts and determine what can be considered the direct provision of weapons and what amounts to delivery for immediate combat purposes given the blurred and changing boundaries of combat zones and their location in the midst of civilian objects and facilities. There is therefore a danger that all transportation of weapons and munitions could be considered DPH, making direct attack permissible.⁸

The Principle of Proportionality.

The principle of proportionality, which calls for collateral damage to be minimized or defined in **paragraph 2(a)(iii) of article 57 of API**. For the protection of civilians and civilian objects to be effective, it is necessary to ensure that all precautions are taken to reduce any incident damage that could be caused by combat actions. Collateral damage is not prohibited by IHL, but it must be minimized. The risk of incidental harm is particularly high in urban areas, owing to the very nature of cities and the distinction difficulties indicated above.

The practical implementation of the principle of proportionality by the armed forces is therefore based mainly on the adoption of strict standard targeting procedures particularly for planned strikes. In assessing the legitimacy of the target, the principle of distinction is applied⁹. Which is difficult as already discussed above. The next step, the collateral damage estimate (CDE), ensures that the principle of proportionality is respected. This method, resembling a scientific risk analysis takes into account the effects that weapons can reasonably be expected to have, and a level of responsibility is assigned to each level of risk.

This analysis is based on knowledge of the sites to be attacked which has already been identified as a challenge in distinction. This limitation inherent in the targeting process is particularly true in an inevitably complex, hence and changing urban setting. The complexity of the situation is further compounded by the deliberate use of civilian

⁷Ibid, pp 51-52

⁸ Nathalie Durhin, protecting civilians in urban areas. A military perspective on the application of international humanitarian law, page ... international Review of the Red cross (2016), 98(1), 177-199. War in cities doi: 10.1017/51816383117000029

⁹In the targeting cycle, the first stage in the analysis of the target dossiers involves ensuring that all the criteria relating to the "military objective" within the meaning of **Article 52(@) of API**, are met.

objects and human shields often not readily visible at first sight, with a view to discrediting the attacker and “pushing” it into causing collateral damage.

The modern types of conflict (with the use of means of asymmetric warfare in urban areas, including improvised explosive devices (IEDs) and human shields) and the frequently adopted “no boots on the ground” approach make it difficult to apply the principle of proportionality in targeting processes in urban settings¹⁰.

Repeated tragedies involving civilians in urban conflict areas have prompted all for changes to the law and practice, with a view to perhaps prohibiting collateral damage even when it is not unlawful or at least urging states to go “beyond what is required by IHL”

The Principle of Precaution(s)

Precautions in attacks

The general rule and precautions in attacks is found in **Article 57 of API**, which, in paragraph 1, requires that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. In it requires verification that the target is a military objective, the choice of means and methods of attack, the possibility of interrupting an attack, choosing between objectives, and advance warning. choice of weapons as required by Paragraph 2(a)(11) is abit difficultin urban areas. This would require First, the most precise weapon should be chosen and Secondly all the effects of the weapon must be taken into account which includes effects of the actual impact and also the blast and fragment effect caused by the studies, using input from the evaluation of damage caused by the past strikes (known as battledamage assessment), which ensures that predictive calculations are accurate as possible. With the difficulties of getting the accurate effects of the impact coupled with the intrinsic nature of cities that is characterized with dense populations and he highly changing setting of the cities, choice of weapons becomes difficult.

Precautions against the effects of attacks

The general rule concerning protection against attacks is provided in **Article 58 of API**¹¹. . It is not, however, absolute as it starts by providing that the parties “to the conflict should implement it to the maximum extent feasible.

ICRCs study on customary IHL, the rule concerning protection from the effects of attacks can be divided into two sub-rules, specifically the need to locate military

¹⁰ Nathalie Durhin, protecting civilians in urban areas. A military perspective on the application of international humanitarian law, page 188, international Review of the Red Cross (2016), 98(1), 177-199. War in cities doi: 10.1017/5181638311700029

¹¹ **AP I, Article 58**, “ The parties to the conflict shall , to the maximum extent feasible; a) without prejudice to **Article 49 of the fourth convention**, endeavor to remove the civilian population individual civilians and civilian objectives; b) avoid locating military objectives within or 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”

objectives away from civilians¹² and the need to remove civilians from the vicinity of military objectives¹³. Though The latter won't be addressed here due to spatial limitation, the **former which is also a requirement Article 58(b) of API** is limited due to demographic changes and the extension of urban areas. It becomes harder to fulfill this obligation in NIAC situations particularly by OAGs, which have no pre-existing military facilities. Such groups are therefore limited in the choice of where to locate their military facilities and may have unlimited resources, making them unable to implement preventive measures¹⁴.

Nature of the Parties to ACs

i) Private Military and Security Companies(PMSC)

there is no commonly agreed definition of a PMSC instead, the internationally vague and generic term PMSC¹⁵ is used to cover companies providing any form of military or security service in situations of armed conflict¹⁵.the past years have witnessed a significant growth in the involvement of PMSC in security and military functions in situations of ACs.

The issue of PMSC brings difficulties to application of IHL due to the fact that, there is no international regulation regarding activities that may be performed by the PMSC employees that hence costs doubt about their status.

Secondly, the fact that IHL is not binding on the PMSC in their legal personality but on the employees individually or also a challenge that needs address individual criminal responsibility already exists, companies have far deeper pockets for the payment of compensation on holding the company accountable or more likely to have an impact on its future practices.

The position of company managers and senior officers also calls for reconsideration of IHL, this is because in addition to the criminal responsibility of employees who actually perpetrate serious violations of IHL or order their commission, managers and possibly more senior company officers may also face legal liabilities¹⁶. It can arise a superior knew or had information that should have enabled him/her to conclude that a subordinate was committing or was going to commit a breach of IHL but failed to take all feasibility measures within his/her power to prevent or repress the breach.

¹² See ICRC Customary law study, Rule 23, pp. 71-74

¹³ Rule 24, pp. 74-76

¹⁴ Nathalie Durhin, protecting civilians in urban areas. A military perspective on the application of international humanitarian law, page 188, international Review of the Red cross (2016), 98(1), 177-199. War in cities doi: 10.1017/51816383117000029

¹⁵ Emanuela-Chiara Gillard, Business goes to war, private military/security companies and international Humanitarian law, page 545, international Review of the Red cross, Volume 88 number 863 September 2006

¹⁶ *ibid*

According to the commentary, the provision is generally limited to direct superiors who have a personal responsibility for the subordinates within their control¹⁷ within a PMSC, although an employee's direct manager would certainly be covered, this responsibility is unlikely to extend to the company's senior officers¹⁸.

As the position of operation of PMSC is not straight forward as a matter of law coupled with the challenges in implementing the obligations in practice, there is need for comprehensive law that would be specific on PMSC at the international level to address the loopholes identified.

Terrorism (war on terror)

The immediate aftermath of the September 11th 2001 attacks against the United States saw the launching of what has colloquially been called the global war against terrorism¹⁹.

A recent challenge for IHL has been the tendency of states to label as "terrorist" all acts of warfare committed by OAGs in the course of an armed conflict in particular NIAC. even though, under IL, such an act might have been lawful.

ICRC believes that IHL is applicable when the "fight against terrorism" amounts to or involves armed conflict such was the case in Afghanistan, a situation that was clearly governed by the rules of IHL applicable in IACs.²⁰

This inherent contradiction between the two legal frameworks (terrorism and IHL) is part of the reason why non-state armed groups often disregard IHL norms, including those prohibiting attacks against civilians and civilian objects. They have no explicit legal incentive to abide by IHL as they can equally be punished upon capture by the government whether they fought according to the laws and customs of war and respected civilian objects or violated the rules.²¹

In implementing international requirements at the domestic level some governments have made it a criminal offence to provide "support", "service" and /or "assistance" to entities or persons involved in terrorist acts, and to intentionally associate with such entities or persons involved in terrorist acts and to intentionally associate with such entities or persons which in practice result in the criminalization of the core activities of humanitarian organization and their personnel aimed at meeting the needs of the victims of AC and situations of violence below that threshold.

¹⁷ Article 86 (2) of AP I mentions the possibility of "penal or disciplinary" responsibility.

¹⁸ See e.g., the practice referred to by Henckaerts and Doswald-Beck, above note 18, vol 1 rules, rule 153 and vol 11 practice, part 2, pp.3733 et seq.

¹⁹ Ibid pp.32-33

²⁰ Report of the ICRC on IHL and the challenges of contemporary armed conflicts submitted in the 32nd international conference of the Red Cross and Red Crescent, Geneva, Switzerland 28 November – 1 December 2011 at page 50

²¹ Report of the ICRC on IHL and the challenges of contemporary armed conflicts submitted in the 32nd international conference of the Red Cross and Red Crescent, Geneva, Switzerland 8-10 December 2015 at page 17

The potential criminalization of humanitarian actions is a concern to the ICRC. This is because it reflects a non-acceptance of the notion of neutral and independent humanitarian action, an approach which the ICRC strives to promote in its operational work in the field.

Progress of Technology

Generally all weapons systems must be capable of being used in compliance with IHL, and in particular its rules on the conduct of hostilities. The responsibility for ensuring this rests, with each state that is developing these new technologies of warfare.²² This is a legal requirement in accordance with **Article 36 of API**. Although this obligation is undisputed, difficulties in interpreting and applying these rules to new technologies of warfare may arise in view of their unique characteristics, the intended and expected circumstances of their use, and their foreseeable humanitarian consequences. Ultimately, these challenges may raise the question of whether existing law is sufficiently clear or whether there is a need to clarify IHL to develop new rules to deal with these challenges²³

Cyber warfare and autonomous weapons systems are but two of the new technologies of warfare that raise a range of legal, ethical and humanitarian issues as some are illustrated below;

i) Cyber warfare.

The **ICRC** understands “cyber warfare” as operations against a computer or a computer system through a data stream, when used as means and methods of warfare in the context of an armed conflict, as defined under IHL.

Cyber warfare can be resorted to as part of an armed conflict that is otherwise the employment of cyber means in the absence of kinetic operations when their use amounts to an armed conflict²⁴

Reconciling the emergence of cyberspace as a new arena for fighting with the legal framework governing AC is a challenging task in several respects and requires careful reflection, cyber warfare hence poses difficulties in protection of victims of ACs and applicability of IHL as expressed below;

To start with, the digitalization on which cyber space is built ensures anonymity and thus complicates the attribution of conduct. Thus, in most cases, it appears difficult if not impossible to identify the author of an attack. This would hence make it hard to

²² Report of the ICRC on IHL and the challenges of contemporary armed conflicts submitted to the 32nd international conference of the Red Cross and Red Crescent, Geneva, Switzerland 28 November- 1st December 2011 at page 51. ²³

Ibid at page 39

²⁴ibid

attribute the perpetrator of an operation and the operation itself to the AC Which is essential in IHL.²⁵

Secondly, there is no doubt that an armed conflict exists and IHL applies once traditional kinetic weapons are used in combination with cyber operations. However, particularly difficult situation as regards the applicability of IHL arises when the first or the only “hostile” acts are conducted by means of cyber operation. Can this be qualified as constituting an AC within the meaning of GCs and other IHL treaties? Does it depend on the type of operation (would the manipulation or deletion of data service or is physical damage as the result of manipulation required).²⁶ All these would pose to be difficult in application of IHL which ideally call for its reconsideration.

Since ICRC opine that cyber operations that result in physical damage to persons, or damage to objects that goes beyond the computer program or data attacked could be qualified as acts of violence, i.e. as an attack in the sense of IHL, In regard to prohibited indiscriminate attacks, it is unclear as to whether cyber operation may be accurately aimed at the intended target and if that the case, whether affects upon civilian infrastructure could be prevented due to the interconnectedness of military and civilian networks.

It is also known less, of in practice it is possible to fully anticipate all the reverberating consequences/knock on effects on civilians and civilian objects of an attack otherwise directed at a legitimate target.²⁷

The very nature of cyber of cyber operation would therefore call for reconsideration of IHL so as to address the above identified challenges which may adversely affect civilians and their objects.

ii) Autonomous weapon systems.

There is no internationally agreed definition of AWS, however, the ICRC has proposed that AWS encompasses any type of weapon systems, whether operating in the air, on land or at sea, with autonomy in its “critical functions” meaning weapon that can select and attack targets without human intervention. After initial intervention, it is the weapon system itself using its sensors, programming and weapons that takes on the targeting processes and actions that are ordinarily controlled directly by man.²⁸

To start with, it’s debatable and /or doubtful whether the weapon system would be capable of autonomously distinguishing military objectives from civilian objects, combatants from civilians and active combatants from persons **hors de combat**. Another

²⁵ Report of the ICRC on IHL and the challenges of contemporary armed conflicts submitted on the 31st international conference of the Red Cross and Red Crescent, Geneva, Switzerland 28 November- 1st December 2011 at page 37. ²⁶ *ibid*

²⁷ *ibid*

²⁸ Report of the ICRC on IHL and the challenges of contemporary armed conflicts submitted in the 32nd international conference of the Red Cross and Red Crescent, Geneva, Switzerland 8-10 December 2015 at page 44.

key challenge is whether a weapon could be programmed to sense and weigh up the many contextual factors and variables required to determine whether the attack may be expected to cause incidental civilian casualties and damage to civilian objects or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, as required by the rule of proportionality.

Likewise, the ability to program a weapon to cancel or suspend an attack if it becomes apparent that the target is not a military objective or is subject to special protection or that attack will be disproportionate as required by the rules on precautions in attack, appears a formidable challenge.²⁹

Thus, for AWS intended for use in contexts where they are likely to encounter protected persons or objects, there are serious doubts as to whether it is technically possible to programme them to carry out the complex, context dependent assessments required by IHL rules of distinction, proportionality and precautions in attack since these are inherently qualitative assessments in which unique human reasoning and judgment will continue to be required.³⁰

These challenges can be overcome if at all there is legal review of the weapon system as required by **Article 36 of API** however **this is hard due to unpredictability of the capabilities and effects of the AWS** talk less of the absence of standard methods and protocols for testing these weapons which too may affect the accuracy of the legal review.

These challenges posed by AWS, now order have prompted the states parties on **Convention on Certain Conventional Weapons (CCW)** and the ICRC to call for human control to be maintained over weapon systems and the use of force to satisfy legal and ethical requirements³¹

Conclusion.

In conclusion therefore, the contemporary ACs characterized with urban warfare, the nature of the parties such as PMSC, branding of OAGs as terrorists and the progress in technology specifically, cyber warfare and Autonomous weapon system illustrated above have strut fundamentally at the core principles of IHL interlia distinction proportionality and precautions. This has hence made protection of victims of armed conflicts weaker if not difficulty, which is the purpose of the IHL; it's against this background that a reconsideration of IHL is urgently needed if at all its relevance as a safety net against brutality is to be appreciated and effective

²⁹ ibid

³⁰ ibid

³¹ Neil Davison, a legal perspective; Autonomous weapon system under international Humanitarian law, at page 11, see also,