

POLICY BRIEFING NO. 1

Reactions to Norms

Armed Groups and the Protection of Civilians

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Introduction

Purpose and audience

By their actions and decisions, armed groups can protect or harm civilians. In situations of armed conflict and violence, civilians face numerous dangers, including death, injury, and threats to their physical and sexual integrity and to family life. They may be harmed, deliberately or incidentally, by armed groups and by the armed forces of a state. The conduct of both will determine the extent to which not only civilians but also captured combatants¹ are protected from physical and psychological harm.²

This Policy Briefing seeks to assist the development of operational and organizational policies which promote respect for humanitarian norms that protect civilians. It is primarily intended for use by individuals, states, and international and non-governmental organizations that seek to protect people who are at risk as a result of armed violence and conflict. However, it is hoped that the Briefing will also be useful to people who have the same objective and

who belong to, or have close links with, an armed group.

A focus on policy not practice

The Briefing generally examines the normative policies of armed groups relating to the protection of civilians in armed conflict and other situations of violence, not their operational practice, though it notes some instances in which the operational practice of a group appears systematically to contradict its stated policy.³ It is based on declarations and statements by members or representatives of armed groups, and policy positions, which can be found in literature, websites, and other materials. On occasion, when policies are not publicly available, it reports statements to third parties, such as bodies of the United Nations (UN) and non-governmental organizations (NGOs). A number of representatives of armed groups also clarified their positions in direct discussions.

It should be noted from the outset that the policies of an armed group are not necessarily static. They are likely to evolve over time under the influence of personalities and changing circumstances. Groups can fragment, generating new policies and practices. Reviews of past policy or changes of leadership may cause a group to issue a

1 The term 'combatant' has a specific as well as a generic meaning in international humanitarian law. Combatants in state armed forces who are captured in the course of an inter-state (international) armed conflict are entitled to prisoner-of-war (POW) status. 'Combatant' is occasionally used by the International Committee of the Red Cross (ICRC) and some states to denote members of armed groups in the context of a non-international armed conflict that involves armed groups, even when they are not entitled to POW status. The more common and preferred term, though, is 'fighters'.

2 International law requires all those who are detained or captured to be treated humanely. This duty covers fighters who are no longer engaged in combat because they are wounded or are surrendering.

3 It is often argued that armed groups make public statements only to improve their image or conduct psychological operations. Doubtless this is sometimes true and sometimes not; and the same may be said of governments.

‘corrective study’ of its rules and conduct; the Briefing cites several examples. Different factions or groups within an armed group may also espouse different views. Such complexity should be considered an opportunity as well as a challenge.

Research methodology

In January 2012, the Human Security Division (HSD) of the Swiss Federal Department of Foreign Affairs (DFAE) commissioned the Geneva Academy of International Humanitarian Law and Human Rights (the Geneva Academy) to study the response of selected armed groups to humanitarian norms, especially those that protect civilians.⁴ Research was undertaken in 2012–13.

The Briefing considers the reaction to international norms of more than 30 armed groups (see the list in Annex 1). The selection took into account different types of conflict, their intensity, a range of geographical contexts, and the various motivations that cause groups to use violence (see Section A).

The project was guided by an Advisory Board which included experts from the Berghof Foundation, Conciliation Resources, Geneva Call, the Centre for Humanitarian Dialogue, HSD, Human Rights Watch, and the International Committee of the Red Cross (ICRC) serving in a personal capacity. In August 2013, a group of selected individuals belonging or linked to armed groups met in the Philippines to discuss a draft of the Briefing. A group of experts met in Geneva on 11 December 2013 to review and comment on the final draft. A number of other experts were also kind enough to comment on that draft. As noted in the disclaimer, the Briefing does not necessarily

represent the views of any of these experts or the bodies, organizations, or states for which they work.

Content and use of the Briefing

The Briefing is divided into three parts and has a total of ten sections. The text is complemented by a bibliography, two annexes, and an index. While the reader is recommended to read the whole document, each section is designed to be self-standing. Guidance on international legal norms is included in text boxes in each section. Those who wish for additional information may find it in *Rules of Engagement*, published by the Geneva Academy in 2011.⁵

Part I considers the motivations and obligations of armed groups, and suggests how best to engage with them. It contains three sections.

Section A discusses widely shared motivations that indicate how a group is likely to react to a specific norm. It is not suggested that this ‘typology’ is in any way authoritative.

Section B describes the normative framework applicable to acts of armed groups under international law. Relevant branches of international law include international humanitarian law (IHL),⁶ international human rights law, and international criminal law. Section B summarizes the rationale and principles of these branches of law.

Section C offers general guidance to those who wish to discuss humanitarian norms with armed groups. It notes key ‘rules of engagement’ and identifies issues and concerns that may be expected to occur regularly or frequently. It considers belligerent reprisals that take place in

4 In October 2013, the DFAE launched a new Strategy on the Protection of Civilians in Armed Conflict. At: <http://www.eda.admin.ch/eda/en/home/topics/human/hum/proci.html>.

5 At: www.geneva-academy.ch.

6 IHL rules generally apply only in situations of armed conflict.

response to alleged abuses by state armed forces or allied paramilitary groups in a situation of armed conflict.⁷

Part II reviews reactions by armed groups to key protection norms. It contains six sections.

Sections D and E consider in more depth who are protected from attack by armed groups under international humanitarian law, and how different groups perceive the scope of protection. Section D describes the rule of distinction, the most fundamental IHL rule governing conduct of hostilities, while Section E considers the rules on proportionality and precautions in attack. **Section F** reviews the use of weapons in combat, particularly anti-personnel mines, including improvised explosive devices (IEDs).

Section G considers the entitlement of women and children to ‘special’ protection, in addition to the protection that IHL affords all civilians. It discusses the prohibition on recruiting children, using them as combatants or fighters, or allowing them to participate directly in hostilities.⁸

Section H examines the detention and treatment by armed groups of civilians and captured fighters.

Section I reviews the trial by armed groups of detained civilians and captured fighters.

Part III contains one section of concluding remarks and recommendations.

Section J includes general legal and policy recommendations to improve the protection of civilians who are put at risk in the course of armed conflicts and violence, and targeted recommendations to individuals, organizations, and states that seek to engage with armed groups.

After a select bibliography of resources, Annex 1 lists the groups whose policies and practice the project researched and analysed. Annex 2 lists norms that the project selected for particular attention. It is by no means an exhaustive list of armed groups’ international obligations. The Policy Briefing is completed by an index.

7 Such ‘reprisals’ are usually acts of revenge, which are unequivocally unlawful under IHL. Reprisals are only deemed lawful in specific, limited circumstances when they seek to bring a violator back into compliance with his or her obligations under IHL. They are widely considered impermissible in non-international armed conflicts.

8 See Section C for a discussion of the difference between a ‘combatant’ and one who ‘participates in hostilities’. In this Policy Briefing, both groups are generally described as ‘fighters’.

Part I:

Armed Group
Motivations and
Obligations and Rules
of Engagement

Section A: Armed groups' motivations

A typology of motivations?

No 'typology' of armed groups has been universally accepted, although certain groups share motivations or aims. For example, in general terms they may:

- Fight against foreign military occupation.
- Seek to remove or replace an existing government or regime or achieve an independent state.
- Promote a strict religious agenda.
- Share a distinct political ideology.
- Have primarily or purely lucrative aims.

Particular groups have more than one of these characteristics, so care must be taken not to oversimplify, or assume that, because a group has one of these characteristics, its policy or behaviour is predictable.

Furthermore, although the focus of this Policy Briefing is on non-state armed groups, there have also been instances where armed groups are pro-government, including those that operate during conflict with the support of the state, or with its tacit approval. Examples would be paramilitaries or 'defenders' in Colombia and currently in Mexico.

Context can influence a group's perception of international norms, particularly when it is **fighting against foreign military occupation**. One of the clear risks in such

situations is that foreigners deemed to be 'occupiers' may be attacked, whether or not they are lawful military objectives under international humanitarian law (IHL).

Groups that focus on simply **removing or replacing the existing regime or creating a new independent state** may consider that any person associated with the regime they oppose is a legitimate target for attack. Under IHL, a much narrower group of people are lawful targets. Such groups may be induced to respect humanitarian norms on the grounds that they expect to assume the responsibilities of government themselves. If they target or show indifference to the treatment of civilians, for example, it can be argued that they are undermining their political objectives. An armed group often also asserts that the regime to which it is opposed must be replaced because it is illegitimate, having committed serious human rights violations, for example. A group that takes this position can be asked to act consistently, by protecting civilians from the effects of its operations.

Armed groups that espouse a **strict religious agenda** often assert the primacy of divine over man-made law. They also tend to authorize a wider range of lawful targets than IHL. (For instance, they may not distinguish civilians who participate directly in hostilities from 'combatants'.) Groups that call for global *jihad* often define the targets of their military operations in especially broad terms. In a May 2012 statement, for example, al-Qaeda in the

Arabian Peninsula (AQAP) invited Muslims in Yemen to 'target Americans everywhere'.⁹ Though many Islamic scholars argue that Islamist justifications for intentionally targeting civilians are a perversion of the Qur'an, it is evidently difficult to persuade such groups to change their behaviour via theological arguments or by simply affirming the authority of IHL.

Such groups are not immune to public pressure, nevertheless, and the Briefing gives several examples of groups that have amended their policies and practices. For example, the Pattani United Liberation Organization, a nationalist movement in southern Thailand, published a *List of Core Principles* in 2012 that it agreed to respect.¹⁰ It sourced the principles in both customary international humanitarian law rules and Islamic teachings. The list refers explicitly to the humanitarian law rules of distinction, proportionality, and precautions in attacks, alongside corresponding principles of Islamic law.

1. Fight only other combatants. Do not attack civilians or civilian objects (IHL rule).

Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.

And We have certainly honoured the children of Adam and carried them on the land and sea (Islamic teaching).

2. When engaging military objectives, ensure that expected collateral damage does not exceed the expected military advantage (IHL rule).

And when he goes away, he strives throughout the land to cause corruption therein and destroy crops and animals. And Allah does not like corruption (Islamic teaching).

3. When engaging military objectives, take all feasible precautions to minimize collateral damage (IHL rule).

And cause not corruption upon the earth after its reformation (Islamic teaching).

The advice of Abu Bakr al-Siddeeq: 'Do not kill the elderly, small children, and women, and do not cut down and burn date palms and do not cut trees that bear fruit and do not slaughter the sheep, cattle and poultry except for food' (Islamic teaching).¹¹

Groups that hold a distinct political ideology may consider the working class (if they are Communist) or the agrarian poor (if they are Maoist) to be a revolutionary force that can transform society and replace capitalism with a form of socialism. In many cases, such groups mobilize civilians en masse, as fighters or to provide direct support for military operations, which may remove their protection under IHL. Making such groups more aware of IHL, and demonstrating that it is not a 'capitalist' or 'imperialist' instrument, may increase their respect for humanitarian norms.

Groups with a political ideology may also have a broad notion of who may legitimately be attacked. Reflecting a concern of many armed groups, the Naxalites have targeted 'police informers'. According to local activists:

⁹ WorldAnalysis.net, AQAP: *Statement on the targeting of U.S. officers in Hodeidah*, 24 May 2012. At: <http://worldanalysis.net/modules/news/article.php?storyid=2157>.

¹⁰ PULO website, *List of Core principles of Pulo's engagement rules*, 4 October 2012. At: <http://www.pulo-info.net/statements.asp?ID=40>.

¹¹ *Ibid.*, Rules 1 to 3.

The Maoists kill people, saying that they are police informers. They killed one man who was doing a good work on health and education. They say they were killing him because he had a cell phone, and was therefore a police informer.¹²

Drug cartels, gangs and **armed groups whose primary motive is lucrative** cannot easily be influenced by an appeal to international law. However, their profit margins fall when official security forces interfere frequently in their affairs, and as a result it is sometimes in their interest to restrict violence to members of similar groups and avoid attacks on ordinary citizens. Few attempts have been made to influence the behaviour of drug gangs by appealing to humanitarian norms, and their status as a party to an armed conflict (for example, in Mexico) is controversial.¹³ In turn, such armed groups have rarely expressed their opinions of IHL or human rights, which explains the relative lack of examples cited in this Policy Briefing.

Armed groups' perceptions of international law

Armed groups often believe that international law, and the international legal and security architecture, are inherently or practically biased against them. This claim is not without foundation, because states and state practice are at the heart of both the development of international law and the international legal system through which it is enforced. In practice, members of armed groups are also far more likely to face criminal prosecution and prolonged incarceration (or execution) than members of ruling regimes. The claim is nevertheless an oversimplification. Numerous governments began as rebel movements or insurgents. A significant number of governments provide political or military support to armed groups abroad, sometimes because they consider such groups to be more humane and more democratic than the regimes they seek to displace. Many armed groups are also skilled at using international law and the media to underline and denounce state violations of international norms.

¹² Human Rights Watch, "Between Two Sets of Guns": Attacks on Civil Society Activists in India's Maoist Conflict, July 2012. At: <http://www.hrw.org/sites/default/files/reports/india0712ForUpload.pdf>. See also New Delhi Television (NDTV), *Maoist Central Committee justifies abductions, says those were 'arrests by the people'*, 24 May 2012. At: <http://www.ndtv.com/article/india/maoist-central-committee-justifies-abductions-says-those-were-arrests-by-the-people-215349>.

¹³ Arguably, organized armed groups do not need to have a political agenda to qualify as a party to an armed conflict under IHL. See, for example, S. Casey-Maslen (ed.), *The War Report: 2012*, Oxford University Press, Oxford, December 2013, Part I.

Section B: The normative framework

This section describes key terms of international law that apply to situations of armed conflict or armed violence. It defines the two categories of armed conflict (international and non-international) that international humanitarian law (IHL) and international criminal law recognize, and summarizes relevant elements of these bodies of law alongside international human rights law.

International humanitarian law

IHL regulates the conduct of hostilities in armed conflicts and obliges parties to a conflict to protect certain groups or individuals at risk.¹⁴ Most applicable rules, at least for international armed conflicts (see below), are found in the four 1949 Geneva Conventions and their two 1977 Additional Protocols. Customary international law is also an important source.¹⁵ It applies to states and armed groups that are parties to an armed conflict, regardless of whether they have formally adhered to or endorsed treaties or other international instruments. In almost *all* instances, the provisions of IHL apply *only* during a situation of armed

conflict.¹⁶ At all other times, human rights law is the primary source of international law with respect to actions by a state or armed group.

IHL distinguishes two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). Both may involve armed groups as parties, but a conflict in which a state fights a non-state armed group is generally a NIAC.

Treaties regulate IACs in more detail than NIACs, though customary law has significantly narrowed the gap (and is the primary source of rules governing the conduct of hostilities in a NIAC). A key difference in the relevant rules is that the law applicable in IACs entitles combatants (generally defined as members of an armed force) to prisoner of war status. Combatants may not be prosecuted merely because they have fought against the enemy (though they may still be tried for war crimes). Fighters in a NIAC are not entitled to prisoner of war status. Insurrection and treason are typically crimes under domestic criminal law, and members of armed groups may be, and often are, prosecuted and punished on these grounds.

¹⁴ International humanitarian law is also called the international law of armed conflict or the laws of war.

¹⁵ For the list of rules of customary international humanitarian law identified by the International Committee of the Red Cross, with substantive commentaries, see ICRC, Customary IHL Database, Part 1, Rules. At: http://www.icrc.org/customary-ihl/eng/docs/v1_rul.

¹⁶ Exceptions to this general rule include duties to prosecute war criminals and the duty to disseminate and train military personnel (and others) in IHL rules.

International armed conflicts

An international armed conflict, according to Common Article 2 to the 1949 Geneva Conventions,¹⁷ includes ‘any’ armed conflict between two or more states, even if the conflict is not recognized by one of them, as well as the now rare situations in which war is formally declared by one state against another. Much of 1949 Geneva Convention IV (on the protection of civilians in armed conflict) also applies to cases where one state partially or completely occupies the territory of another, whether or not there is armed resistance. The 1977 Additional Protocol I potentially extended the scope of IAC to cover armed groups that operate in ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’. This provision is highly contentious and, despite various attempts, no armed group has succeeded in ensuring its application.

Non-international armed conflicts

The term ‘armed conflict of a non-international character’ first appeared in Common Article 3 of the 1949 Geneva Conventions.¹⁸ Recognition of a non-international armed conflict is often controversial, especially for the territorial state, because it implies a loss of control over people or territory. The territorial scope of IHL’s application is often disputed as well, both within and outside national boundaries.

According to a leading judicial decision in the International Criminal Tribunal for the former Yugoslavia (ICTY), two main

conditions must be met for a NIAC to exist. In the first place, armed violence must be ‘protracted’ and must take place *between* governmental authorities and organized armed groups (or *between* armed groups within a state). ‘Protracted armed violence’ means that a certain threshold of violence must have been reached; armed conflicts are not ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’.¹⁹

The second condition is that at least one armed group fighting a government must be ‘organized’. No formula determines what level of organization is sufficient, but it includes the existence of a command structure, the capacity to launch military-style operations involving different units, the ability to recruit and train new fighters, and the existence of internal rules, such as a code of conduct. The type and sophistication of weapons deployed is also an important factor.

International human rights law

The belief that individuals have certain inherent rights is longstanding. Modern international human rights law developed after World War II following the adoption of the 1948 Universal Declaration of Human Rights. Most of the international legal framework of human rights protection has emerged since then, in treaties on specific rights or sets of rights that augment the Universal Declaration or make the rights it contains legally binding and subject to monitoring and accountability. Human rights conventions usually establish a monitoring body to scrutinise compliance and assist states parties to implement them. Over the same period, significant regional

¹⁷ It is called Common Article 2 because the provision is identical in all four of the 1949 Geneva Conventions.

¹⁸ It is called Common Article 3 because the provision is identical in all four of the 1949 Geneva Conventions.

¹⁹ This text comes from the 1977 Additional Protocol II and the 1998 Rome Statute of the International Criminal Court.

instruments and protection mechanisms have developed.

Human rights law applies at all times, including in armed conflicts, though the obligation to respect certain treaty-based rights may be explicitly limited in conflicts (through a formal process known as derogation). Several fundamental rights, for example the right to freedom from torture, may not be derogated from.

The precise interaction between international human rights law and IHL during armed conflicts is still the subject of debate. The extent to which human rights law applies to armed groups and related political authorities or entities that are not under the authority of a state is also contested, although a clear trend in law and policy is to apply at least 'fundamental' or customary human rights norms to such groups.

International criminal law

After World War II (and especially after the Nuremberg and Tokyo trials), the idea of individual criminal responsibility for serious violations of international law slowly gained ground.²⁰ International criminal law is currently applied in national courts (via military tribunals and ordinary courts), and through international ad hoc tribunals (for the former Yugoslavia or Rwanda, for example), internationalized or mixed tribunals (for example, the Special Court for Sierra Leone), and the International Criminal Court (ICC). One of the legal consequences of framing an act as an international crime is that it may give rise to 'universal jurisdiction', which allows (or requires) any state to try alleged perpetrators, even in the absence of a link between the accused and the state that exercises jurisdiction.

In addition to war crimes, which have a direct connection with a specific armed conflict, international criminal law foresees the prosecution of individuals who are suspected of having committed crimes against humanity (in the context of an armed conflict or not). Crimes against humanity occur when a civilian population is subject to widespread or systematic attack in which abuses form part of a plan or policy, and where the individuals who commit or are complicit in such abuses are aware that this is so.

Other normative frameworks

Other normative frameworks may be relevant to armed groups. They include sharia (Islamic law), local customary law (as applied by or between different tribes or ethnic groups, for example), and domestic criminal law. As noted, members of armed groups will typically violate a range of criminal statutes and commit a number of criminal offences through their activities.

²⁰ The Nuremberg and Tokyo trials judged German and Japanese military leaders who were accused of having conducted a war of aggression and of having committed serious crimes during it.

Section C: Promoting humanitarian norms in armed groups

General ‘rules of engagement’

This section offers general guidance on how to promote humanitarian norms (so-called ‘rules of engagement’) in armed groups. It is based on the experience of a variety of actors who, in most cases, have sought to improve protection of the civilian population.²¹

Put the safety of the civilian population at the heart of decision-making

When an individual or organization engages with an armed group, the potential consequences of that engagement for the civilian population should be the overriding concern. In practice, concerns about protection are often subordinated to a desire to secure access to populations at risk.

For organizations, the security of staff is also a central consideration. Legal exposure may be a significant issue as well, because certain donors or governments may seek to prevent any form of engagement, even for

purely humanitarian purposes, with armed groups that they term ‘terrorist’.²²

Understand reasons for lack of compliance with humanitarian norms

To improve compliance, it is vital to understand why a group does not comply with certain international norms. Even a good understanding (of attitudes to justice, power, religion, ideology, money, revenge, etc.) does not guarantee positive effects, but efforts to promote norms are almost certain to fail without such knowledge. Though many factors impede compliance, five stand out: strategic military concerns, likelihood of prosecution, lack of knowledge, political or religious ideology, and lack of ownership. Each is briefly discussed below.

Strategic military concerns. The nature of warfare in non-international armed conflicts may lead the belligerents to adopt tactics that violate international humanitarian law (IHL), for example by launching attacks from within the civilian population. Armed groups sometimes claim that they are obliged to

²¹ For more information on the promotion of humanitarian norms with armed non-state actors, see, for example, Geneva Academy, *Rules of Engagement*, 2011. At: www.geneva-academy.ch.

²² Deeming an armed group ‘terrorist’, regardless of whether it complies with international norms, does not promote respect for those norms or assist peace or other negotiations. In certain cases, indeed, decisions to designate groups as ‘terrorist’ may even run the risk of inadvertently inciting violations of international norms.

adopt tactics that violate humanitarian norms because they would otherwise invite military defeat or annihilation. A state may also fail to respect certain norms when the balance of military force between its own forces and an opposing armed group is highly asymmetrical (in size, weaponry, expertise, financial resources, etc.).

Likelihood of prosecution under domestic or international law. Members of an armed group may be punished under national law for having taken up arms against the state, whether or not they respected international legal norms. Whereas combatants in an international armed conflict are entitled to POW status and are not subject to prosecution for having participated in hostilities, fighters from an armed group are not normally recognized as combatants under IHL and can be prosecuted under the national law of the state that captures them. They may also be indicted by the International Criminal Court (ICC). To date, only one such fighter has been convicted by the Court, the head of an armed group in the Democratic Republic of the Congo (DRC).²³

Lack of knowledge of international norms. Whereas states are obliged to train their armed forces in IHL, many armed groups possess or receive little or no information about their international legal obligations. As a result, concepts that are central to IHL, such as proportionality, may not be well understood, either at senior or lower operational levels.

Political or religious ideology. Ideology may cause armed groups to violate certain international norms *deliberately*. The concept of civilian, including the presumption that civilians should not be attacked, may be alien to a group's view of the world.

Lack of ownership of international norms.

Armed groups are not generally entitled to ratify relevant international treaties. Typically, they are precluded from participating as full members in a treaty-drafting body. As a result, they sometimes argue that they should not be required to respect rules that they have not proposed or adopted.

Engage systematically, in a sustained manner, at an appropriately high level

To be successful, engagement should start as soon as possible, be conducted at an appropriately high level, and be sustained throughout an armed struggle. Where relationships already exist, it is desirable to build on them.

Engaging at a high level increases the likelihood that commitments will be honoured in practice. Engagement at operational level may also be critical to achieving respect in practice. The more an engagement is sustained and repeated, the greater is its potential to positively change behaviour. As a corollary, when engagement starts slowly and involves less senior individuals on both sides, an armed group is less likely to think that the norms and the process are important.

If an organization that promotes humanitarian norms maintains a local presence, it may help to promote compliance.

Seek to demonstrate the benefits of compliance

In general, in any dialogue with armed groups or their members, an effort should be made to demonstrate that the group stands to benefit from complying with international norms, in military, legal, political, or humanitarian terms.

Armed groups themselves often cite a number of positive incentives or self-interest considerations. For example, they may believe that the adoption of humanitarian norms will:

²³ Thomas Lubanga Dyilo led the Union of Congolese Patriots, an ethnic militia active in the armed conflict that broke out in the Ituri region in north-east DRC in 1999. In 2012, the International Criminal Court convicted him of recruiting and using children under 15 years of age as soldiers and sentenced him to 14 years in prison.

- Increase popular support ('win hearts and minds').
- Improve the group's self-image.
- Reflect the group's internal beliefs.
- Encourage reciprocity (and therefore increase fighters' sense of security).
- Project a good national or international image.
- Protect family members in the population.

Positive incentives should be identified and built on in a systematic fashion.

Cooperate with a range of constituencies to promote norms

Current or former members of armed groups, or other military personnel, may be more credible interlocutors than humanitarian workers or diplomats when armed groups consider complying with international norms, especially those governing the conduct of hostilities.

Local communities and foreign supporters of an armed group, including diasporas, can also help to secure fuller compliance, though diaspora communities sometimes take especially hard-line positions.

At all times, culturally appropriate language and methods should be used to disseminate norms and promote compliance. During discussions with Islamist groups, clerics may be able to show how the Qur'an supports humanitarian norms.

Consider a step-by-step approach to improved compliance

Behavioural change does not occur quickly or evenly.²⁴ A group that is not compliant is

unlikely to become fully compliant at once. A group may not have clear, formalized policies on a particular issue, such as sexual violence, and may need time to assess the implications. It may not seem realistic to an armed group to completely and instantly end recruitment or use of children in hostilities or cease laying landmines. In such cases, interim steps to enhance protection may still be worthwhile. For example, the youngest children can be released, or civilians can be warned that mines or improvised explosive devices have been laid. It may be appropriate to recognize progress even if it falls short of full compliance.

Monitor situations for 'windows of opportunity'

Situations of armed conflict or armed violence should be monitored for 'windows of opportunity'. An armed group may be more willing to discuss or comply with humanitarian norms when a lull in fighting or a ceasefire occurs, for example, or when leadership or military strategy changes.

Linkages to peace negotiations

Linking discussion of norms and peace negotiations has potential advantages and disadvantages. Three main scenarios are most likely. First, the peace process and engagement on norms can be separated completely. This may be appropriate when a peace process is moribund or faltering, since an agreement on norms that is included in a peace accord or negotiation that fails will itself become inoperable or will need to be renegotiated. A parallel process can also act as a confidence-building measure while more sensitive issues await resolution or are negotiated.

Second, compliance with humanitarian norms can be formally integrated in a peace process. This course has sometimes been followed with success. On occasion, for example, it has been possible to achieve an agreement to protect civilians although other issues have not been resolved. Such

²⁴ For theories of change, including methods for generating long-term behavioural change, see, for example: <http://www.theoryofchange.org/what-is-theory-of-change/>.

agreements may give rise to monitoring arrangements that can subsequently be adapted to oversee other aspects of an eventual peace accord.

Third, agreements to respect international norms can be reached within a peace process but via separate negotiations. This option is relevant when, for example, compliance with norms is likely to be subordinated to efforts to conclude a peace accord. It enables those promoting international norms to work in parallel with those mediating or negotiating peace agreements.

Inform armed groups about international norms and their content

In the course of engagement, armed groups may need to be informed of their international legal obligations. A number of groups have concluded in retrospect that better knowledge of international law could have helped to reduce harm to civilians. Other groups were not aware of the prohibition on child recruitment or their potential exposure to prosecution by the International Criminal Court or other tribunals. Training can be provided to senior leaders as well as to rank-and-file members of the group.

Advocates of civilian protection can draw on both IHL and international human rights law, even though their application to armed groups is not entirely clear. With respect to IHL, two major controversies persist. What is the precise definition of a civilian who participates directly in hostilities (and who thereby loses protection from attack under IHL)? And when (in a situation of armed conflict) does international human rights law governing the use of force supersede more permissive IHL rules? This is a thorny issue because, while the application of IHL to armed groups is generally not contested (even if the exact means of application remains unclear), some authorities are not willing to grant that human rights law (as opposed to its principles) is similarly or directly applicable. It can be said, nevertheless, that UN practice

is gradually evolving in the direction of accepting that at least certain human rights norms applying directly to the conduct of armed groups.

Because certain norms can give rise to individual prosecution, those engaged in promoting compliance may find it necessary to distinguish their role from that of prosecutorial authorities or others gathering testimonies. They will also need to consider that they may be called to testify before international criminal tribunals on events they have witnessed or statements that have been made to them by members of armed groups.

Reflect agreements and undertakings in writing

Armed groups can undertake to respect international norms by a variety of means. They include unilateral declaration, special agreement, a Memorandum of Understanding, 'Ground Rules', an 'Action Plan', or a 'Deed of Commitment'. All provide an opportunity for groups to express their adherence to international norms. Several armed groups have issued unilateral declarations, for example, in which they have pledged to abide by certain international treaties or norms. A military code of conduct can also be considered a form of unilateral declaration, if it is made public.

The Deeds of Commitment issued by Geneva Call are probably the most well-known form of formal adherence to humanitarian norms. Its [Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action](#) has been signed by more than 40 armed groups. It has also issued a [Deed of Commitment for the Protection of Children from the Effects of Armed Conflict](#) and a [Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination](#).

Special agreements were originally conceived to enable parties to a non-

international armed conflict to activate other provisions of IHL. The term is now used to refer more generally to documents that reflect parties' understanding of applicable law, in particular customary norms and the interpretation of those norms. Agreements and undertakings should be reflected in writing wherever possible, even if they are initially made orally. This enables others to assess compliance and facilitates the provision of internal or external monitoring.

Agreements list fundamental norms that are to be applied, in general or in specific situations. In all cases, they should make arrangements for enforcement and monitoring, and should be drafted or at least translated into relevant local languages. Care should be taken to ensure they do not endorse behaviour that violates the international obligations of the group concerned.

Encourage armed groups to publicize humanitarian norms and monitor and enforce compliance

An armed group that wishes to improve its compliance with humanitarian norms will need to disseminate, monitor, and enforce its principles. Groups should therefore be encouraged to develop and adopt a code of conduct that reflects their local context, while respecting international standards. An internal code of conduct is evidence of a group's intention to maintain military discipline, respect local culture and the civilian population, and remain in compliance with international norms. An armed group may therefore need to 'translate' norms for internal use. If groups request technical assistance or support to enable them to do this, or implement their commitments effectively, care should be taken to ensure that they clearly assume responsibility for the adoption, dissemination, and implementation of norms they have undertaken to respect.

Standard operating procedures for military operations, and punishments for violations,

should be set out clearly. An implementation and monitoring mechanism should also be established to promote compliance; it should make provision for external monitoring. The code should be disseminated among fighters and cases of internal discipline should be recorded. They may be used as evidence if the group is accused of violating international norms.

Those promoting humanitarian norms should be aware that sanctions against members of armed groups may be summary, and in the past have included corporal punishment and execution. They should therefore take care to encourage respect for due process and discourage forms of punishment that violate human rights.²⁵ Measures of individual or group reparation or local forms of justice may be more appropriate, provided that these too respect international norms and human rights standards. Other sanctions might include detention (where feasible), demotion, dismissal, or removal for a specified period of a fighter's weapon or privileges.

Emphasize that humanitarian engagement is not legal recognition

Armed groups often seek recognition. Those who dialogue with such groups should stress from the outset that dialogue will not affect the status of the group under international law. At the same time, groups should be encouraged to understand that public commitment to international norms will cause them to be perceived as more legitimate.

The recognition of an organized armed group as a party to an armed conflict, thereby formalizing the application of IHL, is likely to encourage that group to comply with international norms.

²⁵ The Geneva Academy would not consider corporal punishment or execution appropriate under any circumstances.

Individuals who encourage armed groups to comply with international norms should be as transparent with the government of the concerned state or states as it is feasible to be. Doing so will reduce the danger that they will be perceived to support the armed group or its goals. Those engaging with armed groups should also endeavour to ensure their efforts are coordinated with other stakeholders, including civil society organizations, relief agencies, the International Committee of the Red Cross, and the United Nations.

Promote impartial monitoring of actions of armed groups

Monitoring is critical. Wherever possible, it should be external. The armed group should also be able to complain about the behaviour of the government's forces: it is important to ensure that those who promote international norms are seen to be impartial with respect to allegations made against any party to a conflict.

Monitoring should clearly identify the norms that must be respected and promote the successful implementation of relevant policies and agreements. A variety of approaches may be adopted:

- The armed group can report on its compliance with specific norms.
- Third parties may send verification missions, involving local or international actors.
- Monitoring may be conducted by national human rights institutions.
- Monitoring and reporting may be confidential.
- Monitoring may 'name and shame' violations and those responsible for them.

Peer-based mechanisms can help to promote compliance. The advantages of facilitating and fully cooperating with investigations should be made clear and discussed with the armed group.

Consider the possibility of providing technical assistance

Certain norms (regarding the destruction of anti-personnel mines, for example) may require both an armed group and others to invest time and resources. The group may need technical assistance to help it to fulfil certain commitments (such as the destruction of weapons and ammunition). Care must be taken to ensure that those who promote international norms do not inadvertently become complicit in future criminal behaviour by an armed group or contribute to the development of military strategy. When a group is helped to neutralize anti-personnel mines, the materials should not be recycled into new arms or ammunition.

Discourage belligerent reprisals

The notion of belligerent reprisals is particularly contentious, but it is frequently raised by armed groups who often justify their attacks on civilians by saying that the government attacks civilians in territory they control. For armed groups, it is obviously a temptation (which may be reinforced by anger within the armed group or affected communities) to mirror the conduct of government forces or other armed groups that commit abuses.

In a 2002 interview with Human Rights Watch, Ismail Abu Shanab, a leader of Hamas, declared:

It's not targeting civilians. It is saying that if you attack mine I'll attack yours. If we say yes, we'll stop — can the world guarantee Israel will stop? The rules of the game were set by the other side. If you follow all our martyrdom operations, you will find that they all came after their massacres. We would accept the rules [of international humanitarian law] if Israel would use them. If you ask us to comply, that is not difficult.

Islamic teachings support the Geneva Conventions. They are accepted. When it comes to the other party, if they don't abide, we cannot be obliged to them, except insofar as we can achieve something.²⁶

In Lebanon, after Amnesty International accused Hezbollah of having committed serious violations of international law by deliberately targeting Israeli civilians during the 2006 war, the group replied that, although Israel had targeted civilians and civilian infrastructure from the first day, Hezbollah had continued to focus its attacks on Israeli military facilities. According to Hasan Nasrallah, then Hezbollah's leader: 'We were patient, and still did not feel compelled to bomb civilian targets'. He then added: 'As long as the enemy undertakes its aggression without limits or red lines, we will also respond without limits or red lines. ... We will be very careful to avoid civilians unless they force us to.... Even in this context, when the Zionists act on the principle that there are no principles, no red lines and no limits to the confrontation, it is our right to act accordingly.'²⁷

IHL defines the term 'belligerent reprisals' very specifically. They are not revenge attacks, which are always unlawful. They are acts that are otherwise unlawful but which may exceptionally be lawful when they explicitly address a prior serious violation of IHL by an opposing party to a conflict, and do so proportionately. The claim that belligerent reprisals in a non-international armed conflict may be lawful is strongly contested. Whatever the legal position, however, as Geneva Call has said: 'Peace will never be built on atrocities'. Almost

inevitably, committing violence against civilians in reaction to alleged abuses by state forces tends to create a spiral of violence, even if the response might, in an international armed conflict, formally fulfil the definition of a legitimate belligerent reprisal.

An insurgent from the National Revolutionary Front-Coordinate (Thailand) commented on the use of violence against civilians as a form of revenge.

'It is more than revenge for our dead people, killed by the Thais. Everything the Thais did and do: their invasion, their attempt to change us into Thais through the schools and their development projects, which aim to buy our loyalty with money. None of that counts anymore. Only what we do is important, when we use force.'²⁸

Syria and Yemen provide rare examples of groups that have prohibited reprisals. In 2009, the leader of the Houthi rebels affirmed their commitment to avoid taking 'any reprisals against those who committed crimes against the civilian populations'.²⁹ In August 2012, the Free Syrian Army (FSA) adopted a code of conduct that required each fighter to pledge 'not to exercise reprisals on the basis of ethnicity, sect, religion, or any other basis, and to refrain from any abusive practices, in word or in deed, against any component of the Syrian people'.³⁰ This followed a report in February 2012 by the independent international commission of inquiry on Syria, mandated by the UN Human Rights Council, which found that, in Homs, 'FSA members were

26 Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks against Israeli Civilians*, October 2002, p. 52.

27 Amnesty International, *Israel/Lebanon – Under fire: Hizbullah's attacks on northern Israel*, September 2006, pp. 6–7. At: <http://www.amnesty.org/en/library/asset/MDE02/025/2006/en/8b297b53-d3f6-11dd-8743-d305bea2b2c7/mde020252006en.pdf>.

28 Sascha Helbardt, *Deciphering Southern Thailand's violence: organisation and insurgent practices of BRN-Coordinate* (PhD Thesis), July 2011, p. 165.

29 Armies of Liberation, *Houthi Rebels Pledge to Comply with International Law Regarding Prisoners and Civilians, Media and Humanitarian Groups*, September 2009, p. 2. At: <http://armiesofliberation.com/archives/2009/09/04/houthi-rebels-pledge-to-comply-with-international-law-regarding-prisoners-and-civilians/>.

30 Article IX, Code of Conduct of the FSA, 8 August 2012. At: https://www.facebook.com/note.php?note_id=508232342537240.

found to have tortured and executed suspected *Shabbiha* members in retaliation for abuses committed by *Shabbiha* or plain-clothed security officials posing as them'.³¹

Indeed, retaliation and simple revenge attacks are far more typical than legitimate reprisals. In Pakistan, the Haqqani Network released a statement in 2011 declaring that it would avenge the execution of two fighters convicted for a raid on a branch of the Kabul Bank in Jalalabad city, which resulted in the deaths of around 40 civilians. Before the executions were confirmed, Sirajuddin Haqqani (a senior figure in the Network) said: 'If our man in Afghan custody is executed, we will launch a new operation to only target judges and courts'. He added later: 'Any ruling from the court against our man will have severe consequences for the executioners; we will not spare them'.³²

The Pakistani Taliban (TTP) claimed responsibility for a suicide attack on a police station in 2010 that killed 19 people, including two children and nine policemen. Azam Tariq, a TTP spokesman, said the attack was to avenge deaths from US drone strikes in the tribal areas. 'We are targeting Pakistani security forces because the government has allowed America to launch drone attacks on us.' He added that the TTP 'will continue suicide attacks on security forces. Civilians should avoid proximity with them.' He said that the TTP regretted the killing of schoolchildren but that 'our children are also killed in drone attacks'.³³

31 Human Rights Council, 'Report of the independent international commission of inquiry on the Syrian Arab Republic', UN doc. A/HRC/19/69, 22 February 2012, §§114, 118. At: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69.pdf>.

32 Khaama Press, *Haqqani Terrorist Network Vows Reprisal Over Bank Raid Execution*, 21 June 2011. At: <http://www.khaama.com/haqqani-terrorist-network-vows-reprisal-over-bank-raid-execution/>.

33 The Matrix – A Blog of the Long War Journal, 'Suicide attacks a response to Predator strikes: Pakistani Taliban', 7 September 2010. At: <http://www.longwarjournal.org/threat-matrix/archives/2010/09/suicide-attacks-a-response-to.php>.

Encourage armed groups to acknowledge mistakes and make reparation

When civilians have been harmed by military operations, and especially when civilians have been targeted, groups should be encouraged to publicly acknowledge that abuses have taken place and take appropriate disciplinary action. They should cooperate with, and communicate details of such incidents to the international community, including the aims of the group, the reasons for the attack, and any action taken afterwards to redress abuses or mistakes, for example by means of reparation.

On 16 April 2002, the Irish Republican Army (IRA) offered the following statement of apology for the harm it had caused to civilians during the Troubles in Northern Ireland:

Sunday 21 July marks the 30th anniversary of an IRA operation in Belfast in 1972 which resulted in nine people being killed and many more injured.

While it was not our intention to injure or kill non-combatants, the reality is that on this and on a number of other occasions, that was the consequence of our actions.

It is therefore appropriate on the anniversary of this tragic event, that we address all of the deaths and injuries of non-combatants caused by us.

We offer our sincere apologies and condolences to their families.

There have been fatalities amongst combatants on all sides. We also acknowledge the grief and pain of their relatives.

The future will not be found in denying collective failures and mistakes or closing minds and hearts to the plight of those who have been hurt. That includes all of the victims of the conflict, combatants and non-combatants.

It will not be achieved by creating a hierarchy of victims in which some are deemed more or less worthy than others.

The process of conflict resolution requires the equal acknowledgement of the grief and loss of others. On this anniversary, we are endeavouring to fulfil this responsibility to those we have hurt.

The IRA is committed unequivocally to the search for freedom, justice and peace in Ireland.

We remain totally committed to the peace process and to dealing with the challenges and difficulties which this presents. This includes the acceptance of past mistakes and of the hurt and pain we have caused to others.³⁴

In December 2013, al-Qaeda in the Arabian Peninsula (AQAP) apologised for an attack on a hospital attached to the Ministry of Defence during an assault that had killed 52 people. In a video released by al AQAP's media arm *al-Mallahem*, Qassim al-Rimi, commander of AQAP, said that the attackers had been warned beforehand not to enter the hospital or a place for prayer in the complex, but one fighter had done so. 'Now we acknowledge our mistake and guilt,' al-Rimi said. 'We offer our apology and condolences to the victims' families. We accept full responsibility for what happened in the hospital and will pay blood money for the victims' families.' He also said that that, although the group had made a mistake, 'we are continuing with our jihad'.³⁵

Acknowledge greater compliance

Commitments and improved compliance with international norms by armed groups should be acknowledged whenever it is feasible and reasonable to do so. When armed groups are seen to respect international norms or improve compliance with them, their conduct should receive positive reinforcement.

34 P. O'Neill, Irish Republican Publicity Bureau, Dublin, 'Text of IRA statement of apology', 16 April 2002, received by *An Phoblacht* (Republican News). At: <http://cain.ulst.ac.uk/events/peace/docs/ira160702.htm>.

35 See, for example, Associated Press, 'Al Qaeda apologizes for hospital attack in Yemen', *CBS News*, 22 December 2013. At: <http://www.cbsnews.com/news/al-qaeda-apologizes-for-hospital-attack-in-yemen/>.

Part II:

Armed Group
Reactions to Key
Protection Norms

Section D: The rule of distinction in attacks

Who may lawfully be targeted by attacks, and who is targeted in practice, are critical protection issues. International humanitarian law (IHL) determines who may be lawfully attacked by armed forces and armed groups, and who is protected from attack. Key principles include the rule of distinction, which is covered in this section, and the related rules of proportionality and precaution, which are addressed in Section E.

The content of the rule

The rule of distinction in attacks is a fundamental rule of IHL. It generally prohibits attacks on civilians or civilian objects during international or non-international armed conflicts. Many armed groups broadly support the notions that civilians should be respected and that they should have immunity from attack. The most problematic issue is the definition of who is and is not a 'civilian'. Groups define civilians in very different ways, and often more narrowly than international law. As noted in Section A, some groups consider that anyone employed by the regime in power is a legitimate target.

The ICRC holds that, in a NIAC, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function'). On this ground, it argues that, in general terms, they may be attacked at any time. By contrast, civilians may be attacked only when, and for such time as, they participate

directly in hostilities; at other times, they have protection from attack. In case of doubt, a person must be presumed to be protected against direct attack. The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* includes additional constraints on the kind and degree of force that are permissible.³⁶

Although what constitutes 'direct participation in hostilities' (DPH) is controversial in some respects, many elements of the notion command general agreement. The ICRC asserts that, in order to reach the threshold of harm that is required to qualify as DPH, an act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, inflict death, injury, or destruction on persons or objects protected against direct attack. The military operations or military capacity of a party to the conflict can be adversely affected by killing and wounding of military personnel and causing damage to military objects, but also by sabotage and other armed or unarmed activities that restrict or disturb deployments, logistics, intelligence operations, and communications. Adverse effects may also

³⁶ According to Chapter IX of the *Interpretive Guidance*, in addition to the restraints that IHL imposes on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force that is permissible against persons not entitled to protection against direct attack must not exceed what is required to accomplish a legitimate military purpose in the prevailing circumstances.

arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary.³⁷ Armed groups are often aware of, and well informed about, the legal and political debates that surround DPH.

Policies and approaches

International law seeks to offer the greatest possible protection to all individuals who are not personally and directly involved in fighting, to the extent that the realities of warfare allow. It therefore distinguishes combatants and fighters from all other persons. Other persons can be lawfully targeted only when they significantly and directly contribute to the conduct of hostilities (as opposed to general support for the war effort). Cooking or cleaning, producing or storing weapons far from the battlefield, or acting as look-outs, are not acts sufficient in themselves to remove that protection.

Even if there is no agreement on who is a civilian protected from attack, and therefore whom the armed group may consider to be a legitimate military target, it can be argued on grounds of humanity (and the rules of proportionality and precautions in attacks – see Section E) that armed groups should take additional care not to put children, women, or the elderly at greater risk. Where armed groups with a similar ideology have shown restraint, these may provide positive examples.

Groups that resist foreign military occupation tend to consider all nationals of the occupying power to be a potential target. For instance, Sheikh Ahmad Yassin, leader of Hamas, said in August 2001, after a suicide bomb attack on a pizzeria, that:

The Geneva Convention protects civilians in occupied territories, not civilians who are in fact occupiers. All of Israel, Tel Aviv included, is occupied Palestine. So we're not actually targeting civilians – that would go against Islam.³⁸

In Palestine/the Occupied Palestinian Territories, it is generally agreed by Palestinian armed groups that settlers are legitimate targets. For example, a Fatah official assumed this in an interview with Human Rights Watch in 2002. 'We sent a message to al-Aqsa: "Don't touch Israeli civilians. Never. Focus on the army and settlers. We don't consider settlers to be civilians".'³⁹ Similarly, Ismail Abu Shanab, a spokesperson for Islamic Jihad, claimed that settlers

are not civilians, not because the settlements are not legal but because the settlers are militias. They are not civilians. They have guns and are armed. Every home and settler has a gun, and all these people are militants and targets. They can't hide in the uniform of a civilian.... If I see women and children I must not shoot. We can't behave without humanity. But in principle, settlers are considered targets, legally.⁴⁰

37 For instance, denying to the enemy military use of certain objects, equipment and territory, guarding captured military personnel to prevent them from being liberated (as opposed to exercising authority over them), or clearing mines of the adversary, would reach the required threshold of harm. Electronic interference with military computer networks (via attacks on computer network attacks) or the transmitting of tactical targeting information would do so too.

38 'No Israeli targets off-limits, Hamas spiritual chief warns', Flore de Preneuf interview with Sheikh Ahmad Yassin, *St. Petersburg Times* (Florida), 11 August 2001. At: http://www.sptimes.com/News/081101/Worldandnation/No_Israeli_targets_of.shtml. See Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks against Israeli Civilians*, October 2002, pp. 54–5.

39 Human Rights Watch, interview in Ramallah, 15 May 2002, *ibid.*, p. 55.

40 *Ibid.*

Box 1. The prohibition on attacking civilians: selected sources of key norms

The prohibition on attacking the civilian population or individual civilians

ICRC Study of Customary IHL, Rules 1, 5.*

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.

1977 Additional Protocol II to the Geneva Conventions, Article 13(2). (The Protocol is applicable in high-intensity non-international armed conflict where an armed group controls territory.)

1998 Statute of the International Criminal Court, Article 8(2)(b)(i) and (e)(i).

1990 Cairo Declaration on Human Rights in Islam, Article 3(a). 'In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children.' (The Cairo Declaration is not formally legally binding.)

The prohibition on attacking civilian objects⁴¹

ICRC Study of Customary IHL, Rules 7, 8, 9.*

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

Rule 8. In so far as objects are concerned, military objectives are limited to those 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.

Rule 9. Civilian objects are all objects that are not military objectives.

1977 Additional Protocol I to the Geneva Conventions, Articles 48; 52(1); and 52(2) and (3).

1998 Statute of the International Criminal Court, Article 8(2)(b)(ii).

1990 Cairo Declaration on Human Rights in Islam, Article 3(b). 'It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.'

Temporary loss of protection for civilians participating directly in hostilities

ICRC Study of Customary IHL, Rule 6.* 'Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.'

1977 Additional Protocol II to the Geneva Conventions, Article 13(3).

* From the 2005 ICRC Study of Customary IHL.

41 See Section G, Protection of schools and hospitals.

In an open letter written in reply to the Annual Report for 2012 on the Protection of Civilians published by the UN Assistance Mission in Afghanistan (UNAMA),⁴² the Taliban provided a detailed definition of who they consider to be civilians:

According to us, civilians are those who are in no way involved in fighting. The white-bearded people, women, children and common people who live an ordinary life, it is illegitimate to bring them under attack or kill them. But it has been disclosed to us that the police of Kabul admin, those personnel of the security companies who escort the foreigners' supply convoys and are practically armed, similarly those key figures of the Kabul admin who support the invasion and make plans against their people, religion and homeland, those people who move forward the surrender process for Americans in the name of peace and those Arbakis [i.e. militias] who plunder the goods, chastity and honour of the people by taking dollar salaries, all these people are civilian according to you. No Afghan can accept that the above mentioned people are civilian. We have pledged in the beginning of our yearly operations that these people are criminals. They are directly involved in the protraction of our country's invasion and legally we do not find any difficulty in their elimination, rather we consider it our obligation.⁴³

42 UNAMA, *Afghanistan – Annual Report 2012: Protection of Civilian in Armed Conflict*, February 2013. At: <http://unama.unmissions.org/LinkClick.aspx?fileticket=K0B5RL2XYcU%3D>.

43 Islamic Emirate of Afghanistan, *An open letter to the UNAMA about the biased behaviour of this Organization*, 22 February 2013. At: <http://blogs.mediapart.fr/blog/lynx/010313/open-letter-unama-about-biased-behavior-organization>.

Consider the possibility of a specific agreement

Armed groups generally endorse or accept prohibitions on attacking civilians. It is rare that a group explicitly calls for civilians to be targeted; however, as noted, some have a narrow concept of civilian. Several groups have published agreements not to target civilians. The 1996 Israel-Lebanon Ceasefire Understanding, for example, which senior Hezbollah officials asserted they supported,⁴⁴ stated that 'the two parties commit to ensuring that under no circumstances will civilians be the target of attack and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks'.⁴⁵ However, the document did not define 'civilian' for the purpose of the agreement.

In a 2002 agreement with the Sudanese Government, the Sudan People's Liberation Movement (SPLM) undertook to protect 'non-combatant' civilians and civilian facilities from military attack. It pledged to:

- a) Refrain from targeting or intentionally attacking non-combatant civilians.
- b) Refrain from targeting or intentionally attacking civilian objects or facilities, such as schools, hospitals, religious premises, health and food distribution centres, or relief operations, or objects or facilities indispensable to the survival of the civilian population and of a civilian nature.
- c) Refrain from endangering the safety of civilians by intentionally

44 Amnesty International, *Israel/Lebanon – Under fire: Hizbullah's attacks on northern Israel*, September 2006, p. 5. At: <http://www.amnesty.org/en/library/asset/MDE02/025/2006/en/8b297b53-d3f6-11dd-8743-d305bea2b2c7/mde020252006en.pdf>.

45 *Israel-Lebanon Ceasefire Understanding*, 26 April 1996, §3. At: http://www.usip.org/files/file/resources/collections/peace_agreements/il_ceasefire_1996.pdf.

using them as ‘human shields’ or by using civilian facilities such as hospitals or schools to shield otherwise lawful military targets.⁴⁶

In the Philippines, the New People’s Army (NPA)/National Democratic Front of the Philippines (NDFP) adopted an agreement on respect for human rights and international humanitarian law in 1998.⁴⁷ This stated that the ‘Civilian population and civilians shall be treated as such and shall be distinguished from combatants and, together with their property, shall not be the object of attack’.⁴⁸ In a 2009 agreement between the Philippines Government and the Moro Islamic Liberation Front, the MILF ‘reconfirmed their obligations under humanitarian law and human rights law to take constant care to protect the civilian population and civilian properties against the dangers arising in armed conflict situations’ and undertook to:

- a) Refrain from intentionally targeting or attacking non-combatants, prevent suffering of the civilian population and avoid acts that would cause collateral damage to civilians.
- b) Refrain from targeting or intentionally attacking civilian properties or facilities such as schools, hospitals, religious premises, health and food

46 Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA), *Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack*, 10 March 2002, Art. 1(a), (b), and (c). At: <http://theirwords.org/records/index/page:1?country=SDN>.

47 *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the NDFP*, 16 March 1998. At: <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf>.

48 *Ibid.*, Part IV, Article 4(4). According to the agreement: ‘In the exercise of their inherent rights, the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international humanitarian law’. The principles and standards apply, *inter alia*, to: ‘civilians or those taking no active part in the hostilities’. *Ibid.*, Part IV, Arts. 1 and 2.

distribution centres, or relief operations, or objects or facilities indispensable to the survival of the civilian population and of a civilian nature.⁴⁹

Consider the possibility of a unilateral declaration or adoption of a code of conduct

Whether or not an agreement between parties to an armed conflict is possible, armed groups may adopt unilateral positions, sometimes in the form of an internal code of conduct, in which they commit to respect certain norms. In the Philippines, the Bangsamoro Islamic Armed Forces (linked to the MILF) adopted in 2006 a General Order which stated that the ‘Object of the fight [is] directed only against fighting troops and not to non-fighting personnel’. With respect to ‘civilian people’ it stated that ‘old people, children, and women shall not be harmed or killed, and those people in convents’.⁵⁰ In 2008, the Justice and Equality Movement (JEM) in Sudan pledged to do its ‘utmost to guarantee the protection of civilian populations in accordance with the principles of human rights and international humanitarian law’ and reaffirmed its commitment to ‘refrain from targeting or forcibly displacing civilian populations, destroying civilian infrastructure’.⁵¹

In Libya, the National Transitional Council (NTC) adopted *Frontline Guidelines on the fundamental rules which must be adhered*

49 *Agreement on the civilian protection component of the International Monitoring Team (IMT)*, 27 October 2009, Art. 1.

50 Bangsamoro Islamic Armed Forces, ‘General Order No. 1, An Order Promulgating a Code of Conduct Regulating the Affairs of the Bangsamoro Islamic Armed Forces, Prescribing its Powers, Duties and Functions, and Other Related Purposes’, June 2006 (only hardcopy available), Art. 34(8), and (2) and (3).

51 Geneva/Darfur Humanitarian Dialogue, Statement by the opposition movements (JEM and SLM-Unity), 11 July 2008.

to *in times of conflict* in May 2011. Its Introduction set out a number of rules, including the following:

ONLY target Gadhafi forces and others using force against you. Permissible targets include fighters, buildings, facilities and means of transportation being used or could be used for a military purpose.

DO NOT target civilians or places where there are only civilians.

DO NOT target United Nations/ICRC/Red Crescent personnel or facilities.

Fight only fighters. Attack only military targets. Spare civilians.⁵²

In August 2012, the Free Syrian Army (or some elements of it) adopted a Code of Conduct. Articles I and VIII refer to the prohibition to target civilians during attacks. They state respectively: 'I will direct my weapons exclusively against Assad aggressors'; and 'I pledge not to use my weapon against activists or civilians, whether or not I agree with them; and I pledge to not use my weapon against any other Syrian citizen. I pledge to limit my use of weapons to the defence of our people and myself in facing the criminal regime.'⁵³

Sometimes armed groups join together to affirm policy positions. In 2011, the SLM/A and JEM published a Joint Political Statement that 'reiterate[d] their strong condemnation of all forms of violence against civilians and all forms of violation of human rights as well as all acts by the government which contravene international humanitarian law and conventions in Darfur'.⁵⁴

52 NTC, *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict plus Introduction to Guidelines*, May 2011, p. 3. At: <http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt>.

53 Code of Conduct of the FSA, 8 August 2012. At: https://www.facebook.com/note.php?note_id=508232342537240.

54 SLM/A and JEM Joint Political Statement, 22 March 2011, §5.

Not all statements are consistent with IHL, however. This statement by an insurgent from the Barisan Revolusi Nasional (BRN)-Coordinate (a separatist movement based in northern Malaysia and operating in southern Thailand) takes a different approach to attacks against civilians and civilian objects:

Violence shows that we can overcome differences. Although the Thai system incorporated some of our people, there are still enough to fight it. And the neutral rest has to decide on which side they stand. See, for example, we already cut out the village heads as a link between the people and the state. The government schools in the countryside, which we attacked, do not work anymore. People have to send their kids to our Malay schools. All the money the Thais have, it doesn't count.⁵⁵

There is a tendency among Islamist (notably *takfiri*⁵⁶) groups to espouse a narrow definition of civilian that in some respects contradicts IHL standards. In its monthly publication *Inspire*, al-Qaeda in the Arabian Peninsula (AQAP) gave the following definitions of 'civilian' and 'legitimate target':

- The scholars have divided the people of *dâr al-ḥarb* into combatants and non-combatants.
- The scholars agree that all combatants may be targeted. With the category of non-combatants it is more complex.
- Scholars agree that women and children should not be intentionally targeted.

55 Sascha Helbardt, *Deciphering Southern Thailand's violence: organisation and insurgent practices of BRN-Coordinate*, PhD Thesis, July 2011, p. 165.

56 Takfiris see violence as legitimate methods of achieving religious or political goals. They are generally Sunni Muslims who see people as either true believers or nonbelievers, with no shades in between. A takfiri's mission is to re-create the Caliphate according to a literal interpretation of the Qur'an.

- But they all agree that if women, the elderly, farmers, merchants or slaves participate in the war effort against Muslims either by actual participation in fighting, financial contribution or opinion, they become legitimate targets.
- If combatants and non-combatants are mixed together and integrated, it is allowed for the Muslims to attack them even if women, children, the elderly, farmers, merchants and slaves get killed but this should only be done with the intention of fighting the combatants.⁵⁷

Those calling for global *jihad* tend to define military targets in especially broad terms. In a May 2012 statement cited earlier, AQAP invited Muslims in Yemen to ‘target Americans everywhere’.⁵⁸ However, AQAP’s position is more complex than is often thought. While justifying its attacks on civilians in general, the group has also set some limits, notably with respect to women, children and places of worship.

A final remark, related to the issue of targeting goals in the heart of the hostile countries, America and the Western allies, is that one should avoid targeting places of worship for any religion or faith, regardless whether they are Christian, Jewish, or other. One should also avoid harming civilians who are citizens of countries that have no relation with the conflict, even if they are non-Muslim. This must be done in order to maintain the

reputation of the Resistance in the different spheres of public opinion.⁵⁹

Sheikh Hassan Qaid, head of the Libyan Islamic Fighting Group (LIFG),⁶⁰ stated in a *fatwa* issued in 2001 after the United States attacked Afghanistan:

By declaring war against the Muslims and occupying their countries, the United States of America has made all of its worldwide interests into legitimate targets for the mujahideen. They [the mujahideen] shall bomb and demolish them by any means necessary. Those interests include military, economic, humanitarian, diplomatic, cultural, tourism, or anyone else anywhere around the globe... Women, children, and the elderly... should not be specifically targeted, unless they are in the vicinity of those whose killing is permissible — in which case, there is no sin in killing them...

Anyone who stands alongside the United States and assists it with moral support, petroleum, intelligence, shared military bases, or airports in its war against the Muslims in Afghanistan and elsewhere should be fought and killed in order to support our Muslim brothers in their battle against the infidels, to protect Islam, and to take our revenge upon the oppressors.⁶¹

57 AQAP, *Targeting the populations of countries that are at war with the Muslims*, in *Inspire*, Fall 1432 (2011), Issue 8, pp. 42–7. At: <http://publicintelligence.net/inspire-al-qaeda-in-the-arabian-peninsula-magazine-issues-8-and-9-may-2012/>.

58 AQAP: *Statement on the targeting of U.S. officers in Hodeidah*, 24 May 2012. At: <http://worldanalysis.net/modules/news/article.php?storyid=2157>.

59 *Inspire – al-Qaeda in the Arabian Peninsula Magazine*, Issue 8 (Winter 2012), p. 24. At: <http://publicintelligence.net/inspire-al-qaeda-in-the-arabian-peninsula-magazine-issues-8-and-9-may-2012/>.

60 *Al-Jama’ah al-Islamiyyah al-Muqatila*.

61 NEFA foundation, *Dossier: Libyan Islamic Fighting Group (LIFG) (Al-Jama’ah al-Islamiyyah al-Muqatila)*, October 2007, p. 16. At: <http://www.nefafoundation.org/file/nefalifig1007.pdf>.

Box 2. Libyan Islamic Fighting Group, *Corrective Studies in Understanding Jihad, Accountability and Judgment of the People* (September 2009)

The *Corrective Studies* considerably modified some of the basic principles on which the LIFG had been founded, including the definition of legitimate military target. The text affirmed that the ethics and morality of *jihad* prohibit the killing of ‘women, children, the elderly, monks, wage earners (employees), messengers (ambassadors), merchants and the like’.⁶² It essentially forbade LIFG fighters from targeting certain segments of the civilian population during attacks. It further stated that:

Also among the ethics and morals of jihad is the proscription of treachery, the obligation to keep promises, the obligation of kindness to prisoners of war, the proscription of the mutilation of the dead and the proscription of hiding spoils from the leader. Adherence to these ethics is what distinguishes the jihad of Muslims from the wars of other nations that do not give any weight to ethics.⁶³

Be alert to the possibility of corrective studies and revisions of codes of conducts

A number of groups have issued ‘corrective studies’, documents that revise policy on the basis of experience. Others, notably the Quetta Shura (Afghan) Taliban,⁶⁴ have significantly revised internal codes of conduct.⁶⁵ These documents may have value for promoting humanitarian norms.

In October 2001, the Libyan Islamic Fighting Group was listed by the United Nations 1267 Committee as a Foreign Terrorist Organisation because of its affiliation with al-Qaeda. Many LIFG members were subsequently jailed by the Libyan government. In 2006, some of them, together with the Gaddafi International Charity and Development Foundation, initiated a three-year consultation that produced a 417-page document titled *Corrective Studies in Understanding Jihad, Accountability and the Judgment of People*. The document analysed ethical and moral concepts related to jihad and Islamic law in an effort to delegitimize the use of armed struggle to overthrow the regimes of Muslim states. In explicitly repudiating Salafi jihadism and renouncing the ‘use of violence to change political situations’ (see Box 2), it represented an important change from the fatwa that LIFG leaders issued in 2003 after US military action against Afghanistan in 2001.

Although the *Corrective Studies* marked a considerable advance towards compliance with international humanitarian norms, some scholars have pointed out that the document does not address several theological readings that support salafi *jihadist* methods and tactics. It does not tackle, for instance, the concept of *takfir* (being an unbeliever)

62 M. A. Musawi, *A Selected Translation of the LIFG Recantation Document*, Quilliam, 2009. At: <http://theirwords.org/?country=LBY&ansa=213>.

63 *Ibid.*

64 See, for example, Muhammad Munir, ‘The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic law’, *International Review of the Red Cross*, Vol. 93, No. 881 (March 2011). At: <http://www.icrc.org/eng/assets/files/review/2011/irrc-881-munir.pdf>.

65 Revisions by the Taliban between 2006 and 2009 were significant. One major change was that aid workers were perceived to be legitimate targets for attack in the 2006 Code, but were not mentioned explicitly in the 2009 version. (Subsequent revisions in 2010 and 2011 made only slight changes.) One commentator suggested several factors had influenced the change, including internal pressures, the desire to be seen as an alternative Afghan government, and highly negative publicity after such attacks. Email from Ashley Jackson, Research Fellow, Humanitarian Policy Group, Overseas Development Institute (ODI), 20 December 2013.

which is the main theological justification for attacks against other Muslims by salafi *jihadists*.⁶⁶

In February 2009, Fadil Harun, an *al-Qaeda* operative, published on a jihadi website a two-volume manuscript entitled *The War against Islam: the Story of Fadil Harun*. Essentially an autobiography, it was motivated by the author's belief that 'I should write a history of the jihadis in my time as I witnessed it and not as it is perceived by the West or those who disagree with us'.⁶⁷ Harun's intent (see Box 3 overleaf) seems to have been to produce a corrective study of *al-Qaeda*, to distinguish it from other jihadi groups that act in its name. The author believed that, after the fall of the Taliban regime, many jihadi groups had deviated from the 'true path of jihad'. In particular, he argued that they had deliberately targeted civilians in disregard of the basic principles that regulate what Harun called 'lawful jihad'.

Seventeen declassified documents written between 2006 and 2011 by the most prominent *al-Qaeda* leaders, including Osama Bin Laden, indicate that Bin Laden shared similar concerns.⁶⁸ He was apparently alarmed by the conduct of regional jihadi groups and their indiscriminate attacks against civilians, which, he appears to have believed, were damaging the reputation of *al-Qaeda* around the world.⁶⁹

66 *Ibid.*, p. 5.

67 Fadil Harun, *al-Harb 'ala al-Islam: Qissat Fadil Harun* (War against Islam: Fadil Harun's Story), Vol. 1, p. 330, in Nelly Lahoud, *Beware of Imitators, Al-Qa'ida through the Lens of its Confidential Secretary*, Combating Terrorism Center at West Point, 4 June 2012, p. 4. At: <http://www.ctc.usma.edu/posts/beware-of-imitators-al-qaida-through-the-lens-of-its-confidential-secretary>.

68 The documents were seized on 2 May 2011 during the US raid in Abbottabad, Pakistan that killed Bin Laden. For further information see *Letters from Abbottabad: Bin Ladin Sidelined?*, Declassified doc. SO-COM-2012-0000019, Combating Terrorism Center at West Point, 3 May 2012, pp. 1–2. At: <http://www.ctc.usma.edu/posts/letters-from-abbottabad-bin-ladin-sidelined>.

69 *Ibid.*, pp. 3–4.

For many years, Chechen rebels proclaimed their willingness to comply with international humanitarian law. They referred specifically to the four 1949 Geneva Conventions and the two 1977 Additional Protocols.⁷⁰ In 2007, however, on the occasion of the *Declaration of the Caucasian Emirate*, the leader of the Chechen rebels, Doku Umarov, delivered a statement that materially changed the group's definition of 'legitimate target'.

I am saddened by the position of those Muslims who declare as their enemies only those *kuffar* who attacked them directly. And at the same time they seek support and sympathy from other *kuffar*, forgetting that all infidels are one nation. Today in Afghanistan, Iraq, Somalia and Palestine our brothers are fighting. Those who attack Muslims are our common enemies wherever they are. Our enemy is not Russia only, but also America, England, Israel and anyone who wages war against Islam and Muslims. They are our enemies because they are enemies of Allah.⁷¹

Five years later, in a video released on the internet, the Chechen leader changed policy again. Speaking at a time when widespread civil protests were taking place in Russia,⁷² he affirmed that the Russian people were no longer to be considered a legitimate target and offered the following explanation:

The population in Russia today definitely does not support Putin. They've been exploited by these sinners and they are hostages to this

70 Physicians for Human Rights, *Endless Brutality: War Crimes in Chechnya*, Boston, 2001, p. 110. At: https://s3.amazonaws.com/PHR_Reports/chechnya-endless-brutality-report2001.pdf.

71 'Dokka Umarov Declares the Islamic Emirate of the Caucasus, Expands Jihad', *Europe News*, 4 November 2007. At: <http://europenews.dk/en/node/2453>.

72 See, for example, 'Russian election protests', News Blog, *Guardian*, 10 December 2011. At: <http://www.guardian.co.uk/global/2011/dec/10/russia-elections-putin-protest>.

Box 3. al-Qaeda corrective study in *The War against Islam: the Story of Fadil Harun*⁷³ (February 2009)

Harun argued that *al-Qaeda* operations were guided by principles of lawful jihad, such as minimizing civilian casualties. For instance, when the 1998 suicide attack against the US embassy in Dar al-Salam (Tanzania) was planned, he recalled that:

We had chosen this time [10am] because many Muslims tend to go to the mosque around that time; thus there would not be many of them in that area which is normally packed with people. At the same time, [we also figured that] the average non-Muslim civilian would be working in his office around that time. [We therefore estimated] that the street would not be filled with pedestrians, unlike [say] 12pm when everyone is out for lunch. We also decided that the attack would be from behind the buildings [of the embassies] to minimize Kenyans' material and human losses. We also selected a Friday since it is the last day of the week and embassy staff would all be in their offices. Let us not forget the principal role of Khalid al-`Awhali [one of the two suicide bombers attacking the US embassy in Nairobi, who survived]: he would start with a direct attack using innocuous bombs consisting of explosive materials but without shrapnel to push away as many people [i.e., civilians] from the location as possible. Then we gave `Azzam [the other suicide bomber] one minute to engage in a manoeuvre with the Marines using a handgun to give al-`Awhali the chance to push away the pedestrians. [We told him that] if during this time he sensed that the Marines were going to shoot him, he should use the big weapon, namely [blow up] the truck filled with explosives. We took all these measures, and God is Witness to what I am saying.

The author reiterated his wish to distance al-Qaeda from 'the new generation of irresponsible jihadis' around the world who 'are in the habit of striking in random fashion [at unlawful targets] without consulting anyone'.

Fadil Harun, *War against Islam: Fadil Harun's Story*, vol. 1, p. 330.

Chekest regime. So I order all fighters that are carrying out or are planning to carry out security operations on the territory of Russia to put a halt to these operations that could hurt the peaceful population of Russia.⁷⁴

Civilians were no longer legitimate targets, not because they enjoyed protected status under international humanitarian law but because they opposed the Russian government. The Kavkaz Center, a propaganda outlet of the Caucasus Emirate, called a temporary halt to attacks on Russian civilians, adding that the 'moratorium does not apply to military and political structures of the belligerent state'.⁷⁵

73 Fadil Harun (also known as Fazul `Abdallah Muhammad) was killed by Somali government forces in June 2011. He played a key role in the 1998 East Africa bombings that targeted US embassies in Nairobi and Dar es Salaam, after which he claimed to have been appointed al-Qaeda's 'Confidential Secretary'. See Nelly Lahoud, *ibid.*

74 'Caucasus Insurgency Head Backs Halt of Terror Attacks on Russian Civilians', *Radio Free Europe*, 3 February 2012. At: www.rferl.org/content/caucasus_insurgency_head_backs_halt_of_terror_attacks_on_russian_civilians/24472256.html.

75 'Caucasus Emirate leader orders halt on attacks against Russian civilians', *The Long War Journal*, 3 February 2012. At: http://www.longwarjournal.org/archives/2012/02/caucasus_emirate_lea_4.php.

Attacks on civilians may cause an armed group to break away or end an alliance

In a statement released in July 2011, a spokesman for Boko Haram initially recognized the distinction between civilians and fighters, and that civilians should not be targeted. He acknowledged that attacks might have incidental consequences for the civilian population.

What is holding us back is the innocent civilian population, but as soon as people stay clear from security agents we will launch a full-scale attack. ... We as a group don't kill people who are innocent. What we are trying to tell people is that, in regaining the pride of the people in Islam, people have to endure in losing their properties and sometimes lives are also involved and this can fall on everyone, including us.⁷⁶

However, when the group's spokesman explained who Boko Haram considered to be civilians, it was clear that the group had adopted a definition of legitimate target that was far wider than that laid down by IHL.

This is a government that is not Islamic. Therefore, all its employees — Muslims and non-Muslims — are Infidels. This is a Government which naturally fights Islam because Muslims were killed in Zagon Kataf, in Jos and Southern Kaduna but the perpetrators have never been prosecuted by the so-called existing laws of the land. Mosques were destroyed and punishment for this is death. Therefore, we have the right to kill them all. But if there are people who profess Islam and do not take part in Government or Western Education, their blood and wealth are sacred.⁷⁷

In a video released in June 2012, Abu Usamatul al-Ansari, a member of the Ansaru armed group, explained why it separated from Boko Haram. Al-Ansari said that attacks by Boko Haram were 'inhuman to the Muslim Ummah', and underlined the differences between the two groups by claiming that Ansaru would not kill innocent non-Muslims, except in 'self-defence', and would not kill 'innocent security operatives' unless they attacked his group.⁷⁸

⁷⁶ Modern Ghana, *Stay Away from Christians, Boko Haram warns Muslims in Nigeria*, 6 July 2011. At: <http://www.modernghana.com/news/338512/1/stay-away-from-christiansboko-haram-warns-muslims.html>. Cited in D. Cook, *Boko Haram: A Prognosis*, 2011, retrieved from James A. Baker III Institute for Public Policy, Rice University website. At: <http://bakerinstitute.org/publications/REL-pub-CookBokoHaram-121611.pdf>.

⁷⁷ *Ibid.*

⁷⁸ 'Abu Usamatul al-Ansari announces Boko Haram breakaway faction', *Militant Leadership Monitor*, 30 June 2012. At: http://mlm.jamestown.org/single/?tx_ttnews%5Btt_news%5D=39564&tx_ttnews%5BbackPid%5D=539&cHash268f317c28e5f58115c512c17f744bd8#.Ua3qMNJA3To.

Section E: The rules of proportionality and precautions in attacks

The content of the rule of proportionality in attacks

The rule of proportionality states that, even when a lawful military objective is targeted, an attack must not be ‘expected’ to cause ‘excessive’ harm to civilians (deaths, injuries, or damage to civilian property) compared to the anticipated military advantage. The **rule of proportionality in attacks** is part of customary international humanitarian law and is applicable in both non-international and international armed conflicts (see Box 4).

Key questions include:

- What is ‘excessive’?
- Is each individual attack to be assessed separately or in a broader context?

Unfortunately, no agreed formula determines when civilian harm is excessive under IHL.

The content of the rule of precautions in attacks

In addition, a party to an armed conflict must do all it reasonably can to minimize the dangers to civilians caused by its military operations (the **rule of precautions in attacks**). This means that, wherever possible, parties must not locate military personnel or equipment in civilian areas or objects; must choose to use more accurate weapons, especially when a target is not in the line of sight; and must time attacks when they are least likely to cause civilian casualties. In accordance with the rule of distinction (see Section D), only lawful military objectives may be targeted. A military garrison or a tank clearly fulfils the necessary criteria, but there is debate over whether certain personnel or objects are lawful targets. The legality of attacks on dual-use objects (such as government TV stations or the electricity grid) is controversial.

Box 4. The rule of proportionality in attacks under customary law*

Rule 14. Launching 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, is prohibited.

* From the 2005 ICRC study of customary IHL.

Box 5. The rule of precautions in attacks under customary law*

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

* From the 2005 ICRC study of customary IHL.

Policies and approaches

Armed groups can comply with the rules of proportionality and precaution by identifying and applying measures to reduce the threat to civilians that their own attacks or those of their enemies cause. Attacks that fail to respect these rules are considered indiscriminate, and violate IHL. If committed wilfully, indiscriminate attacks may be war crimes.

This is a difficult area legally and, for many armed groups, the rules are operationally challenging. Nevertheless, opportunities for dialogue exist. Would a different timing of attacks result in fewer civilian deaths or injuries? Would choosing a different, more targetable weapon save lives? Could personnel or equipment be positioned further from populated areas or homes or other civilian objects? Any of these actions might reduce harm to the civilian population.

In general, armed groups have made few statements about the rules of proportionality and precautions in attacks. A number of reasons might explain this, including the relative complexity of the notion of proportionality in IHL. We nevertheless give some examples below of overt or implicit references to the notion of proportionality.

Consider the possibility of a specific agreement

In the Philippines, under an agreement in 2009, the MILF pledged, among other things, to:

- Take all precautions feasible to avoid incidental loss of civilian life, injury to civilians, and danger to civilian objects; and
- Ensure that all protective and relief actions shall be undertaken in a purely non-discriminatory basis covering all affected communities.⁷⁹

In 2004 the Government of Sudan, the Sudan Liberation Movement/Army (SLM/A), and the Justice Equality Movement (JEM) pledged to take 'all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any Party or group, including the Janjaweed and other militias'.⁸⁰

In 2008, JEM and SLM-Unity pledged to do their 'utmost to guarantee the protection of civilian populations in accordance with the principles of human rights and international humanitarian law' and to 'recognize that placing military assets and personnel in close proximity to civilian areas increases the risk that civilians will be caught up in hostilities

79 Agreement on the civilian protection component of the International Monitoring Team (IMT), 27 October 2009, Art. 1(d) and (e). At: <http://www.opapp.gov.ph/resources/agreement-civilian-protection-component-international-monitoring-team-imt>.

80 Protocol between the Government of Sudan, SLM/A, and JEM on the Improvement of the Humanitarian Situation in Darfur, 9 November 2004, §2.1.

or even targeted'. In a later statement, JEM and the SLM promised to 'continue [their] ... policy of maintaining a proper physical separation between our armed forces and the civilian population'.⁸¹

Consider the possibility of a unilateral declaration

In Afghanistan, the Taliban indirectly addressed the rules of proportionality and precaution in a version of its Code of Conduct issued in 2009 by the head of the Afghan Taliban, Mullah Omar.⁸² Rule 41 stated that *mujahedeen* must meet four conditions when they conducted suicide attacks:

A - Before he goes for the mission, he should be very education [sic] in his mission.

B - Suicide attacks should be done always against high-ranking people.

C - Try your best to avoid killing local people.

D - Unless they have special permission from higher authority, every suicide attack must be approved by the provincial authority.

Rule 46 also included a general order that bombers must do their best to avoid civilian casualties. In 2010, Mullah Omar stated in his *Eid al-Fitr* message that he 'requires his fighters to take every possible precaution to protect the people's lives and property as well as the public infrastructure'.⁸³

In Libya, the National Transitional Council stated in its *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict* (May 2011) that NTC fighters should 'AVOID as far as possible any effect on civilians of an attack against Gadhafi forces'.⁸⁴

81 The Geneva/Darfur Humanitarian Dialogue, 'Statement by the opposition movements (JEM and SLM-Unity)', 11 July 2008. At: <http://www.hdcentre.org/files/110708.pdf>.

82 On 'The Islamic Emirate of Afghanistan rules for mujahideen'. See: 'Taliban issues code of conduct', in *al-Jazeera*, 28 July 2009, at: <http://english.aljazeera.net/news/asia/2009/07/20097278348124813.html>. See also Kate Clark, *The Layha: Calling the Taleban to Account*, Afghanistan Analysts Network, June 2011, at: <http://aan-afghanistan.com/index.asp?id=1894>.

83 Olivier Bangerter, 'Reasons why armed groups choose to respect IHL, or not', *International Review of the Red Cross*, Vol. 93 No. 882 (June 2011), p. 355.

84 NTC, *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict plus Introduction to Guidelines*, May 2011, p. 3. At: <http://www.ejiltalk.org/wp-content/uploads/2011/08/Final-Libyan-LOAC-Guidelines-17-May-2011.ppt>.

Section F: Weapons

Like child recruitment, the selection of weapons is a challenging issue. Armed groups frequently argue that they are at a structural disadvantage because government armed forces are typically able to procure arms lawfully on the open market and usually also have access to more sophisticated and more potent weapons.

All weapons are subject to the customary international humanitarian law rules of distinction, proportionality and precaution in attacks (see Sections D and E above).⁸⁵ IHL also generally prohibits inherently indiscriminate weapons. These are weapons which are so inaccurate that they cannot target a military objective or their effects cannot be controlled;⁸⁶ or which are 'of a nature to cause superfluous injury or unnecessary suffering'.⁸⁷

The prohibition on use of anti-personnel mines, including improvised devices

The use by armed groups of anti-personnel mines (whose use is not yet prohibited under customary law) has received considerable attention, especially following the adoption in 1997 of the Anti-Personnel Mine Ban Convention (which can only be ratified by states).

In the last decade there has also been a great increase in the use of improvised explosive devices (IEDs), some of which function as landmines (being victim activated).⁸⁸ They have successfully targeted soldiers but have also been responsible for killing and injuring many civilians.

Box 6. Prohibition on use of anti-personnel mines: key sources of norms

The 1997 Convention on the Prohibition of the Use, Stockpiling and Transfer of Anti-Personnel Mines and On Their Destruction (1997 Anti-Personnel Mine Ban Convention), Article 1. 'Each State Party undertakes never under any circumstances to use anti-personnel mines.'

Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and For Cooperation in Mine Action (for non-state actors only).

⁸⁵ For a discussion of applicable international and national law on weapons, see, for example, Geneva Academy, *Weapons Law Encyclopaedia*, at: www.weaponslaw.org.

⁸⁶ For example, biological weapons.

⁸⁷ These are weapons that cause gratuitous injuries not justified by military necessity. Examples are expanding 'dumdum' bullets or exploding bullets.

⁸⁸ A mine is victim activated, so, strictly speaking, a remotely controlled explosive device cannot be a mine.

Policies and approaches

Anti-personnel mines cause indiscriminate harm to civilians and cause armed groups to lose support among the local population, particularly when young children are harmed. Command-detonated devices are generally considered more discriminate than victim-activated devices and can be more easily targeted against a lawful military objective than can mines, including improvised mines.⁸⁹ At the least, those engaging with armed groups on international norms can ask groups to facilitate emergency demining in civilian areas by allowing impartial demining organizations to operate safely.

Consider the possibility of a specific agreement

Specific agreements have included undertakings to cease laying mines and permission to demine. In Sudan, the 2005 Comprehensive Peace Agreement provided that: '[t]o safeguard against the menace and hazards posed by landmines and unexploded ordnance, the Parties agree [that]: ... The laying of mines, explosive devices or booby traps of whatever type shall be prohibited'.⁹⁰ In Nepal, an Agreement on the Monitoring of Management of Arms and Armies (8 December 2006) stated:

Both sides shall assist each other to mark landmines and booby-traps used during the time of armed conflict by providing necessary information within 30 days and to defuse and remove/lift and destroy

them within 60 days. All improvised explosive devices will be collected at designated sites a safe distance from the main cantonment areas. These should be agreed by the parties in consultation with the UN Mission. Unsuitable devices will be destroyed immediately. Stable devices will be stored safely and under 24-hour armed guard provided for by the guard arrangements cited below. The parties, in consultation with the UN, will determine a timeline and process for the later destruction of all improvised explosive devices.⁹¹

The Agreement prohibited 'planting mines or improvised explosive devices'.⁹² The Maoists had frequently used a variety of IEDs during their military campaign.

Consider the possibility of a unilateral declaration

Many armed groups have accepted a prohibition on anti-personnel mines, in some cases even when the state has not,⁹³ and use of these weapons has generally declined, though certain groups continue to use them and many deploy IEDs.

In April 2012, the Justice and Equality Movement in Darfur (JEM) signed Geneva Call's *Deed of Commitment*, agreeing to prohibit the use, production and transfer of anti-personnel mines, to cooperate in humanitarian mine action activities, and to take necessary measures to enforce compliance. Dr. Gebreil Ibrahim Mohamed, Chairman of JEM, said:

⁹¹ Art. 4.1.2, Agreement on the Monitoring of Management of Arms and Armies. At: http://www.un.org.np/sites/default/files/report/tid_188/2006-12-8-Agreement_Arms.pdf. The Agreement was formally signed in Kathmandu by negotiators of the Seven Party Alliance government and the Communist Party of Nepal (Maoist).

⁹² *Ibid.*, §5.1.8.

⁹³ In Burundi, India, Iran, Iraq, Myanmar/Burma, the Philippines, Somalia, Sudan, Turkey, and Western Sahara. In all, 43 armed groups have so far signed the Geneva Call Deed of Commitment banning anti-personnel mines.

⁸⁹ Remote control mechanisms are not always reliable, however.

⁹⁰ Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Army/Sudan People's Liberation Movement, July 2005, p. 97, §§8.6.1 to 8.6.6. At: <http://reliefweb.int/report/sudan/comprehensive-peace-agreement-between-government-republic-sudan-and-sudan-peoples>.

Though JEM has no past experience of using any type of mines, and mines are not part of its weaponry, the movement decided to sign this Deed of Commitment banning AP mines because it can imagine the physical, psychological and un-repairable harm such weapons may cause to innocent lives who are not party to the concerned conflict. *JEM is in fact against all means or methods that might directly and indirectly hurt non-combatants in armed conflicts.* As a member of the Sudan Revolutionary Front (SRF), JEM calls on the other members of the alliance, The Sudan People's Liberation Movement-North (SPLM-N), the Sudan Liberation Army-Abdul Wahid (SLA-AW) and the Sudan Liberation Army-Minni Minawi (SLA-MM), to also join the ban on AP mines.⁹⁴

Be alert to the importance of monitoring and enforcement

As with other commitments, compliance must be monitored and enforced. In 2000, the Moro Islamic Liberation Front in the Philippines signed the Deed of Commitment. In 2008, it was alleged that they had laid new anti-personnel mines. A fact-finding mission concluded that, although mines had been used, it was not possible beyond reasonable doubt to ascribe their use to the MILF.⁹⁵

In an interesting case, an armed group in Turkey monitored the implementation of Geneva Call's Deed of Commitment on Anti-Personnel Mines. In August 2010, an explosion occurred in the Batman province of south-eastern Turkey, killing four Kurdish civilians, including members of the Peace and Democracy Party (BDP). After the event, the Kurdish Worker's Party (PKK) was held responsible for placing a landmine.⁹⁶ A few months later, the General Command of the People's Defence Forces (HPG, the PKK's armed wing) wrote publicly to Geneva Call, taking full responsibility for the attack and condemning it as a violation of the Deed of Commitment.⁹⁷ It added that those responsible for the attack were in police custody and would be put on trial 'according to the standard of justice' of the PKK. The letter ended by reaffirming that:

The practice exercised in Batman can't squeeze into HPG action's understanding and is opposite to our principles and we want you know that we will be faithful to Deed of Commitment under Geneva Call for the total ban on the use of anti-personnel landmines that we signed with [the Canton of] Geneva.

We want to let you know that it will never be question of any attempt to oppose to the agreements that we signed with your organization.⁹⁸

94 Geneva Call, *Communiqué: Sudan: the Justice and Equality Movement pledges against anti-personnel mines*, 24 April 2012 (emphasis added). At: <http://www.genevacall.org/Africa/Sudan/sudan.htm>.

95 See, generally, Geneva Call, *Fact-Finding during Armed Conflict: Report of the 2009 Verification Mission to the Philippines to Investigate Allegations of Anti-Personnel Landmine use by the Moro Islamic Liberation Front*. At: <http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2010-GC-Report-Philippines-Web.pdf>.

96 Report: PKK punished those behind Batman blast, apologized for deaths, *Today's Zaman*, 2 December 2010. At: <http://www.todayszaman.com/news-228438-report-pkk-punished-those-behind-batman-blast-apologized-for-deaths.html>.

97 HPG, letter to Geneva Call, 24 October 2010.

98 *Ibid.*

On 23 November 2010, the HPG publicly announced that a military tribunal had condemned the two men responsible to 24 years imprisonment for:

1. The violation of the international agreements that HPG signed:
 - a. To place mines which can cause damage to the civilians,
 - b. To lead a kind of action which can damage ... civilians.
2. The heavy carelessness, the abuse of duty, the kind of moderate action.
3. The way of action opposed to the party, to the functioning of the leadership and to the people.⁹⁹

In addition, the PKK built a monument to commemorate the victims of the attack and apologised to their families.¹⁰⁰

In October 2012, when it was reported that, '[a]lthough the Taliban ... leader Mullah Omar banned the use of anti-personnel landmines in 1998, denouncing such weapons as un-Islamic and anti-human, anti-government elements continue to use them', the UN Assistance Mission in Afghanistan (UNAMA) called on the Taliban leadership 'to publicly reiterate a ban on these weapons and to stop their use', adding that IEDs caused 'devastating harm to civilians'.¹⁰¹ The Taliban stated in reply:

We clearly want to state that our Mujahideen never place live landmines in any part of the country but each mine is controlled by a remote and detonated on military targets only. On the other hand, those

suspicious explosions which occur on main roads and target civilian buses and other vehicles are the works of our enemy in direct cooperation with the CIA [US Central Intelligence Agency] through which they want to defame our Mujahideen, an example of which is the saddening incident of Balkh province's Dawlatabad district which occurred a few days earlier. On the other hand, there are also old unexploded ordinances scattered throughout our country which every now and then detonate on civilians. Similarly, personal and family feuds in some parts of the country are also reasons behind such incidents to disturb weddings and other social gatherings therefore blaming Mujahideen for all incidents is in itself injustice and unacceptable accusation.¹⁰²

Consider using a 'step-by-step' approach when a ban is not feasible

When an armed group is not ready to endorse a total ban on landmines, a gradual approach may be warranted. In Colombia in 2006, the National Liberation Army (ELN) agreed to allow certain areas to be demined even though it was not prepared at the time to cease using landmines. The ELN signed a *Proposal of Emergency Humanitarian Demining in Samaniego – Department of Narino* prepared by Geneva Call together with the Municipality of Samaniego and other community-based organizations.¹⁰³

99 The sentence of the court of HPG concerning the department of Batman, The Military tribunal of the People's Defence Forces (HPG), 23 November 2010.

100 'Özevin ve Özdemir kardeşler için anıt heykel dikildi', *Batman Belediyesi*, 31 August 2012. At: <http://www.batman.bel.tr/Haberler.aspx?HaberID=149#.UqmBZnfO92t>.

101 'UN urges Afghan Taliban to forego use of IEDs', *International Herald Tribune*, 20 October 2012, at: <http://tribune.com.pk/story/454339/un-urges-afghan-talibans-to-forego-use-of-ieds/>.

102 Media Part, *Reaction of Islamic Emirate regarding accusations of UNAMA about explosive devices*, 22 October 2012, at: <http://blogs.mediapart.fr/blog/lynx/241012/reaction-islamic-emirate-regarding-accusations-unama-about-explosive-devices>.

103 Geneva Call, 'The National Liberation Army Agrees to Demine Areas of Civilian Use in Nariño, Colombia', Press release, 30 October 2006, at: <http://www.genevacall.org/news/press-releases/f-press-releases/2001-2010/2006-30oct-gc.htm>.

Consider extending a declaration to anti-vehicle mines

Although anti-vehicle mines are not formally prohibited in international law, some groups have been persuaded to cease using these weapons, which kill and wound many civilians when they destroy cars or buses. In April 2011, after discussions with Human Rights Watch, the Libyan National Transitional Council (NTC) announced in a *Communiqué Regarding Landmines* that ‘no forces under the command and control of the NTC will use anti-personnel or anti-vehicle landmines’.¹⁰⁴ It added that forces under its command and control ‘shall be requested to destroy all landmines in their possession, including mines recovered during operations’. It agreed to ‘cooperate in the provision of mine clearance, risk education and victim assistance’.¹⁰⁵ Earlier in the same month, Human Rights Watch researchers had reported that anti-vehicle mines had been laid despite rebel assurances they would not be used.¹⁰⁶

104 NTC, *Communiqué by the Libyan National Transitional Council Regarding Landmines*, 30 April 2011, at: http://www.hrw.org/sites/default/files/related_material/Communiqué.pdf.

105 *Ibid.*

106 Stuart Hughes, ‘Libya conflict: Rebels accused of renegeing on mines vow’, BBC, 19 April 2011, at: <http://www.bbc.co.uk/news/world-africa-13138102>.

Section G: Special protection of women and children

The rules protecting women and children

As the International Committee of the Red Cross (ICRC) has observed, international humanitarian law (IHL) affords women the same protection as men – as combatants, civilians, or persons *hors de combat*. All the fundamental rules of IHL therefore apply equally to men and women without discrimination. However, recognizing that they have specific needs and vulnerabilities, IHL grants women and children a number of additional protections and rights.¹⁰⁷

Women should be protected against all forms of sexual violence, and should be separated from men when they are held in detention. Children should also be detained separately from adults (unless the adults are their parents). While the prohibition of sexual violence applies equally to men and women (and to boys and girls), in practice women and girls are far more likely to be victims of sexual violence during armed conflicts.¹⁰⁸ Both IHL and human rights law prohibit recruitment of children. Recruitment

of children who are under 15 years of age in either international or non-international armed conflicts is a war crime.

Policies and approaches: the prohibition of sexual violence

For some groups, the special protection of women is a sensitive issue. Relatively little work has been done in this important area, and few groups have made public pronouncements on sexual violence, although the Geneva Call Deed of Commitment prohibiting sexual violence and gender discrimination¹⁰⁹ includes the following commitments:

1. To adhere to an absolute prohibition of sexual violence against any person, whether civilian, member of State armed forces or member of an armed non-State actor.
2. To take all feasible measures towards effectively preventing and responding to acts of sexual

¹⁰⁷ See, among others, ICRC Study of Customary IHL, Rule 134: 'Women', at http://www.icrc.org/customary-ihl/eng/docs/v1_rule134; and ICRC Study of Customary IHL, Rule 135: 'Children', at http://www.icrc.org/customary-ihl/eng/docs/v1_rule135.

¹⁰⁸ *Ibid.*

¹⁰⁹ As of writing, seven non-state armed groups from Burma/Myanmar, India, and Iran had signed the Deed of Commitment. See: <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm>.

Box 7. The special protection of women and prohibition of sexual violence: key sources of norms

The special protection of women

ICRC Study of Customary IHL, Rules 93 and 134.*

Rule 93. Rape and other forms of sexual violence are prohibited.

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected.

Common Article 3 to the 1949 Geneva Conventions.

1977 Additional Protocol II to the Geneva Conventions, Article 4(2)(e).

1998 Statute of the International Criminal Court: Article 7(1)(g), rape as a crime against humanity; Article 8(2)(b)(xxii) and (e)(vi), rape is a war crime in international and non-international armed conflict.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, esp. Articles 3 and 4.

United Nations Security Council Resolution 1325 (2000).

Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination (for non-state actors only).

The special protection of children

ICRC Study of Customary IHL, Rule 135.*

135. Children affected by armed conflict are entitled to special respect and protection.

1990 African Charter on the Rights and Welfare of the Child, Article 27. 'States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse...'

United Nations Security Council Resolution 1612 (2000).

Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict (for non-state actors only).

* From the 2005 ICRC Study of Customary IHL.

violence committed by any person, in areas where we exercise authority.

3. To ensure that persons deprived of their liberty are protected from sexual violence.
4. To further endeavour to provide victims of sexual violence with the assistance and support they require in order to address the impact of such violence.

Consider the possibility of a specific agreement

In a Memorandum of Understanding (MoU) with the UN in July 2010, the Justice and Equality Movement (JEM, Sudan) promised that it would show:

continued respect to human rights and fundamental freedoms for the people in Darfur as well as fully and effectively implementing the following:

- Actively support UNICEF work on the protection and wellbeing of children affected by the conflict in Darfur
- Prevent and work to end ... acts of sexual violence against children
- Provide special protection to girls among the affected targeted children.¹¹⁰
- Female prisoners MUST be especially protected against sexual violence.

Policies and approaches: the protection of schools and hospitals

Consider the possibility of a unilateral declaration

Under Nepal's Comprehensive Peace Agreement (2006), the Communist Party of Nepal-Maoist (CPN-M) stated that they 'completely agree on the need to specially protect the rights of women and children and the need to stop all forms of sexual exploitation and other forms of misbehaviour on women...'.¹¹¹

In Libya, *Frontline Guidelines* issued by the National Transitional Council in May 2011 contained detailed provisions on how to treat detainees. The following is an excerpt:

Take detainees to a safe place of detention. ... HUMANE TREATMENT must be observed at ALL times.¹¹²

There are special provisions for women:

- Female prisoners MUST have separate accommodation under female supervision
- Female prisoners may be searched ONLY by females

Schools and medical facilities are entitled to protection as civilian objects under IHL. Special protection is afforded to hospitals and other medical establishments and staff. Attacks against both schools and hospitals are nevertheless regularly reported during armed conflicts.¹¹³ With respect to schools, the UN Secretary-General reported to the General Assembly and Security Council in 2012: 'In a double attack on 20 December 2011 in Charsadda District, a Government primary school for girls and a primary school for boys were blown up. In neighbouring Mohmand Agency, the TTP claimed responsibility for the attack, reportedly to avenge military operations in the region and in opposition to secular and girls' education.'¹¹⁴

In July 2013, Boko Haram's leader said the following: 'Teachers who teach western education? We will kill them. We will kill them in front of their students, and tell the students to henceforth study the Quran. We are going to burn down the schools, if they are not Islamic religious schools for Allah.'¹¹⁵

110 JEM, *Memorandum of Understanding between JEM and the UN regarding Protection of Children in Darfur*, 21 July 2010, Art. 1. At: <http://www.hdcentre.org/files/Signed%20MoU%20UN-JEM%2021%2007%202010.pdf>.

111 Comprehensive Peace Agreement, 21 November 2006, §7.6.1 (emphasis added).

112 NTC, *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict plus Introduction to Guidelines*, May 2011, pp. 1–2.

113 See, for example, ICRC, *Health Care in Danger: Making the Case*, Geneva, 2011. At: <http://www.icrc.org/eng/resources/documents/publication/p4072.htm>. See also B. O'Malley, *Education under Attack*, 2010, UNESCO, 2010. At: <http://unesdoc.unesco.org/images/0018/001868/186809e.pdf>.

114 Report of the Secretary-General on Children and armed conflict, UN doc. A/66/782–S/2012/261, 26 April 2012, §144.

115 See, for example, Daniel DeFraia, 'Boko Haram leader: Burn schools, kill teachers, no ceasefire', Global Post, 15 July 2013. At: <http://www.globalpost.com/dispatch/news/regions/africa/130715/boko-haram-leader-burn-schools-kill-teachers-no-ceasefire>.

In 2010, Hamas' military wing, the Ezzeddeen al-Qassam Brigades (EQB), issued a military communiqué listing various operations it had carried out in previous years. It declared 'its full responsibility' for an operation on 6 March 2008 against what it called a 'racist school, that graduates Zionist extremist murderers, where the martyr Al'a Abu Dahim moved forward to avenge the Gaza massacre that was committed by the Zionist enemy in March 2008 and caused of killing 1,400 Palestinians, most ... civilians. The heroic operation ... led to killing 8 Zionists, and injuring of 30 others, according to Zionist confessions.'¹¹⁶

As noted in Section C above, in December 2013 al-Qaeda in the Arabian Peninsula (AQAP) apologised for an attack on a hospital. In this rare public apology, Qassim al-Rimi, the commander of AQAP in Yemen said that one of his fighters had disobeyed orders and attacked a hospital attached to the Ministry of Defence during an assault that month that killed 52 people. However, al-Rimi added that, although the group had made a mistake, 'we are continuing with our jihad'.¹¹⁷

Consider the possibility of a unilateral declaration

In 2009 Fadil Harun, a member of al-Qaeda, stated (in a corrective study) that:

I wish to make clear to those who choose random targets purposely causing [innocent] casualties, be they Muslims or non-Muslims (kuffar): this is not our method (nahj) ... this is also

a sincere advice (nasiha) to [jihad] brethren who aim their weapons directly against children; could they not find any other target to strike against other than a school?¹¹⁸

Even if such facilities are not attacked, the impact of armed conflict and armed violence on schooling and health care is significant. In Libya, the May 2011 *Frontline Guidelines* by the NTC requires that detainees be humanely treated at all times and that:

- Children MUST be able to continue their schooling.¹¹⁹

The prohibition of child recruitment and their use as fighters

Recruitment and use of children by armed groups is taken far more seriously than it used to be. The International Criminal Court's very first conviction was for the recruitment of children under 15 years old and their use as combatants (see below). Consistent with the Optional Protocol to the Convention on the Rights of the Child, which prohibits child recruitment or use of children as fighters, the UN Security Council has imposed sanctions on groups that recruit or use children under 18. The Independent Commission of Inquiry on Syria has deemed that the relevant provisions of this Protocol apply directly to armed groups.

Congolese warlord Thomas Lubanga Dyilo was the first person to face international charges for abuses committed during the Democratic Republic of Congo's recent crisis, and the ICC's first detainee. As the alleged leader of the Union of Congolese Patriots (UPC) and commander-in-chief of its military wing (Forces patriotiques pour

¹¹⁶ EQB, 'Abu Obeida's statement during the press conference in December 25th, 2010', Military Communiqué, 25 December 2010. At: http://www.qassam.ps/statement_popup-1357-Abu_Obida_statement_during_the_press_conference_in_December_25th_2010.html?keepThis=true&TB_iframe=true&height=550&width=570.

¹¹⁷ See, for example, Associated Press, 'Al Qaeda apologizes for hospital attack in Yemen', *CBS News*, 22 December 2013. At: <http://www.cbsnews.com/news/al-qaeda-apologizes-for-hospital-attack-in-yemen/>.

¹¹⁸ Fadil Harun, *War against Islam: Fadil Harun's Story*, vol. 1, p. 330.

¹¹⁹ NTC, *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict plus Introduction to Guidelines*, May 2011, p. 4.

la libération du Congo (FPLC)), Lubanga was accused of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities from September 2002 to 13 August 2003. In a public hearing on 14 March 2012, the Court found him guilty of war crimes.

To tackle issues related to child involvement in armed conflicts, in 1996 the United Nations appointed a Special Representative of the Secretary-General on Children and Armed Conflict.¹²⁰ Following UN Security Council Resolution 1612, parties to conflicts listed in the Secretary-General's annual report on children and armed conflict are requested by the Security Council to develop Action Plans. These are written and signed undertakings to address grave violations against children. They specify timetabled activities that a party must take before it can be de-listed. Activities include, *inter alia*, issuing military orders to stop and prevent child recruitment, developing child specific release and reintegration programmes, and prosecuting individuals who violate the rights of children. Several armed groups have signed Action Plans but as of April 2012 only the Communist Party of Nepal-Maoist (CPN-M) and the Inya Bharathi faction (Sri Lanka) had been de-listed after the UN Monitoring and Reporting Mechanism (MRM) had verified their full compliance.¹²¹

ICC jurisprudence in the Lubanga case showed that it is not a defence to argue that an armed group accepted children who had volunteered for their own protection. Recruiting children aged 15 to 18 years old may also breach UN Security Council measures under Resolution 1612.

Several armed groups acknowledge that they have recruited children older than 15. In Colombia, the ELN's Code of

¹²⁰ UN General Assembly Resolution 77/96, establishing the mandate of the Special Representative of the Secretary-General for Children and Armed Conflict, 1996.

¹²¹ 'Children and armed conflict – Report of the Secretary-General', UN doc. A/66/782-S/2012/261, 26 April 2012, §§80–1, 197, 209, and 244.

Conduct prohibits children under 15 from being incorporated into its armed forces. Children under 15 can be integrated in 'other revolutionary activities', excluding participation in hostilities.¹²² In Abkhazia, the Handbook of International Humanitarian Law of the *de facto* Armed Forces of Abkhazia states that 15 is the minimum age for voluntary enrolment in the armed forces and groups, as well as voluntary participation in active fighting. The minimum age for conscription into the armed forces is 18.¹²³

Policies and approaches: child recruitment and their use as fighters

Recruitment of children is a sensitive issue for many armed groups.¹²⁴ Most (though not all) know that recruitment of children is unlawful, but they argue that, because government armed forces have access to more and more powerful weapons, they need to recruit more people, which often means children. Certain groups acknowledge that children can be induced to commit acts of savagery. As noted below, some armed groups simply deny that they recruit children

¹²² 'El Ejército de Liberación Nacional y el Derecho Humanitario', Cedema.org, 15 July 1995. At: <http://cedema.org/ver.php?id=3391>.

¹²³ Geneva Call, 'In their words: Perspectives of armed non-state actors on the protection of children from the effects of armed conflict', 2010, §81, pp. 10–11. At: http://www.genevacall.org/resources/research/f-research/2001-2010/2010_GC_CANSA_InTheirWords.pdf.

¹²⁴ The Paris Principles, adopted by UNICEF in 2007, are controversial because they refer to children 'associated with an armed force or armed group'. The definition is set out in Section 2.1: "A child associated with an armed force or armed group" refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.' This definition is extremely broad and many armed groups consider that it is wholly unrealistic.

(younger than 15) or argue that they take in child volunteers to protect them.¹²⁵

Positive and negative incentives can encourage armed groups to cease recruiting and using children in hostilities. The threat of listing and sanctions by the Security Council, and individual prosecutions under international criminal law, are examples of negative incentives. Positive incentives might include support for community-led reintegration of former child soldiers, in the context of Action Plans. In practice, even when an armed group is willing, it may be challenging to secure the release of children and prevent their return to the same or another armed group. Creative approaches to vocational retraining and social reintegration are required.

Consider the possibility of a specific agreement

In 2009, the MILF agreed an Action Plan with the UN on recruitment and use of child soldiers in the armed conflict in Mindanao. It stated:

The Moro Islamic Liberation Front (MILF) commits specifically to implement effectively the following provisions:

- a) To prevent the recruitment of children, male and /or female, under the age of 18 and to ensure the release and reintegration of those who may be found in the BIAF [Bangsamoro Islamic Armed Forces]

125 In DR Congo, for example, Human Rights Watch issued a report on the actions of the M23 rebel group in September 2012. Colonel Makenga, an M23 leader it interviewed, denied allegations of forced recruitment and summary executions. He claimed: 'We recruit our brothers, not by force, but because they want to help their big brothers.... That's their decision.' He added that: 'They are our little brothers, so we can't kill them'. Human Rights Watch, *DR Congo: M23 Rebels Committing War Crimes*, 11 September 2012. At: <http://www.hrw.org/print/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes>.

in accordance with the action plan laid out herein, to be finalized by 1 August 2009.¹²⁶

In 2010, it further undertook that: 'No child shall be admitted into the BIAF. The BIAF shall not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'¹²⁷ Sanctions were also foreseen for non-compliance.

Any person who recruits or uses in hostilities, or permits to take part in hostilities, a person or persons under the age of 18 years shall, upon conviction, suffer the penalty of dismissal from the service, a fine of 3,000 pesos, and imprisonment of 3 months, or both as may be determined by the MILF-BIAF leadership. The same penalty shall be imposed upon any person who compels compliance or punishes non-compliance with recruitment of a person or persons under the age of 18 years.¹²⁸

It should be remembered, however, that groups may issue contradictory statements. In the case in point, an Addendum to the BIAF's Action Plan in February 2012 declared: 'In addition to the general definition of Child Soldier in Action Plan, the MILF would like to stipulate that from the Islamic point of view, the age of maturity for a male child is considered as being from 13

126 *Action Plan between the Moro Islamic Liberation Front (MILF) and the United Nations in the Philippines Regarding the Issue of Recruitment and Use of Child Soldiers in the Armed Conflict in Mindanao* (2009), Art. 2(1).

127 Supplemental General Order for General Order Nos. 1 & 2; and in support of the Action Plan between the Moro Islamic Liberation Front (MILF) and the UN in the Philippines Regarding the Issue of Recruitment and Use of Child Soldiers in the Armed Conflict in Mindanao, 20 January 2010. At: [http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/8A124E947E0E67E5C12578BD00519B90/\\$file/action-plan-milf-un-philippines-20-jan-2010.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/8A124E947E0E67E5C12578BD00519B90/$file/action-plan-milf-un-philippines-20-jan-2010.pdf).

128 *Ibid.*, Article 64-A: Recruiting Children.

to 15 years and for a female child from 12 to 13 years'.¹²⁹

Consider the possibility of a unilateral declaration

Under Nepal's Comprehensive Peace Agreement (2006), the CPN-M (the Maoists) stated that they 'completely agree on the need ... not to include children below the age of 18 in any form of military force. The children who have already been affected shall be rescued immediately and adequate provisions shall be made for their rehabilitation.'¹³⁰ In Libya, the *Frontline Guidelines* of the National Transitional Council (NTC) stated unequivocally:

DO NOT allow persons who are less than 18 years of age to fight, even if they have volunteered to do so.¹³¹

In a press statement on the use of child soldiers the same month,¹³² the NTC denounced the Gaddafi regime for using child soldiers. It reaffirmed that 'the revolutionary forces have never, and will never, use child soldiers amongst its fighting ranks'.¹³³ In April 2012, however, the UN Secretary-General reported to the General Assembly and the Security Council that many cases of child recruitment by opposition forces or brigades associated with the NTC had been reported during the Libyan conflict. 'Children

were spotted undertaking military training, carrying weapons, wearing uniforms and performing various tasks in support of combat operations. At the end of 2011, children were seen manning checkpoints and providing security.'¹³⁴ After publication of the *Frontline Guidelines*, the UN was not able to confirm whether new child recruitment by the armed group had stopped.¹³⁵

Islamist groups frequently assert that they do not use child soldiers, because a child reaches maturity before the age of 15. For example, the Taliban Code of Conduct provides only that 'Youngsters that have no beard are not allowed to be taken for Jihad'. This position seems to be reiterated in an open letter which the Taliban sent to UNAMA in response to UNAMA's Annual Report for 2012, although it does not mention the age at which a child is considered to become an adult. The Taliban set out several reasons for prohibiting the deployment of children.

In practice we can say it explicitly that no one can prove the exploitation of children by us in war. The reason is that it has no advantage; rather it harms the Mujahidin on the following basis:

1. Legally the decision of a child is not trustworthy to attack the enemy and sacrifice his life.
2. A child cannot manage to reach the target and harm the enemy.
3. A child can easily fall to the enemy's hands and can divulge the secrets, hideouts and plans of Mujahidin.
4. A child cannot carry a vehicle or a waistcoat full of mines weighing more than 10 kg to the targeted area.

129 Addendum to the Action Plan between the Moro Islamic Liberation Front (MILF) and the United Nations in the Philippines regarding the issue of recruitment and use of child soldiers in the armed conflict in Mindanao, 1 February 2012 (only hardcopy available).

130 Comprehensive Peace Agreement, 21 November 2006, §7.6.1 (emphasis added).

131 NTC, *Frontline Guidelines*, pp. 2, 3. NTC, *Reply to Statement of Human Rights Watch on July 13, 2011 regarding claims of human rights abuses in areas under the Libyan Revolutionaries Controls*, 19 July 2011, p. 3. At: <http://feb17.info/wp-content/uploads/2011/07/Zentan-1.jpg>.

132 NTC, 'Press Statement on the use of child soldiers', 10 May 2011. At: <http://pdfcast.org/pdf/the-ntc-condemns-the-use-of-child-soldiers>.

133 *Ibid.*

134 'Children and armed conflict – Report of the Secretary-General', UN doc. A/66/782-S/2012/261, 26 April 2012, §§56-7.

135 *Ibid.*, §56.

5. A child cannot move tactically because of his childhood to cross the enemy's security check posts and reach the target.

6. The deployment of children in Jihadi ranks has its own moral disadvantages which are legally forbidden. The special rules and procedures of the Islamic Emirate regarding the Martyrdom attacks say:

(Article 19: 'In all activities related to Jihad and especially in martyrdom attacks, the deployment of beardless and youngsters is strictly prohibited. Everyone should try to prevent it.')

¹³⁶

Consider a step-by-step approach

If an armed group is not prepared to end all recruitment of children under 18, a gradual approach may be helpful. In India, Naxalites do not deny recruiting children over the age of 15 and using them as fighters. The General Secretary of the Communist Party of India (CPI)-Maoist made this clear in late 2006:

As regards training minors under 18 years in the use of arms, we wish to make it clear that our policy and the PLGA [People's Liberation Guerrilla Army] constitution stipulate that no one should be taken into the army without attaining 16 years of age. And this age limit is strictly followed while recruiting. In the specific conditions prevailing in the war zone ... children attain mental and political maturity by the time they complete 16 because they are directly or indirectly involved in the revolutionary activity from their very childhood. They receive basic education and political training early

in their lives and have organisational experience.... When the enemy ... is erasing every norm of international law, the oppressed people have the full right to arm themselves and fight. *Making a fuss over age makes no meaning in a situation where the enemies of the people are targeting children too without any mercy. If the boys and girls do not do resist with arms they will be eliminated completely.* The intellectuals of the civil society should understand this most inhumane and cruel situation created by the enemy and take the side of the people instead of pushing them more into defensive by raising all sorts of idealistic objections.¹³⁷

In April 2012, the National Democratic Front of the Philippines (NDFP) issued a Declaration and Program of Action for the Rights, Protection and Welfare of Children. It reaffirmed the rights of Filipino children in times of peace and during armed conflict. The Declaration, explicitly referring to international human rights and humanitarian law, stated:

Article III. Children in relation to the civil war

The NDFP is cognizant of the rigors and risks for children in communities and areas affected by the civil war. ...

Section 1. The NDFP adheres to the decision of the Political Bureau of the CPP's Central Committee in 1988 stipulating that the New People's Army may recruit only persons who are 18 years old and older as armed fighters for its combat units even as Article 77(2) of the 1977 Protocol I Additional to the 1949 Geneva Conventions ... still legally permits

¹³⁶ Islamic Emirate of Afghanistan, 'An open letter to the UNAMA about the biased behaviour of this Organization', 22 February 2013. At: <http://blogs.mediapart.fr/blog/lynx/010313/open-letter-unama-about-biased-behavior-organization>.

¹³⁷ Human Rights Watch, *Dangerous Duty: Children and the Chhattisgarh Conflict*, September 2008, pp. 32-3 (emphasis added). At: http://www.hrw.org/sites/default/files/reports/naxalite0908web_0.pdf.

the recruitment of children 15 years and above as soldiers.

Section 4. The NDFP confirms the following: ... Article 1 of the Basic Rules of the New People's Army as amended by the Memorandum of October 1999 of the Executive Committee of the Central Committee of the Communist Party of the Philippines, has been replaced by the following text in order to clarify the commitments of the NPA and to avoid any misinterpretation:

1. Any person, who is at least 18 years of age and is physically and mentally fit, regardless of sex, race, nationality or religion, has the capacity to fight and is ready to participate in armed struggle against the reactionary state power, may become a combatant or a member of a fighting unit of the New People's Army.

Any person, not less than 15 years of age, may be admitted as a trainee or apprentice of the New People's Army and may be assigned to self-defence and other non-combat units and tasks.

The restriction on youth or children below the age of 18 years does not forfeit the primordial right of self-defence in the face of clear and imminent threat to life.

In the event of enemy aggression against or encroachment on the territory of the people's democratic government, all persons above 15 years of age may be mobilized for self-defence, provided that priority among those below 18 years of age but more than 15 years of age shall be given to the eldest ones in the distribution of weapons of self-defence. The foregoing amendment shall take immediate effect.

Section 5. The NDFP recognizes the 1990 Convention on the Rights of the Child. However, the NDFP considers the 2000 Optional Protocol on the Involvement of Children in Armed Conflict, particularly on the prohibition of recruitment of children under 18 years of age in the armed forces and armed groups and their participation in hostilities, as not legally binding. Hence, it does not impose legal obligations on the NPA.¹³⁸

138 NDFP Declaration and Program of Action for the Rights, Protection and Welfare of Children, 24 April 2012, pp. 4-6. At: <http://theirwords.org/?country=PHL&ansa=75>.

Section H: Detention

The rules governing detention

Although the practice has seldom been described, armed groups often detain civilians or combatants, and also sometimes put them on trial (see Section I). This section discusses human rights norms with respect to civilians and captured fighters, and the obligation under humanitarian law to treat them humanely at all times. Some standards are more controversial than others, and those that apply to the legality of detention, detention procedures, and treatment while in detention remain somewhat unclear. Armed groups that are mobile also face particular practical challenges.¹³⁹

Armed groups may not regard detaining people, even for prolonged periods, as kidnapping or hostage-taking.¹⁴⁰ In India, for example, the Naxalites responded to allegations of kidnapping by stating:

These are not ‘kidnaps’ done for ransom, vendetta, personal demands or settling scores. People

are ‘arresting’ them and putting the genuine long-standing collective demands of the oppressed people, particularly the *adivasis* [indigenous Indians] in those areas in front of the government. All the demands are pertaining to the severe excruciating state repression that has been unleashed on them, particularly for the release of thousands of Adivasis incarcerated in the jails and their leaders.¹⁴¹

With respect to the prohibition on ill-treatment of military prisoners during armed conflict, in Syria, the Free Syrian Army’s Code of Conduct (August 2012) includes an explicit commitment to international human rights law:

I will respect human rights in accordance with our legal principles, our tolerant religious principles, and the international laws governing human rights.¹⁴²

Moreover, Articles III to VII refer to human rights and IHL rules, on respect for prisoners, prohibition of torture and other forms of ill-treatment, and prohibition of murder and pillage. However, some FSA soldiers interviewed by a UN Commission of Inquiry said that lower level soldiers were tried

¹³⁹ Such groups might be tempted to murder captured soldiers instead of detaining them, even though this would constitute a war crime.

¹⁴⁰ See, for example, Art. 1(1) of the 1979 International Convention. This states: ‘Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention’.

¹⁴¹ ‘Maoist Central Committee justifies abductions, says those were “arrests by the people”’, New Delhi Television, 24 May 2012. At: <http://www.ndtv.com/article/india/maoist-central-committee-justifies-abductions-says-those-were-arrests-by-the-people-215349>.

¹⁴² Code of Conduct of the FSA, 8 August 2012, Art. II. At: https://www.facebook.com/note.php?note_id=508232342537240.

Box 8. Humane treatment of civilians and captured fighters: selected sources of key norms

The obligation of humane treatment of detainees

ICRC Study of Customary IHL, Rules 87, 134, 135.*

1949 Geneva Conventions, Common Article 3.

1977 Additional Protocol II to the Geneva Conventions, Articles 4(1), 5(3), and 7.

1966 International Covenant on Civil and Political Rights, Article 10(1). 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Human rights treaties are not explicitly applicable to armed groups, but the prohibition on torture or cruel, inhuman or degrading treatment or punishment is a fundamental norm that applies in all circumstances.

1969 American Convention on Human Rights, Article 5.

1981 African Charter on Human and Peoples Rights, Article 5.

2004 Arab Charter on Human Rights, Article 20.

The prohibition of torture and cruel treatment

ICRC Study of Customary IHL Rule 90.*

Common Article 3 to the 1949 Geneva Conventions.

1977 Additional Protocol II to the Geneva Conventions, Article 4(2).

1966 International Covenant on Civil and Political Rights, Article 7.

1989 Convention on the Rights of the Child, Article 37(a).

1950 European Convention on Human Rights, Article 3.

1969 American Convention on Human Rights, Article 5(2).

1981 African Charter on Human Rights, Article 5.

2004 Arab Charter on Human Rights, Article 8.

* From the 2005 ICRC Study of Customary IHL.

by courts applying sharia law, and many claimed never to have heard of international humanitarian and human rights law. A soldier said that he believed that the creed 'an eye for an eye' was part of sharia law and 'supersedes international standards'.¹⁴³

The armed wing of Hamas stated in October 2011 that:

We treated the prisoner as well as can be in accordance with our

Islamic ethics through the years, simultaneously, the occupation perpetrated oppressive, vengeful measures against our prisoners, while the 'civilized' world [was] watching. This puts a responsibility before freedom loving people worldwide to work to put the humanitarian issue of Palestinian prisoners of the forefront of their priorities.¹⁴⁴

143 'Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic', UN Human Rights Council, 26 June 2012, §91.

144 EQB, 'On the occasion of implementing the "Devotion of Free" prisoner exchange deal', press release, 18 October 2011. At: http://www.qassam.ps/statement-1402Devotion_of_the_Free_prisoner_exchange_deal.html.

The Libyan Islamic Fighting Group affirmed in *Corrective Studies* (see Section C) the ‘obligation of kindness to prisoners of war’ and prohibited the mutilation of the dead as well as ‘hiding spoils from the leader’.¹⁴⁵

Policies and approaches

Consider the possibility of a specific agreement

Ensuring that detainees are treated humanely is an important objective, though it is sensitive, especially for governments (which consider any detention by armed groups to be hostage-taking or kidnapping and perceive any form of court convened by an armed group to be a kangaroo court without legal standing). Torture and inhumane treatment of detainees are war crimes. One option is to promote specific agreements, perhaps with the United Nations, to promote their release. In Sudan, for example, the Justice and Equality Movement pledged in 2009 to ‘exchange prisoners and release imprisoned, convicted, detained and arrested persons in relation to the conflict between them with a view to building confidence and accelerating the peace process’.¹⁴⁶

Consider the possibility of a unilateral declaration

It is more usual for armed groups to make unilateral declarations on treatment of detainees. In Libya, the National Transitional Council issued detailed instructions in May 2011 on how to treat detainees May 2011. The following is an excerpt:

¹⁴⁵ Musawi, *A Selected Translation of the LIFG Renunciation Document*, Quilliam 2009, p. 18. At: <http://their-words.org/?country=LB&ansa=213>.

¹⁴⁶ JEM, *Agreement of Good Will and Confidence Building for the Settlement of the Problem in Darfur*, 17 February 2009, §4.3.c. At: <http://www.sudantribune.com/spip.php?article30199>.

Detainees must receive humane treatment AT ALL TIMES, from the moment of capture. DO respect detainees and protect them from harm.

Humane Treatment:

DO NOT use any form of physical, sexual or mental violence against any detainee. No form of torture or intimidation is allowed.

DO NOT subject detainees to humiliating or degrading treatment such as displaying them in a publicly humiliating fashion.

DO NOT take revenge on detainees.

DO NOT hold individuals answerable for acts for which they are not personally responsible.

DO NOT remove personal property from the detainees unless this is for security reasons. If any property is removed, a receipt must be provided to the detainee.

DO NOT obey an order to carry out any of these prohibited acts. That order is unlawful.

REPORT ANY INCIDENTS OF INHUMANE TREATMENT TO A SUPERIOR OFFICER

Give immediate medical treatment/ first aid to anyone who needs it.

There is a duty to search for, collect, and aid the injured and wounded from the battlefield of both sides. The dead must also be collected, treated with respect, and buried.

Take detainees to a safe place of detention. Once at a place of detention follow these steps:

a: Provide any further necessary medical treatment.

b: A capture card must be made and a copy sent to the ICRC.

c: Interrogate if necessary.

HUMANE TREATMENT must be observed at ALL times.¹⁴⁷

In March 2011, in a press statement on the 'treatment of detainees and prisoners', the NTC conveyed its regret 'for some individual incidents that have occurred during the first few days after the revolution'. As a consequence and to 'guarantee ... the non-repetition of such accidents', it stated that:

Any Libyan caught whether they be military personnel or citizens recruited to cause sabotage and spread chaos, should not be titled as 'Prisoner' but as a Libyan brother (or sister) who has been deceived. All prisoners and detainees will be provided with food, water and necessary medical assistance and will be treated humanely, without the use of aggression in any form. The NTC will vow to punish those who violate this code and will allow local and international human rights organizations to freely visit and talk to the detainees and prisoners at any time.¹⁴⁸

Islamic teachings are cited by some armed groups to support norms they espouse. In the Philippines, for example, the General Orders of the Bangsamoro Islamic Armed Forces referred to statements of the Prophet Mohammed,¹⁴⁹ including that 'whatever is prohibited during peace is also prohibited during war',¹⁵⁰ and stated that civilian property and fighters who are *hors de combat* should be protected.

147 NTC, *Frontline Guidelines on the fundamental rules which must be adhered to in times of conflict plus Introduction to Guidelines*, May 2011, pp. 1–2.

148 NTC, 'The Treatment of Detainees and Prisoners', press statement, 25 March 2011. At: <http://www.ntc-libya.org/english/prisoners/>.

149 BIAF, 'General Order No. 1, An Order Promulgating a Code of Conduct Regulating the Affairs of the Bangsamoro Islamic Armed Forces, Prescribing its Powers, Duties and Functions, and Other Related Purposes', June 2006 (hardcopy only).

150 *Ibid.*, Art. 34(1).

Wounded enemy combatants — Never betray or be treacherous or vindictive. Do not mutilate. Don't cut or burn palm trees or fruitful trees or ruin dwellings. Don't slay sheep, a cow, camel or other animals except for food...

Surrendered enemy combatants — Maintain and observe justice at all times and avoid blind retaliation. Protect and treat them humanely.¹⁵¹

In Yemen, the leader of the Al-Huthi fighters declared:

We have confirmed so many times that we ensure that all prisoners are being treated and dealt in a proper manner maintaining their dignity, mental and physical safety especially that we fear Allah before anyone and we deal with prisoners respecting their rights and we consider it a religious duty. We take good care of the prisoners and deal with as our sons and with what is available with us from clean clothes, provide them with proper accommodation, food and also Qat [...]. Therefore, we assure you that our treatment to the prisoners are based on our religious principles and does not contradict at all international humanitarian law and conventions.¹⁵²

He went on to say that his movement welcomed and sought help from organizations such as the Red Cross to improve the communication of hostages with their families,¹⁵³ and reaffirmed its commitment to IHL and human rights law,

151 *Ibid.*, Art. 34(6).

152 'Houthi Rebels Pledge to Comply with International Law Regarding Prisoners and Civilians, Media and Humanitarian Groups', *Armies of Liberation*, 4 September 2009, p. 1. At: <http://armiesofliberation.com/archives/2009/09/04/houthi-rebels-pledge-to-comply-with-international-law-regarding-prisoners-and-civilians/>.

153 *Ibid.*

'including the United Nations Principles on Internal Displacement'.¹⁵⁴

Other Islamist groups do not argue for humane treatment of prisoners in every instance. The Afghan Taliban's Code of Conduct (2010) has a section devoted to the treatment of prisoners, which includes the following provisions:

- 7 When you capture drivers, contractors or soldiers, releasing them for money is prohibited. The provincial authority has the right to use him for a prisoner exchange. If someone wants to guarantee him, he needs to talk to the provincial authority. If the prisoner is a high ranking person, then the Imam assistant has the right to make a decision regarding his future.
- 8 If an Afghan National Army member (ANA) is captured by the Mujahidin, the Imam or Imam assistant will make the decision whether to kill him, to use him for a prisoner exchange, or to exchange him for money. If the captured person is converted to Islam, then the Imam will exchange him if the captured person gives permission, but there should be a pledge that he will not convert back to the infidels.
- 9 If the Mujahidin take people hostage and they cannot take them to their place for any reason and the hostages are infidel fighters or they are government workers, then the Mujahidin have the right to kill them. If the Mujahidin are not sure that the hostages are infidel fighters or government workers, then they have no right to kill them, even if this means the hostages must be freed.

10 If an ANA or Afghan National Police member (ANP) surrender to the Mujahidin, they should not be killed. The Mujahidin should take care of them very well, no matter if they come with or without a weapon.

In the case of spies, it is stated that: 'If someone admits that he is spy because you forced or tortured him, that does not make this person a spy and you can't punish him. It is prohibited for a Mujahid to promise to someone that if he admits then he will not be killed, will be let go, or will not be tortured.'

In Nepal, under the 2006 Comprehensive Peace Agreement the Maoists agreed that, in 'respecting the individual's freedom and right to security', they 'shall not place anyone under whimsical or illegal detention and shall not abduct or imprison any individual'. They undertook to 'release the details of the condition of the people who have been disappeared or have been kept captives' and agreed 'to inform about their status to their family members, legal consultant or any other authorised person'.¹⁵⁵

The ELN's Code of Conduct:

- Prohibits the murder of non-combatants.
- Prohibits use of civilians as human shields.
- Prohibits pillage and seizure.
- Sets out detailed rules for respecting prisoners of war, who must be treated with dignity and humanely.
- Prohibits murdering or wounding an adversary who surrenders or is *hors de combat*.

¹⁵⁵ Comprehensive Peace Agreement 2006, 21 November 2006, §7.3.1. At: <http://www.satp.org/satporgtp/countries/Nepal/document/papers/peaceagreement.htm>.

The Code notes, however, that mercenaries and spies will not be provided with the same protection as prisoners of war, though they will be treated with humanity.¹⁵⁶

Sometimes armed group agreements or declarations have clearly been written by foreign lawyers. This may reduce the likelihood that these instruments will be taken seriously, because it can be perceived that they are only for foreign consumption.

Finally, it is interesting to highlight the case of one armed group that changed its position and behaviour. Having kidnapped civilians since 1964 to finance its guerrilla war, in February 2012 the Revolutionary Armed Forces of Colombia (FARC) publicly announced that it would cease this practice.¹⁵⁷ In the same document, the group's leader added that this step was taken to demonstrate FARC's commitment to work towards a peaceful solution to the conflict in Colombia. This is a reminder that many armed groups are potentially dynamic, which creates opportunities for dialogue, given the right conditions.

156 *El Ejercito de Liberation Nacional y el Derecho Humanitario*, Cedema.org, 15 July 1995. At: <http://cedema.org/ver.php?id=3391>.

157 *Secretariado del Estado Mayor Central de las FARC-EP*, 'Comunicado Publico sobre Retenciones y Prisioneros', Montañas de Colombia, 26 February 2012. At: http://www.resistencia-colombia.org/index.php?option=com_content&view=article&id=1212:secretariado-del-estado-mayor-central-de-las-farc-ep&catid=22&Itemid=37.

Section I: Trial

The rules governing fair trial

Armed groups find it difficult to respect fair trial rights because most do not have access to trained judges and lawyers. In a non-international armed conflict, IHL prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.¹⁵⁸ This is a customary law rule.¹⁵⁹

The International Committee of the Red Cross (ICRC) has stated that, in a fair trial, an accused person has the right:

- To trial by an independent, impartial, and regularly constituted court.
- To be presumed innocent.
- To receive information on the nature and cause of the charges.
- To defend himself or herself and be assisted by a lawyer of his or her choice.
- To have free legal assistance if the interests of justice so require.
- To be granted sufficient time and facilities to prepare a defence.
- To communicate freely with counsel.
- To be tried without undue delay.
- To examine witnesses and have them examined.
- To the assistance of an interpreter, if he or she cannot understand the language used in the proceedings.
- To be present at his or her trial.
- To not be compelled to testify against himself or herself or confess guilt.
- To be tried in public and to have judgement pronounced publicly, unless this would prejudice the interests of justice.
- If convicted, to be advised of available remedies and their time-limits.
- To appeal.
- To not be punished more than once for the same act or on the same charge (non bis in idem).

¹⁵⁸ Common Article 3 to the four 1949 Geneva Conventions.

¹⁵⁹ According to the ICRC, 'no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees' (2005 ICRC Study of Customary IHL, Rule 100: Fair Trial Guarantees).

Box 9. The right to a fair trial: selected sources of key norms

ICRC Study of Customary IHL, Rule 100.

Common Article 3 to the 1949 Geneva Conventions.

1977 Additional Protocol II to the Geneva Conventions, Article 6.

1998 Statute of the International Criminal Court, Article 8: war crimes.

1966 International Covenant on Civil and Political Rights, Article 14.

1950 European Convention of Human Rights, Articles 5(3) and 6.

1969 American Convention on Human Rights, Article 8.

1981 African Charter on Human and Peoples' Rights, Article 7.

Policies and approaches

Consider the possibility of technical assistance

Little is known about the practices of armed groups with respect to fair trial rights. Many organizations are likely to be unwilling to advise armed groups on how to conduct trials of military or civilian prisoners. Technical assistance should not be provided in any trial where the death penalty might be imposed.

Part III:

Legal and Policy
Recommendations
to Improve the
Protection of Civilians

Section J: Conclusions and recommendations

In addition to providing the legal background, this Policy Briefing has proposed a possible agenda for enhancing the protection of civilians in situations of armed conflict involving armed groups. It is not exhaustive, and could not be, because every situation and each armed group requires a tailored approach. There is no alternative to painstaking research, careful reflection, and sustained and high-level advocacy vis-à-vis the armed group in question, supported by technical assistance. However, the rewards of such action, in terms of better protection of civilians and captured fighters, are potentially significant. Effective engagement can save lives and prevent many forms of harm.

This section offers some general recommendations, and recommendations for specific stakeholders.

General recommendations

Before engaging with an armed group on humanitarian norms, assess the likely effects of such engagement on the protection of civilians.

Understand the reasons why particular actors do not comply with humanitarian norms. Understanding motives is key to efforts to improve compliance.

Look for, and take advantage of, ‘windows of opportunity’. Doing so can sharply increase

the success of efforts to raise humanitarian concerns with an armed group. A group may be more willing to discuss norms during a lull in fighting or ceasefire than when conflict is intense; or after a change of leadership or military strategy.

Coordinate as much as possible with other relevant groups, organizations, or individuals, bearing security concerns in mind. Engagement is more likely to succeed if approaches and messages are consistent. When they are well coordinated, different forms of engagement can be complementary and mutually reinforcing.

Cooperate with individuals and groups who can influence the behaviour of armed groups, such as local communities, diasporas, religious figures, and military experts.

Consider using a step-by-step approach to improve civilian protection. Engagement is not all or nothing; groups may adopt elements of a humanitarian agenda gradually. A gradual approach needs to be sustained and requires patience, time and resources.

When an armed group takes steps to improve protection of civilians, recognize its efforts publicly (as far as possible). Positive reinforcement is critical to further success.

Every engagement with an armed group should be systematically documented; where possible, experiences and lessons learned should be shared with the international community.

Recommendations to armed groups

Seek to protect all civilians to the maximum extent possible by adopting and implementing policies, practices, and codes of conduct. Protection can be achieved while pursuing military and political goals.

Do not engage in reprisal or revenge attacks when atrocities are committed by others. Revenge merely contributes to the creation of a spiral of violence.

Consider allowing external bodies to monitor compliance with undertakings and commitments. Independent, impartial monitoring enhances the reputation of an armed group and the credibility of its humanitarian commitments.

Whenever humanitarian norms have been violated, and especially when civilians have been targeted, publicly acknowledge mistakes and take appropriate disciplinary action. Armed groups should communicate details of such incidents to the international community, including the aims of the group, the reasons for the attack, and any action taken afterwards to redress abuses or mistakes, for example by acts of reparation.

Recommendations to states

Permit impartial bodies to engage with armed groups on the subject of civilian protection whenever possible. Draconian domestic counterterrorism legislation can indirectly contribute to civilian harm and suffering by impeding or preventing disinterested engagement with armed groups.

List armed groups as 'terrorist' only as a last resort. Because it is very difficult to remove an armed group from a list of terrorist organizations once it has been so designated, listed groups may feel they

have less incentive to respect international norms. In addition, key groups or individuals may be excluded from peace negotiations, unnecessarily prolonging the conflict in which they are involved.

Recommendations to international and non-governmental organizations

Inform armed groups about the existence and content of international norms. Many armed groups lack, or desire, information about their international legal obligations. Some members of armed groups have concluded in retrospect that civilians would have suffered less harm had more information on humanitarian norms been available to them.

Demonstrate the benefits of compliance. In any engagement with armed groups and their members, seek to identify positive incentives: military, legal, political or humanitarian benefits that the group or its members will derive from complying with international norms.

Do not subordinate the protection of civilians merely to gain access to communities at risk. Difficult decisions must be made, but in general they should be guided by the well-being of civilians.

When an armed group makes undertakings, follow up and secure them by providing monitoring and technical assistance. No agreement is implemented as a matter of course. Successful implementation requires sustained commitment from all sides. Be willing to provide support whenever it is appropriate and feasible.

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Annexes

Annex 1. List of Armed Groups

To prepare this Policy Briefing, the project analysed policies of the following armed groups.

Africa

Ansaru	Nigeria.
Boko Haram	Nigeria.
JEM	Justice and Equality Movement. Sudan.
LRA	Lord's resistance Army. Uganda, South Sudan, DR Congo, Central African Republic.
M23	DR Congo.
SLM/SLA	Sudan Liberation Movement/Sudan Liberation Army. Sudan.
SPLM	Sudan People's Liberation Movement. Sudan.

Asia

Bersatu	United Front for the Independence of Pattani. Thailand.
BIAF	Bangsamoro Islamic Armed Forces. Philippines.
BRN-C	National Revolutionary Front-Coordinate. Thailand.
Haqqani Network	Pakistan/Afghanistan.
CPN (M)	Communist Party of Nepal (Maoist). Nepal.
MILF	Moro Islamic Liberation Front. The Philippines.
Naxalites	Communist Party of India-Maoist. India.
NPA/NDFP	New People's Army/National Democratic Front of the Philippines. The Philippines.
PULO	Pattani United Liberation Organisation. Thailand.
Quetta Shura Taliban	Afghanistan.
TTP	Pakistan Taliban. Pakistan.

Europe

Armed Forces of Abkhazia

PKK

Kurdistan Workers' Party. Turkey.

Chechen rebel movements

Latin America

ELN

Ejercito de Liberación Nacional. Colombia.

FARC-EP

Revolutionary Armed Forces of Colombia.

Middle East

Al-Houthi

Yemen.

AQAP

al-Qaeda in the Arabian Peninsula. Saudi Arabia and Yemen.

Ezzeddeen Al-Qassam

Brigades:

see Hamas.

Fatah

West Bank.

FSA

Free Syrian Army. Syria.

Hamas

Armed wing: Ezzeddeen Al-Qassam Brigades. Gaza.

Hezbollah

Lebanon.

LIFG

Libyan Islamic Fighting Group. Libya.

NTC

National Transitional Council. Libya.

Annex 2. Selected humanitarian norms

This Annex lists humanitarian norms which the project prioritized. The norms selected do not represent all applicable rules,¹⁶⁰ and it is not presumed that a ‘hierarchy’ of international norms exists. It is a list of core humanitarian rules that protect civilians and other groups at risk, notably captured soldiers and fighters.

A. Targeting

1. Civilians shall never be attacked. A civilian is any person who is not a member of the armed forces.
2. Civilian objects shall never be attacked. Civilian objects are all objects that are not military objectives. In case of doubt, an object shall be presumed to be civilian.
3. Where (and only where) a civilian participates directly in hostilities, he or she loses protection against attack, but only for the period of that direct participation.
4. During the conduct of military operations and in areas under military control, constant care must be taken to spare the civilian population and civilian objects.
5. It is prohibited to launch any attack which may be expected to cause loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage expected.
6. All feasible precautions must be taken to protect the civilian population and civilian objects against the effects of attacks.

B. Specific Methods of Warfare

1. Starving the civilian population is prohibited. It is prohibited to attack, destroy, remove, or render useless objects that are indispensable to the survival of the civilian population.
2. Rapid and unimpeded passage of humanitarian relief must be allowed and facilitated for civilians in need, as long as that relief is impartial in character and conducted without any adverse distinction.
3. It is prohibited to attack civilians in reprisal.

C. Weapons

1. The use of anti-personnel mines, including improvised mines, is generally prohibited.

160 For the list of rules of customary international humanitarian law identified by the International Committee of the Red Cross, with substantive commentaries, see ICRC, Customary IHL Database, Part 1, Rules. At: http://www.icrc.org/customary-ihl/eng/docs/v1_rul.

D. Treatment of Civilians

1. Civilians, as well as captured fighters, must be treated humanely. Children and women must be accorded special respect.
2. Murder is prohibited at all times.
3. Torture and cruel, inhuman, or degrading treatment are prohibited.
4. Rape and other forms of sexual violence are prohibited.
5. Pillage is prohibited. Civilian objects and property shall be respected.
6. The civilian population, in whole or in part, shall not be forcibly displaced for reasons related to the conflict, unless the security of civilians or imperative military necessity so demand.
7. Where civilians or captured fighters are put on trial for an alleged crime, they must be afforded all of the basic guarantees and procedures generally recognized as necessary in a fair trial.

E. The use of children as soldiers

1. Children must not be recruited into armed groups.
2. Children must not be allowed to take part in hostilities.

F. Individual and command responsibility

1. Individuals are criminally responsible for war crimes they commit. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders or where such crimes could reasonably have been prevented.

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