

The Lawful Killing of Civilians Under International Humanitarian Law

Written by Beth Morrison

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BETH MORRISON, MAY 27 2022

Given that the laws of war are intended to protect those who are not participating in hostilities during times of armed conflict, it may come as a surprise that civilians can still be lawfully killed in war. To be clear, the deliberate targeting of civilians is a war crime, nevertheless, in certain situations, the foreseen, but incidental killing of civilians is permissible in war. This article will lay out some of the responsibilities that combatants and fighters have towards civilians under the body of international law that regulates warfare: International Humanitarian Law (IHL).

IHL is a set of rules that seek to minimise the effects, destruction, and carnage of armed conflict for humanitarian reasons. It is contained in conventions, treaties, customary law and general principles, notably in The Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1949 and their Additional Protocols of 1977.

Although IHL's aims are humanitarian, IHL is pragmatic in its acceptance of the realities of armed conflict. It does not outright forbid armed conflict, or even have a blanket prohibition on the killing of civilians. IHL recognises that the aim of war is to fight and win, and killing is a means towards that end. Such killing, however, cannot be unlimited. Arguably, IHL is suitably ambiguous to permit a broad interpretation, on a case-by-case-basis, while affording protections to those not part of the hostilities. This balancing act allows militaries enough scope to carry out their strategies, while at the same time alleviating suffering and ensuring accountability for acts that could amount to war crimes.

As such, IHL attempts to limit the destruction of war by providing a guideline for what is appropriate amidst the waging of war, and calls for restraint. IHL demands that when war is waged, it is waged with strategy and discipline, and with respect for human life. Fundamentally, IHL's primary aim is to reduce human suffering in war by limiting the effects of armed conflict, as opposed to banning human suffering by eradicating armed conflict. Therefore, there are instances where the killing or wounding of civilians may be deemed lawful under IHL.

One of the primary tenets of IHL is the rule of distinction. 'Distinction' demands that belligerents and fighters at all times distinguish between civilians and civilian objects on one hand, and combatants and military objectives on the other hand, so as to protect persons not taking part in the conflict. Civilians can never be deliberately and indiscriminately targeted, and to do so is a war crime. The same is true for targeting civilian property, especially hospitals, schools and cultural properties, or items essential to the population's survival, such as crops, farm animals or water supplies.

The rule of distinction also applies to the means of warfare. Certain weapons with the capacity to disproportionately harm civilians (as their effects cannot be controlled) are banned by treaties. Examples of these weapons include chemical weapons, biological weapons, anti-personnel landmines, and cluster munitions. When a specific weapons system is expressly proscribed, it is usually because it does not meet the legal requirements of discrimination. Once fired, these weapons cannot tell civilians and combatants apart, instead taking everyone within its radius as a casualty.

IHL also bans indiscriminate methods of warfare, such as area bombardment, which involves dropping large,

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imprecise, bombs over populated urban areas through air strikes and ground shelling. Any attack that is not launched at a specific military objective, or which involves a method or means of warfare that cannot be conducted with precision, is considered an indiscriminate attack, and therefore a war crime.

A second tenet of IHL relevant to civilian casualties is the rule of proportionality. 'Proportionality' demands that when estimating the civilian deaths or injuries from an attack on a legitimate military target, the harm caused cannot be excessive (disproportionate) to the concrete and direct anticipated military advantage to be obtained by the attack. In other words, if the harm to the civilians or civilian objects is deemed too great or excessive to the direct military advantage anticipated, the attack cannot lawfully take place. This principle balances the interests between a concrete and direct military advantage on one hand, and the incidental loss in civilian lives or damage to civilian objects on the other. Proportionality is a serious responsibility combatants have towards civilians, and yet nowhere in the laws of war is proportionality clearly defined. It is subject to a case-by-case determination, a task determined by the combatant at the time of targeting, and is ultimately left for the courts and tribunals to legally adjudicate on. This ambiguity is acknowledged in the ICRC's commentary on Article 51(5) of 1977 Additional Protocol I:

Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.

The rules of distinction and proportionality are further nuanced by the principle of 'military necessity'. This principle permits combatants to carry out necessary attacks to achieve a legitimate military objective, even if these attacks will result in foreseen civilian casualties. Importantly though, under IHL, the only legitimate military purpose is the weakening of the military capacity of the opposing belligerents. For example, if a munitions factory full of civilian workers were targeted, any workers harmed or killed would likely be done so lawfully, presuming the destruction was not disproportionate to the advantage gained. As the destruction of the enemy's munitions factory would weaken them militarily, it may be deemed a legitimate military target.

In summary, IHL allows for the killing of civilians when militarily necessary, subject to the principles of distinction and proportionality. This stems from a recognition that killing is a given in wars, and it is simply unfeasible to criminalise all kinds of civilian deaths. IHL can be understood as accepting the realities of violence in war while restraining its effects. Fundamentally, as long as an attack is proportionate to the concrete and direct anticipated military gains, any incidental wounding or killing of civilians may not automatically be deemed an unlawful act, subject to individual assessment.

About the author:

Beth Morrison is a doctoral research candidate in International Relations at the University of Queensland specialising in Civilian Protection. Her current research focuses on US military practices and the laws of war, and on providing compensation for civilian victims of lawful harm. She is also Executive Director for Women in International Security Australia, an International Humanitarian Law community speaker for the Red Cross and teaches in both International Relations and Public Policy and Governance at the University of Queensland.