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**Under Siege:  
International Humanitarian Law and Security Council Practice  
concerning Urban Siege Operations**

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## Note from the CHE Project

As part of its objective to inform debate regarding the intersecting trajectories of counterterrorism norms and humanitarian action, the CHE Project publishes independent research and policy reports from experts in various associated fields. Against the backdrop of the international legal framework and with a focus on Syria, this paper analyzes operational dimensions of urban siege warfare. In doing so, the paper examines and illuminates an important facet of the ongoing armed conflict in Syria. Listed armed groups designated as "terrorists" control access to territory and civilians in Syria, and those groups operate in areas reportedly surrounded by government forces. Humanitarian actors may thus benefit from an understanding of the international legal framework applicable to urban siege operations, as well as how military actors may assess the value and feasibility of such operations. The CHE Project asked Professor Sean Watts—a Professor of Law at Creighton University School of Law—to examine international humanitarian law applicable to siege operations and UN Security Council Resolution 2139 (2014) with a view toward the implications for humanitarian actors. Professor Watts concludes that while siege operations, as traditionally practiced, are not technically prohibited, they are now significantly limited by IHL in both international armed conflict and non-international armed conflict, and that international political opinion seems to have increasingly little patience, at least in connection to some contexts, for the human suffering and deprivation involved in urban sieges.

# UNDER SIEGE: INTERNATIONAL HUMANITARIAN LAW AND SECURITY COUNCIL PRACTICE CONCERNING URBAN SIEGE OPERATIONS

Sean Watts<sup>1</sup>

## 1. Introduction

Along with a host of weighty operational and policy considerations, urban siege operations present complex legal issues to humanitarian relief organizations. A sound understanding of the military operational and international legal dimensions of urban siege operations may benefit humanitarian organizations negotiating access to besieged areas for relief efforts. This paper provides a brief orientation to modern military principles that guide urban siege operations and traces the applicable IHL landscape. Particular attention is paid to IHL limits on belligerent parties' conduct with respect to targeting operations and to treatment obligations concerning besieged civilian populations.<sup>2</sup> Additionally, this paper evaluates the legal significance and effect of recent United Nations (UN) Security Council decisions concerning hostilities in the Syrian Arab Republic on IHL provisions applicable to sieges.

From these observations, this paper draws three major conclusions. First, modern military doctrine regards siege operations as essential to the effective conduct of hostilities. Second, while as a general matter IHL obligations still differ between international and non-international armed conflicts, few meaningful substantive differences exist with respect to IHL targeting and treatment obligations specific to siege operations. And third, IHL and international opinion evince significantly reduced tolerance for the nearly inevitable humanitarian costs of urban siege operations, especially as traditionally conducted. While neither IHL nor any other international legal framework forbids urban siege operations as such today, belligerent parties' prerogative to conduct siege operations is significantly reduced and may be approaching a vanishing point. Considering recent decisions of the UN Security Council, traditional urban siege operations may rapidly be coming to the point of impracticability from legal and operational viewpoints.

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<sup>2</sup> Although doubtless applicable, the targeting principles and rules discussed in this paper operate differently in many regards with respect to sieges or encirclements of military installations with no civilian presence.

## 2. The Modern Military Necessity and Doctrine of Siege Operations

Although the term ‘siege’ often stirs archaic images of war, siege operations have proved to be remarkably persistent facets of armed conflict. Despite purported revolutions in military affairs, siege operations remain a core competency and operational staple of modern armed forces. And if military doctrine and population demographics are guides, sieges are likely to remain regular features of future warfare. The coincidence of modern armed forces’ greater sensitivity to civil considerations with increased urbanization of civilian populations indicates a sustained, and perhaps increased, role for sieges in future armed conflict.<sup>3</sup> Even a rudimentary understanding of how and why armed forces undertake siege operations—or ‘encirclement operations,’ as they are also known in both doctrine and law<sup>4</sup>—can help facilitate application of relevant IHL provisions.

Compelling strategic and operational practicalities have consistently drawn belligerents into urban combat.<sup>5</sup> Urban areas often occupy vital geographic locations such as ports, riverfronts, or crossroads. The features that make urban locations attractive to their regular inhabitants—access to routes of ground, sea, and air transit, concentrations of resources, and human capital—make them similarly attractive, and often imperative, to successful military operations.

Military doctrine cautions commanders to weigh carefully the necessity of urban operations before undertaking them.<sup>6</sup> Buildings and bridges present ready-made obstacles, easily converted by even weak defending forces into effective fighting positions resistant to the most capable and determined attacker. The complex physical characteristics of urban terrain—irregular street patterns, intricate and ill-defined internal and external building spaces, subterranean routes and structures, and vertical vantage points—“voluminously extend the commanders [sic] area of operations.”<sup>7</sup>

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<sup>3</sup> For an example of military doctrine emphasizing attention to civilian centers of gravity see UNITED STATES DEP’T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, ¶1-129 (2006) (instructing counterinsurgent forces to isolate insurgents from sources of support among the civilian population); *id.* at 3-2 (noting intelligence preparation in counterinsurgency operations “places greater emphasis on civil considerations, especially people and leaders in the [area of operations] than does [intelligence preparation] for conventional operations.”). For data on the phenomenon of urbanization see Alexandre Vautavers, *Military Operations in Urban Areas*, 92 INT’L REV. RED CROSS 437 (2010) (citing ANTONIN TISSERON, GUERRES URBAINES: NOUVEAUX MÉTIERS, NOUVEAUX SOLDATS 3 (2007)(noting that “[i]n 2010, 75% of the world’s inhabitants live in urban areas.”).

<sup>4</sup> United States, Dep’t of the Army, Field Manual 3-90-2, Reconnaissance, Security, and Tactical Enabling Tasks, 6-1 (2013)[hereinafter FM 3-90-2]; United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, ¶5-34 (2004).

<sup>5</sup> To be sure, not all sieges take place in urban areas. The battle of Dien Bien Phu saw Viet Minh forces, led by General Vo Nguyen Gap conduct siege operations against a French Expeditionary Corps military stronghold in rural, northwest Vietnam. See generally, BERNARD B. FALL, *HELL IN A VERY SMALL PLACE: THE SIEGE OF DIEN BIEN PHU* (1967).

<sup>6</sup> United States Dep’t of the Army, Field Manual 3-06, Urban Operations, 1-3 – 1-4 (2006) [hereinafter FM 3-06].

<sup>7</sup> *Id.* at 2-3, para. 2-10.

Urban concentrations of civilian populations also confront armed forces with difficult human conditions. Urban populations' heterogeneous collections of culture, language, and religion, as well as other diverse human demographics, complicate military-civilian interactions. In addition to complicating attackers' efforts to limit the effects of targeting operations to enemy belligerents, urban civilian populations offer defending forces logistical, informational, and moral support. Conducting military operations in this complex human environment has often proved a time-consuming, dangerous, and resource-intensive method of combat.

It is not surprising, then, that throughout history commanders have declined to advance into urban areas, resorting instead to encirclement and siege to reduce enemy resistance or provoke surrender. Even for numerically and technically superior forces, sieges may be tactically and strategically compelled. Siege operations are often necessary to avoid the high attacking-force casualty rates associated with urban combat, to divert or preserve valuable forces for later operations, or to avoid highly destructive block-by-block urban assaults. Siege operations may also be desirable as a means to leverage an attacking force's relative advantage in firepower over a besieged enemy's relative advantage in manpower. Where military doctrine traditionally prescribes that attackers employ a three- or five-to-one numerical advantage against defending forces, encirclement operations merely call for a rough numerical parity of forces.<sup>8</sup>

Review of current military doctrine also reveals that isolation is essential to successful siege operations. An influential military field manual observes, "Isolation of an urban environment is often the most critical component of shaping operations."<sup>9</sup> Besieging forces can impose isolation in three forms: physical, psychological, or electronic. Physical isolation, separation from reinforcement and logistical supply, is the most widely understood and historically practiced form of isolation employed in siege. Indeed, physical isolation may be the *sine qua non* of siege. Psychological isolation has proved important as well. Information operations and military deception separate the besieged force from outside sources of moral support. Psychological isolation deprives the besieged force of political and emotional support in order to reduce morale and the will to resist. Finally, military doctrine increasingly appreciates electronic isolation as a critical form of separation during siege.<sup>10</sup> Electronic warfare and network attacks can reduce enemy capacity to command and control besieged forces and can also distort the enemy's operational awareness to the advantage of the besieging force.

While operationally desirable or even essential, isolation of besieged areas almost inevitably produces tensions with the humanitarian needs of civilian populations. Civilians in besieged areas unavoidably share the hardships of besieged forces. Efforts directed at isolating enemy forces, whether physical, psychological, or electronic, can have massively harmful effects on civilians. In fact, experience indicates civilians are likely to

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<sup>8</sup> FM 3-90-2, *supra* note 4, at 6-3.

<sup>9</sup> FM 3-06, *supra* note 6, at 6-3.

<sup>10</sup> FM 3-90-2, *supra* note 4, at 6-2.

experience the deprivations of isolation, physical, psychological, or electronic, far sooner and to a greater extent than their military co-besieged.<sup>11</sup>

It is clear that, even in an age of networked and highly mobile warfare, the forces that drive belligerents to wage urban siege warfare remain at work. As long as control of urban areas and the populations that occupy them remains relevant to the political goals of warfare, urban military operations, including siege, will persist as relevant, even necessary, methods of warfare. Yet the extent to which the fundamental principles prescribed for successful execution of sieges, such as imposing isolation, accord with internationally prescribed humanitarian limits on warfare is in some doubt. International legal restraints now operate to significantly limit siege warfare, especially the long-recognized siege imperative of physically isolating besieged forces.

### 3. International Humanitarian Law Applicable to Siege Operations

If sieges and urban operations have proved difficult for military forces, they have been disastrous for civilian populations. Historic sieges, Troy and Aleppo,<sup>12</sup> Vienna and Paris, Liège and Leningrad, are a litany of humanitarian catastrophes. Turning to recent memory, the human toll is little changed. Sarajevo, Grozny, and now the Syrian cities of Homs, Ghouta, and Aleppo have joined (or, in the sad case of Aleppo, rejoined) the unfortunate litany. While modern military doctrine counsels greater attention to avoiding civilian casualties and destruction of civilian property, humanitarian actors and commanders alike seeking to prevent or relieve human suffering face extensive challenges during siege operations, not least of which is navigating and effectively resorting to notoriously vague provisions of IHL.<sup>13</sup>

IHL limits belligerent parties' conduct during sieges most significantly in two respects. First, IHL includes significant restraints on targeting operations—efforts to use violent, destructive force against enemy forces—especially those that foreseeably impact civilian populations. Second, IHL closely regulates belligerents' treatment of and respect for civilian persons under their control. Readers familiar with the structure of IHL may recognize these two strains of regulation respectively as the so-called Hague and Geneva traditions of the *ius in bello*.<sup>14</sup> These regulatory traditions, especially in their modern

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<sup>11</sup> JOHN STOYE, THE SIEGE OF VIENNA 242 (1964) (describing briefly disease and suffering among elderly civilians); LEON GOURE, THE SIEGE OF LENINGRAD 216-53 (1962) (describing deteriorating condition of the civilian population) [hereinafter GOURE].

<sup>12</sup> Aleppo bears the unfortunate distinction of having suffered numerous brutal sieges in the years 639, 962, 969 and 1259-60. DICTIONARY OF BATTLES AND SIEGES: A-E, 28 (Tony Jaques, ed., 2007). After winning the 962 siege of Aleppo, Byzantine forces killed or enslaved the city's entire Arab population. *Id.* For a brief description of tactical conditions at the Mongol siege of Aleppo in 1259, see Kate Raphael, *Mongol Siege Warfare on the Banks of the Euphrates and the Question of Gunpowder (1260-1312)*, 19 J. ROYAL ASIATIC SOC. 355, 364 (2009).

<sup>13</sup> FM 3-90-2, *supra* note 4, at Appendix A, A-6 (advising besieging forces to “minimize collateral damage” and “separate noncombatants from combatants”).

<sup>14</sup> Some recognize a bifurcation of the modern *ius in bello* between rules derived from the Hague Regulations of 1899 and 1907 on one hand and rules appearing in the various iterations of the Geneva

incarnations, place significant restraints on the conduct of siege operations and in some respects even require belligerents to abandon central tenets and military doctrine applicable to urban siege warfare.

Readers familiar with IHL will also recall the critical issue of conflict classification. States have long differentiated, in many respects, IHL applicable to international armed conflicts (IAC) from that applicable to non-international armed conflicts (NIAC). Classifying an armed conflict as either IAC or NIAC remains an essential first step in any IHL analysis. While States have committed to far more extensive IHL regulation of IAC than NIAC, a significant trend toward regulatory parity, especially through development of custom, has emerged. This section will analyze both Hague and Geneva tradition siege rules for applicability in IAC and NIAC, revealing few meaningful substantive differences in IHL provisions specifically applicable to siege.

### A. The Conduct of Hostilities during Siege

Early customary regulation of siege warfare did not focus significantly on humanitarian concerns. Formalistic and symbolic expressions of chivalry, such as sending heralds, and the desire to profit personally from looting appear to have prevailed over efforts to prevent suffering and destruction.<sup>15</sup> Ancient and medieval siege operations usually featured humanitarian efforts as functions of attacker self-interest or cultural identification with the besieged population rather than as matters of legal obligation. As a general matter, once a besieged force rejected the surrender demands of a besieging force, the former was regarded as entirely liable for damage and suffering the latter inflicted, including indiscriminate destruction of property, pillage and deprivation, or even murder of civilians.<sup>16</sup> Civilian populations would wait centuries for international legal protection from targeting operations during sieges.

The Annexed Regulations of the 1899 Second and 1907 Fourth Hague Conventions are the earliest, multilateral treaties to regulate targeting operations and also siege. These Regulations include one of only four operative IHL provisions to resort to the term

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Conventions on the other hand. The former rules are typically said to be of the Hague Tradition and concern primarily regulation of the means and methods used in warfare. Rules derived from the so-called Geneva Tradition typically focus on protections for the victims of warfare, including the wounded, sick, shipwrecked, and civilians. Additional Protocol I to the 1949 Geneva Conventions represents perhaps the most significant blending of the two traditions. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Still, the bifurcation has always been slightly artificial, as each tradition has consistently overlapped with the other. For instance, both the Hague and Geneva Traditions have long addressed protections for prisoners of war. *See* Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, arts. 4-20, October 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Regulations]; Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

<sup>15</sup> *See e.g.* PAUL BENTLEY KERN, ANCIENT SIEGE WARFARE 22 (1999) (noting with respect to early sieges “Sacking was standard practice.”).

<sup>16</sup> Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 48 (Michael Howard, George J. Andreopoulos, and Mark R. Shulman eds., 1994).

‘siege.’<sup>17</sup> Although now somewhat dated and significantly augmented by subsequent law, Hague Regulations Article 27 still offers a number of important targeting considerations during sieges.

First, the article reinforces the foundational IHL principle of distinction.<sup>18</sup> Although the scope of civilian objects addressed is somewhat narrow by modern distinction standards, Article 27 is strong evidence of a besieging force’s obligation to spare from the effects of attacks facilities that do not contribute to the enemy’s military effectiveness.<sup>19</sup> Second, the article imposes a duty on the besieged force to identify buildings not used for military purposes. Article 27 directs the defending force to mark such facilities visibly with signs made known in advance to the attacking force. Finally, the article resorts to imperative language, directing that “all necessary steps must be taken to spare” the facilities mentioned previously. Yet the article soon qualifies its imperative by the phrase “as far as possible,” apparently reserving a degree of prerogative and discretion on the part of the besieging force to establish those humanitarian measures it has the opportunity and resources to carry out and those it does not.

Although commendable as a step toward addressing the effects of sieges on civilian populations, Article 27 reflects, at most, a minor diminishment of sovereign prerogative on matters of targeting. The article did little to spare besieged cities from devastation and suffering during the Second World War.<sup>20</sup> States’ military legal manuals further illustrate the shortcomings of the Hague Regulations with respect to insulating the civilian population from the effects of urban sieges. A United States Army Field Manual published in 1956, surprisingly still in force, advises besieging forces that “persons who attempt to leave or enter a besieged place without . . . permission are liable to be fired upon . . . .”<sup>21</sup>

Following the unpromising experience of the Second World War and a decades-long hiatus in development, the law of targeting underwent important refinements in the 1977

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<sup>17</sup> 1907 Hague Regulations, *supra*, note 14, art. 27. The 1949 First and Second Geneva Conventions anticipate the possibility of making arrangements to evacuate wounded and sick persons from “a besieged or encircled area.” Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 15, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, art. 18, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]. The 1949 Fourth Geneva Convention similarly encourages agreements for evacuations from “besieged or encircled areas.” Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 17, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>18</sup> See Michael N. Schmitt, *The Principle of Discrimination in 21<sup>st</sup> Century Warfare*, 2 YALE HUMAN RIGHTS AND DEVELOPMENT L. J. (1999).

<sup>19</sup> *Id.* Article 27 designates “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected . . . : as protected during sieges. *Id.*

<sup>20</sup> See generally GOURE, *supra*, note 11.

<sup>21</sup> United States Dep’t of the Army, Field Manual 27-10, The Law of Land Warfare, ¶¶ 44 & 45 [hereinafter FM 27-10].

First Additional Protocol to the 1949 Geneva Conventions (AP I).<sup>22</sup> AP I, and to a lesser extent its contemporary Second Additional Protocol to the 1949 Geneva Conventions (AP II),<sup>23</sup> resurrected and significantly augmented the law of targeting applicable to international and non-international armed conflicts respectively. Although AP I targeting provisions abandon the earlier Hague reference to siege, it is clear that they apply fully to siege operations<sup>24</sup> and for that matter to all attacks “in whatever territory conducted.”<sup>25</sup>

The most prominent AP I development of targeting law is its refinement of the principle of distinction. After restating the general principle,<sup>26</sup> AP I adds a series of specific understandings to the principle of distinction. The effect is to reduce some ambiguity yet to introduce to the principle other novel ambiguities. First, the AP I notion of distinction prohibits attacks “the primary purpose of which is to spread terror among civilians.”<sup>27</sup> As military doctrine directs besieging forces “to maintain constant pressure” on the besieged force, there is obviously enormous potential for a besieging force’s attacks to produce terror among civilians in the confined and isolated conditions of urban siege.<sup>28</sup> The International Committee of the Red Cross (ICRC) Commentary on AP I recognizes that even lawful attacks inevitably produce immense anxiety, and even terror, among civilians.<sup>29</sup> However, only attacks conducted specifically and primarily in order to produce terror among civilians are prohibited. Accordingly, AP I does not prohibit the spread of terror as an incidental effect on civilians during urban siege operations.

Second, the AP I notion of distinction includes an understanding of when civilians forfeit protection from intentional targeting. Civilian participation in the defense of a besieged urban area is entirely likely and even anticipated by military doctrine.<sup>30</sup> Article 51(3) of

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<sup>22</sup> AP I, *supra*, note 14. Today there are 173 States Parties to AP I. International Committee of the Red Cross, *Treaties and States Parties to Such Treaties, available at* <http://www.icrc.org/ihl>. A number of militarily significant States however, have not ratified AP I, including the United States, Israel, India, Iran, Indonesia, Malaysia, Pakistan, Singapore, and Turkey. *Id.*

<sup>23</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

<sup>24</sup> See UNITED KINGDOM, MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383 ¶5-34 (2004) [hereinafter JSP 383]. The Manual observes, “The principles of the law of armed conflict, particularly the rules relating to attacks, apply equally to situations of siege or encirclement.” *Id.*

<sup>25</sup> AP I, *supra*, note 14, art. 49. Article 49 identifies “[a]ttacks” as “acts of violence against the adversary, whether in offence or in defence.” *Id.*

<sup>26</sup> AP I, *supra* note 14, art. 48. Article 48 states, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . . .” *Id.*

<sup>27</sup> AP I, *supra* note 14, art 51(2).

<sup>28</sup> FM 3-90-2, *supra* note 4, at 6-3.

<sup>29</sup> International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ¶1940 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC Additional Protocols Commentary].

<sup>30</sup> FM 3-06, *supra* note 6, at Appendix A, A-2 (noting the Palestine Liberation Organization enjoyed extensive support from the civilian population, including information and concealment, during the Israeli 1982 siege of Beirut).

AP I reaffirms civilians' general protection from targeting but withdraws that protection from civilians "for such time as they take a direct part in hostilities."<sup>31</sup>

The precise meaning of "direct part" is infamously unclear.<sup>32</sup> Consensus among scholars and States as to what constitutes direct participation may be coalescing to some degree around three interpretations offered in an ICRC document on AP I Article 51(3).<sup>33</sup> First, to forfeit protection in the context of siege, a civilian's participation in hostilities must intend to or actually have a negative effect on the besieging force's military operations. Second, there must be a direct causal link between a participating civilian's acts and the aforementioned adverse effect on enemy forces. And finally, the acts of participation must be directly related to hostilities between the parties.

Consistent with the ICRC guidance, civilians who carry out attacks on behalf of the besieged force against a besieging force would forfeit protection from intentional targeting under AP I. Although the conclusion might strain the requirement of proximate harm, it also is highly likely that any civilian participation in targeting—including reconnaissance, spotting, or adjusting indirect fire, or even delivery of ammunition directly to actively firing systems—would divest a civilian of protection from direct targeting.<sup>34</sup> It is also likely that civilians who support life-sustaining functions of the besieged force, for example by growing or delivering food, would *not* forfeit protection from targeting under the majority view.<sup>35</sup> Thus the civilian population of a besieged area remains protected from intentional targeting even though their efforts at water collection, food production, or sanitation benefit the besieged force.

Less clear, however, are the consequences for civilians who perform functions that benefit the besieged forces beyond life-sustaining efforts but that do not immediately harm the besieging force. Civilians who assist in constructing barricades or repairing defensive positions in preparation for defense against an assault likely find themselves in a legal gray area, with some views regarding them as susceptible to intentional targeting while they do so and others regarding them as nonetheless protected. Whatever the legal conclusion one reaches as to such participation, the fact that such activities place these civilians in close and regular proximity to defensive works that qualify as legitimate

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<sup>31</sup> This paper does not address the complex issue of timing associated with Article 51(3). For such discussion see Bill Boothby, "And for such time as": *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J INT'L L. AND POL. 741 (2010).

<sup>32</sup> See generally Forum, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 N.Y.U. J INT'L L. AND POL. 637 (2010) (presenting a wide array of perspectives AP I direct participation in hostilities).

<sup>33</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

<sup>34</sup> See ICRC INTERPRETIVE GUIDANCE, *supra* note 33, at 56. See also Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. AND POL. 697, 710-20 (2010) (describing under-inclusive aspects of the ICRC Interpretive Guidance understanding of direct participation and outlining a range of perspectives on civilian contributions to targeting efforts)

<sup>35</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 33, at 51-52.

military objectives puts them at great risk to attack either directly or incidentally from the besieging force.

A third important AP I refinement of the principle of distinction concerns indiscriminate means and methods of attack. AP I, Article 51(4) prohibits attacks: a) “not directed at a specific military objective;” b) that “employ a method or means which cannot be directed at a specific military objective;” or c) that “employ a method or means of combat the effects of which cannot be limited.” Each of these aspects of AP I distinction bears directly on the weapons and tactics that may be lawfully employed in urban sieges. Collectively, the article’s provisions clearly establish a besieging force’s duty to select defined and precise objectives within the besieged area and to employ only weapons and tactics appropriate to those objectives. The fortified positions that besieged forces develop in response to prolonged siege may prompt a besieging force to resort to weapons of increasingly destructive effect. Recent Syrian government development and use of barrel bombs is illustrative.<sup>36</sup> However, to the extent these weapons cannot be reliably directed to individual lawful targets or their effects exceed those necessary to achieve a militarily necessary effect, AP I Article 51(4) prohibits their use in sieges.

Fourthly with respect to distinction, experience has shown that urban siege operations can produce seeming microcosms of total war. As the military siege doctrine described previously emphasizes, siege requires total encirclement and control of the area occupied by enemy forces.<sup>37</sup> Every corner of a besieged area, nearly every object within it, and every person besieged can plausibly be regarded as militarily significant and thus worthy of attack. In this vein, a besieging force may be attracted to regard the entire besieged area, and even its entire population, as a single military objective. Under such a conception, a besieging force might regard civilians and civilian objects as subsumed into a larger, unitary military target comprised of the entire urban area.

AP I distinction speaks presciently against such unconstrained conceptions of military objectives and requires besieging forces to differentiate within besieged areas between specific military objectives and civilian objects and between besieged enemy forces and the civilian population.<sup>38</sup> Specifically, Article 51(5) prohibits a besieging force from treating “as a single military objective a number of clearly separated and distinct military objectives in a city, town, village or other area containing a similar concentration of civilians or civilian objects.” Despite the inevitable concentrations of civilian and military concerns encountered in urban siege operations, attackers may not conflate separate objectives into a single zone of attack for carpet-bombing or any other indiscriminate method of attack.<sup>39</sup> To be sure, AP I permits the besieging force a degree of discretion in target characterization and selection. Most civilian objects that the besieged force uses or

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<sup>36</sup> See Raja Abdulrahim, *In Syria, a shrinking city struggles on between terrifying air raids*, L.A. TIMES, Apr. 11, 2014 (describing Syrian government use helicopters to drop explosives-filled oil barrels into urban Aleppo).

<sup>37</sup> See supported text, *supra* notes 9-11.

<sup>38</sup> AP I, *supra* note 14, art. 51(5).

<sup>39</sup> See ICRC ADDITIONAL PROTOCOL COMMENTARY, *supra* note 29, at ¶1968.

plans to use for military action, so-called dual-use objects, will constitute lawful military objectives under AP I.<sup>40</sup> But this discretion is balanced to some degree by the requirement that the besieging force resolve cases of doubt in favor of civilian status.<sup>41</sup>

If refinements to the principle of distinction reflect the most prominent AP I development of the IHL applicable to general targeting operations, the Protocol's most substantial addition to restraints on siege operations is surely Article 54. Article 54 (1) states simply, "Starvation of civilians as a method of warfare is prohibited." Although laudable for its clarity, 54 (1) might be regarded as a somewhat superfluous norm in that all methods of warfare intentionally directed against a civilian population are forbidden by the principle of distinction. Be that as it may, the prohibition is regarded by most sources as unequivocal, leaving no opportunity for a besieging force to contribute in any way to civilian starvation.<sup>42</sup> And lest a clever besieging force characterize civilian starvation as not constituting a "method of warfare" but as merely incidental to legitimate efforts at isolation of the besieged enemy forces, persuasive commentary clarifies that cases of civilian starvation "dictate the evacuation of such persons."<sup>43</sup>

The prohibition on starvation of the civilian population is not limited to efforts to interdict the flow of food and water into the besieged area. Article 54 (2) further operationalizes the AP I starvation prohibition by prohibiting destruction of "food-stuffs" and other life-sustaining objects "indispensable to the survival of the civilian population." While the complementary effect on the preceding prohibition of starvation is clear, Article 54 (2) includes a confusing array of intent and knowledge elements. By its terms, the article prohibits only destruction of life-sustaining objects "*for the specific purpose* of denying them for their sustenance value to the civilian population or to the adverse Party, *whatever the motive*, whether to starve out civilians, to cause them to move away, or *for any other motive*."<sup>44</sup> The plainest understanding of this confusing passage likely deconstructs it into a discussion of means and ends. That is, under 54 (2) an attacking force may not intentionally destroy life-sustaining materials for the purpose of inducing deprivation as a means for accomplishing any military end.

It is difficult to overstate the limiting effect of Article 54 on traditional siege doctrine. In particular, the tactical imperative of physical isolation is practically impossible to implement lawfully under Article 54. Admittedly, Article 54 (3) offers a limited concession to attacking forces, permitting destruction of objects protected by 54 (2) in cases where such objects are used "solely for the members of . . . armed forces;" or "in direct support of military action." Yet, even this concession to military necessity is qualified such that destruction remains unlawful if "it may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." Note that even permitting conditions to arise that drive the civilian

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<sup>40</sup> AP I, *supra* note 14, art. 52(2).

<sup>41</sup> AP I, *supra* note 14, art. 52(3).

<sup>42</sup> UK Manual, *supra* note 24, ¶5.34.2.

<sup>43</sup> ICRC ADDITIONAL PROTOCOL COMMENTARY, *supra* note 29, at ¶2096.

<sup>44</sup> AP I, *supra* note 14, art. 54(2) (emphasis added).

population to depart the besieged area is prohibited. Thus, in effect, imposing conditions of physical isolation—which, as stated previously, is perhaps the *sine qua non* of siege—is almost entirely prohibited with respect to life-sustaining objects for civilians during urban siege under AP I. Although a respected law-of-war scholar has offered an interpretation of Article 54 intended to mitigate its effect on successful siege operations and to preserve efforts at physical isolation,<sup>45</sup> that view has gained wide acceptance from neither supporters nor critics of Article 54.<sup>46</sup> It is also noteworthy that the Rome Statute of the International Criminal Court prohibits as a war crime in international armed conflicts “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival . . . .”<sup>47</sup>

Finally, at least with respect to besieging force obligations, AP I imposes a series of precautions that an attacking force must undertake with respect to civilians and civilian objects. These include significant obligations to minimize unintended, collateral harm to civilians by verifying the military character of targets,<sup>48</sup> by providing warning of attacks and bombardments,<sup>49</sup> and by limiting target selection.<sup>50</sup> Additionally, as a supplement to the distinction-based obligation,<sup>51</sup> AP I Article 57 requires attackers to refrain from attacks expected to cause incidental damage “that would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>52</sup>

The humanitarian efficacy of these generally applicable precautions in attack is likely mixed. On one hand, urban siege conditions raise the likelihood that attacks will result in

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<sup>45</sup> See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 140-41 (3d ed., 2012). Rogers argues full siege involving starvation cannot be prohibited entirely by AP I, stating:

First, starvation of civilians is not a grave breach of Protocol I. Secondly, a clear intention would need to be expressed in a treaty to abolish such a well established practice. Thirdly, the besieging commander would not need to violate Art. 54, para. 2 of Protocol I. There would be no need to ‘attack, destroy or render useless’ food supplies. He would simply prevent those supplies from getting through to the besieged area by turning them back. Fourthly, the provisions of Art. 54, para. 3 of Protocol I do not operate independently of those of Art. 54, para. 2. Fifthly, the besieging commander would not violate Art. 54, para. 1 of Protocol I if he guaranteed the safe passage of civilians (and the wounded and sick) out of the besieged area. Sixthly, given the terms of Art. 51, para. 7, last sentence and Art. 58 of Protocol I, the besieged commander could not refuse such an offer. Seventhly, the relief actions referred to in Art. 70 of Protocol I can take place only with the agreement of the parties concerned.

*Id.*

<sup>46</sup> See e.g. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 222-23 (2d ed. 2010).

<sup>47</sup> Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(xxv), 2187 U.N.T.S. 90 [hereinafter ICC Rome Statute].

<sup>48</sup> AP I, *supra* note 14, art. 57(2)(a)(i).

<sup>49</sup> AP I, *supra* note 14, art. 57(2)(c). See also 1907 Hague Regulations, *supra* note 14, art. 26.

<sup>50</sup> AP I, *supra* note 14, art. 57(3).

<sup>51</sup> See AP I, *supra* note 14, art. 51(5).

<sup>52</sup> AP I, *supra* note 14, art. 57(2)(a)(ii).

(otherwise) prohibited consequences, especially incidental harm to civilians and civilian objects—so-called collateral damage. The required precautions against disproportionate incidental harm are therefore exceedingly important during siege operations. On the other hand, siege conditions often render infeasible precautions that would otherwise prove quite feasible. For instance, siege conditions significantly limit an attacker’s military targeting options. Generally speaking, siege operations present few opportunities for direct, line-of-sight engagements where the attacker has firsthand, “real-time” information on the target, leaving bombardment as the only practicable option for reducing an enemy’s capacity. Additionally, while advance warnings of bombardments provide the civilian population an opportunity to evade the effects of attack, they do the same for the besieged force.

To this point, AP I appears to have placed the onus of humanity largely on the besieging force. The wisdom and efficacy of this approach to targeting law has been questioned by a number of commentators and likely forms the basis of some States’ objections to AP I.<sup>53</sup> The fact that the besieged force, not the besieging force, exercises immediate and direct control over the besieged area and its civilian population makes a compelling case for allocating the balance of humanitarian responsibility to the former.

In that vein, AP I introduces a number of important obligations with respect to distinction on the part of besieged forces. First, Article 51(5) prohibits a defending force from using civilians to shield military objectives from attack. More than simply prohibiting the abhorrent practice of using ‘human shields,’ Article 51(5) captures a defender’s obligation in its emplacement of forces to account not only for tactical considerations of terrain and enemy presence but also for the presence and movements of the civilian population.<sup>54</sup> Defenders seem obliged under Article 51(5) to compromise, if necessary, their tactical preferences in favor of sparing the civilian population from the effects of siege.

Second, and closely related, AP I Article 58 enumerates three precautions on the part of defenders to protect civilians from the effects of attacks. These precautions include endeavors to remove the civilian population from the vicinity of military objectives, to avoid locating military objectives in populated areas, and to take “other necessary precautions” to protect the civilian population under their control. Importantly, and especially in the context of urban siege operations, Article 58 limits operation of these obligations “to the maximum extent feasible.” The feasibility of a given defensive

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<sup>53</sup> See Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT’L L. 353 (1998). See also W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 175-76 (1990) (observing, “The primary responsibility for minimization of collateral civilian casualties continues to reside with the party to the conflict with control over the civilian population and with the individual citizen.”).

<sup>54</sup> Military doctrine explicitly instructs armed forces to account for civilian factors in military planning and decision making. For instance, the acronym METT-TC reminds leaders to consider “mission, enemy, terrain and weather, troops and support available, time available and civil considerations” as mission variables in all operations. UNITED STATES DEPT OF THE ARMY, ARMY DOCTRINE REFERENCE PUBLICATION 3-0, UNIFIED LAND OPERATIONS 1-2 (2012).

precaution is likely to be a function of the size of the besieged area, the size of the civilian population, the size and nature of the besieged force, and even the tactical capabilities of the besieging force. The smaller and more congested the besieged area, the larger the civilian footprint in that area, and the more capable the besieging force, the less likely Article 58 precautions will be regarded as feasible.

In addition to its own provisions on targeting, AP I makes clear the States Parties' intent not to supplant but rather to augment preexisting obligations in attack.<sup>55</sup> It is important to recall that AP I adds to and does not supplant the besieged force's Hague-based duty to mark protected buildings and objects. Besieged forces remain under an obligation to identify, and even to differentiate for the besieging force, locations of scientific, artistic, medical, and cultural facilities. A significant tactical disadvantage might seem to result from a defender's compliance with this duty. To illustrate this point, an attacker might quickly discern a significant understanding of the defender's deployment scheme within a besieged area from these markings simply by process of elimination. While not insignificant, the advantage should not be overstated. Recall that the besieging force remains under the AP I obligation to satisfy itself that all of its targets are either combatants or military objectives, with cases doubt being resolved in favor of civilian status. Still, in a battle of close force and capability margins and limited intelligence-gathering opportunities, the tactical effect of Article 27 marking might be significant.

Two final thoughts on targeting bear consideration in closing. First, despite unsettled questions concerning some AP I targeting law rules, many provisions of AP I undoubtedly reflect customary norms that bind all States regardless of whether they are parties to the treaty.<sup>56</sup> It is well beyond the scope of this paper to advise on the customary law status of each AP I targeting provision applicable to siege. An impressive, though criticized, ICRC study offers a comprehensive analysis.<sup>57</sup> It is perhaps sufficient to say that a majority of the rules described above reflect customary IHL and that non-States Parties to AP I have not of late offered frequent or clear objections to the particular rules cataloged above.<sup>58</sup>

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<sup>55</sup> AP I, *supra* note 14, art. 49.

<sup>56</sup> See e.g. See Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 427, (1987); Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 467-68 (1987); 1977 Protocols Additional to the Geneva Conventions: Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec'y of Def., Customary International Law Implication (May 9, 1986) *reprinted in* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 388, 389 (Sean Watts ed., 2006) (observing with respect to AP I article 54, "Starvation of civilians shall not be used as a method of warfare . . .") [hereinafter U.S. AP I Memo].

<sup>57</sup> 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

<sup>58</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102, cmt. d (1987) (noting the practice of persistent objection by States unwilling to be bound by a norm of customary international law). Some writers express less enthusiastic support for the doctrine of persistent objection to

Second, there is the question of whether targeting obligations during urban siege operations vary according to conflict classification. As stated previously, IHL regulates non-international armed conflict (NIAC), conflicts not pitting two or more States against one another, to a far lesser degree than does international armed conflict (IAC). States have not expressly promulgated for NIAC the entire regulatory framework applicable to IAC. Although perhaps desirable from a humanitarian perspective, incorporating wholesale the IAC rules applicable to siege is not, at present, a legally correct approach to regulating siege in NIAC. Technically, none of the AP I provisions presented previously applies in NIAC. Still, significant humanitarian protections can be found from existing IHL rules applicable in NIAC.

As with IHL applicable to IAC, one finds obligations relevant to both targeting and treatment. It is again beyond the scope of this paper to fully flesh out the substantive differences between the targeting law of IAC and NIAC; however, initial indications suggest a great deal of parity, especially with respect to the bedrock principle of distinction.<sup>59</sup> AP II, the primary source of treaty-based targeting rules applicable to NIAC, offers compelling evidence that parties are bound by the principle of distinction during NIAC. AP II Article 13 replicates, though in abbreviated terms, much of the AP I treatment of distinction discussed above. Especially relevant to siege, AP II Article 14 reproduces nearly identically the AP I prohibition on starvation and on destruction of objects indispensable to the civilian population. And there are strong indications that these AP II targeting provisions reflect customary international law applicable even to non-States Parties.<sup>60</sup> To the extent AP II lacks many of the AP I refinements to the principle, it is likely that custom has filled these gaps since AP II entered force.<sup>61</sup>

One is increasingly hard-pressed to identify distinctions made by States or IHL scholars between IAC and NIAC with respect to distinction. The upshot for purposes of IHL targeting rules is a strong, if not near perfect, parity between the requirements of the principle of distinction during siege operations, whether conducted in IAC or NIAC.

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norms that otherwise constitute binding custom. See MALCOLM SHAW, INTERNATIONAL LAW 86 (5<sup>th</sup> ed. 2003). Shaw limits the doctrine to states that have objected since the origin of the custom in question.

<sup>59</sup> See AP II, *supra* note 23, art. 4(1)(d) (prohibiting “acts of terrorism”); *id.* art. 13(1) (protecting civilians from “the dangers arising from military operations”); *id.* art. 13(2) (prohibiting acts which make civilians “the object of attack” or “spread terror among the civilian population”); *id.* art. 13(3) (withdrawing protection from civilians “for such time as they take direct part in hostilities”); *id.* art. 14 (prohibiting starvation as a method of combat and destruction or removal of “objects indispensable to the survival of the civilian population”); *id.* arts. 15-16 (protecting respectively, “works and installations containing dangerous forces and cultural objects”); ICC Rome Statute, *supra* note , art. 8(e)(i), (ii), (iv), (v), (viii), (xii) (enumerating war crimes involving attacks during non-international armed conflict).

<sup>60</sup> President Ronald Reagan submitted AP II to the United States Senate for advice and consent with a view to U.S. ratification. See Letter of Transmittal from Ronald Reagan, U.S. President, to the United States Senate and State Department, reprinted in 81 AM. J. INT’L L. 910–12 (1987) (including analysis and commentary on Protocol II).

<sup>61</sup> CUSTOMARY IHL STUDY, *supra* note 57, at Rules 7-24 (concluding that all distinction, proportionality, and precaution-based rules of IAC are also applicable as custom to NIAC). See also WILLIAM H. BOOTHBY, THE LAW OF TARGETING 441-45 (2012)(concluding that with respect to distinction and precautions most IAC provisions apply through AP II or custom to NIAC).

Simultaneously, one finds in NIAC the same profoundly impactful IHL prohibition on starvation as applies to IAC and its resulting constraints on besieging forces' efforts to isolate besieged areas.

## B. Humanitarian Assistance in Siege

While laudable as humanitarian measures, IHL restraints on targeting operations represent, at most, a half step toward protection of civilians in besieged areas. Far better prospects for insulating civilians from the horrible conditions of siege lie with rules concerning humanitarian relief and evacuation of civilians from the conditions of siege altogether. These rules are found in the Geneva tradition of IHL. As with the preceding Hague tradition rules of targeting, one finds in the IHL Geneva tradition's rules for respect and treatment of civilians both provisions rooted in early IHL treaties and in more recent IHL refinements. As a general matter, the rules of the Geneva tradition specifically directed to conditions of siege address either removal of the civilian population from the besieged area or access to that population for purposes of humanitarian relief.

As distinct from the Hague tradition, however, one finds far less convergence between the NIAC and IAC Geneva traditions than those of the IAC and NIAC Hague traditions. This is primarily attributable to States' failure to incorporate most of the protected person classes of the Geneva tradition to NIAC. For instance, IHL provisions on NIAC do not include the prisoner-of-war class of the Third Geneva Convention or the civilian-protected-person class of the Fourth Convention. One senses also in the NIAC provisions applicable to humanitarian access to besieged populations a lower sense of obligation on the part of parties to the armed conflict. Still, with respect to the obligation to permit civilian evacuations, primarily as a function of the universally applicable IHL prohibition on starvation, one finds closer parity to IHL rules for IAC. This section outlines the respective evacuation and access provisions of IAC and NIAC with a view to evaluating the duties of besieging and besieged forces with respect to treatment of civilian populations.

In addition to a series of generally applicable protections for civilian populations caught up in hostilities, the 1949 Fourth Geneva Convention specifically protects civilian victims of sieges during IAC. Article 17 states that Parties "shall endeavor to conclude local agreements for the removal from besieged or encircled areas" of several enumerated classes of persons.<sup>62</sup> The First and Second 1949 Geneva Conventions include nearly identical provisions with respect to their respective protected classes, wounded members of armed organizations and wounded members of armed organizations at sea caught up in sieges during IAC.<sup>63</sup>

The Article 17 duty is found in Part II of the Fourth Convention, provisions of which are understood "to cover the whole of the populations of countries in conflict," suggesting an

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<sup>62</sup> Geneva Convention IV, *supra* note 17, art. 17.

<sup>63</sup> Geneva Convention I, *supra* note 17, art. 15; Geneva Convention II, *supra* note 17, art. 18.

open-ended scope of protection.<sup>64</sup> Yet the article is actually somewhat of a Part II outlier, reserving its protections to a narrower class of civilians. As its text makes clear, Article 17 benefits only “wounded, sick, infirm, and aged persons, children and maternity cases.” Thus healthy adult civilians who are not pregnant are formally outside its ambit of protection. The humanitarian effect of the article is further diminished by the nature of the Article 17 obligation. Note that the article does not require Parties to agree to removal or evacuation schemes but merely to endeavor to do so. The result is a quite limited obligation with respect to a narrow class of besieged civilians.

While Article 17 and its First and Second Convention cognates undoubtedly represent an IHL regime specifically addressed to removal and evacuation of certain populations during siege, these provisions likely no longer represent the final word on removal obligations. In light of the aforementioned prohibition on starvation of civilian populations, it seems clear that neither a besieging nor a besieged force may compel civilians to remain in a besieged area that lacks adequate food and water. Doing so would inevitably constitute a violation of the Article 54 prohibition on starvation of civilians as a method of warfare, especially given that provision’s broad understanding of what constitutes a method of warfare.<sup>65</sup> At a minimum, Parties engaged in siege are obliged to arrange for removal of starving civilian populations from besieged areas to the extent they are unable or unwilling to supply them with adequate food and water in the besieged area. The humanitarian prospects of besieged civilian populations are also greatly improved by the obligational nature of the AP I, Article 54 prohibition on starvation, as opposed to the aspirational Fourth Convention Article 17 rule. That is, the Article 17 aspiration that parties merely “endeavour” to remove only a narrow class of civilians is largely overcome by the AP I Article 54 obligation not to permit conditions of civilian starvation to arise as part of siege operations. The likely customary status of Article 54 and its duplication in article 14 of AP II applicable to NIAC also greatly augment the humanitarian effect of the starvation prohibition with respect to evacuation.<sup>66</sup>

When evacuation is not compelled or possible, the second major protection of the Geneva tradition for besieged populations, guarantees of humanitarian relief access, becomes especially relevant. In addition to its aspirational rule on evacuation, the Fourth Convention’s Article 17 provides for humanitarian access. But like the accompanying provision on evacuation, the Article 17 humanitarian access rule is strictly limited in obligation and scope. First, Parties to a siege need merely “endeavour” to conclude passage for relief supplies. Second, Article 17 covers only religious and medical supplies. Article 23 of the Fourth Convention broadens somewhat the scope of supplies, requiring Parties to admit passage of “foodstuffs, clothing, and tonics.” Article 23 also operates in imperative rather than the aspirational terms of Article 17. But this expanded scope of relief operates only to the benefit of “children under fifteen, expectant mothers and

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<sup>64</sup> Geneva Convention IV, *supra* note 14, art. 13.

<sup>65</sup> See discussion *supra* supported by note 44.

<sup>66</sup> See CUSTOMARY IHL STUDY, *supra* note 57, at 186 (identifying AP I, art. 54 as reflective of customary international law).

maternity cases.”<sup>67</sup> The result is an exceedingly narrow scheme of humanitarian access, likely negotiated to preserve the essential military interest in maintaining the physical isolation of besieged areas.

As with the preceding rules on removal, however, the Fourth Convention does not constitute the final word on humanitarian relief access. AP I, Article 70 significantly broadens both the beneficiaries and scope of IHL humanitarian relief and access. First, Article 70 addresses relief actions free of the Fourth Convention’s restrictions on beneficiaries. The article resorts to sub-categories of civilians, such as, “children, expectant mothers, maternity cases, and nursing mothers” merely for purposes of establishing priorities of relief. Second, the Article 70 scope of relief supplies, described by reference to a provision applicable to occupied territory, includes “food and medical supplies . . . clothing, bedding, means of shelter, other supplies essential to the survival of the civilian populations . . . and objects necessary for religious worship.” Through AP I, IHL finally offers a rule for relief of nearly all the humanitarian needs of nearly all civilian persons in besieged areas—almost.

Although State signatories to AP I were willing to shed the Fourth Convention’s limits on the scope and nature of relief to civilian populations in besieged areas, they seem to have been unwilling to do so as a matter of unfettered obligation. Article 70 manages to sound at once optional and obligatory. Article 70 states in relevant part, “relief actions which are humanitarian and impartial in character and conducted without distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.” Not surprisingly, two views concerning the obligatory character of Article 70 have emerged.

The ICRC AP I Commentary emphasizes the Article 70 phrase “shall be undertaken . . . .” Recalling again the Article 54 prohibition on starvation, the Commentary adds, “the possibility of refusing a relief action or relief consignments is not a matter of discretion; such refusals should thus remain exceptional.”<sup>68</sup> The Commentary then highlights as concessions to the demands of military necessity and mutual distrust between adversaries, a series of qualifications and conditions Parties may impose on relief convoys and actions. Possible limits on relief actions to besieged populations include: prescribing technical arrangements such as timing and routes;<sup>69</sup> searches and inspections of relief convoys;<sup>70</sup> and supervision of relief distribution by a Protecting Power.<sup>71</sup> A Canadian law-of-armed-conflict manual adopts the ICRC view.<sup>72</sup>

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<sup>67</sup> GC IV, *supra* note 14, art. 23(1).

<sup>68</sup> ICRC ADDITIONAL PROTOCOL COMMENTARY, *supra* note 29, at ¶2808.

<sup>69</sup> AP I, *supra* note 14, art. 70(3)(a).

<sup>70</sup> AP I, *supra* note 14, art. 70(3)(a).

<sup>71</sup> AP I, *supra* note 14, art. 70(3)(b).

<sup>72</sup> Canada, a State Party to AP I, instructs its forces that during sieges, “The parties to a conflict are obliged to facilitate rapid and unimpeded passage of all relief consignments, equipment, and personnel.” CANADA, OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-021 ¶614.7 (2001).

While the ICRC Commentary view offers a colorable interpretation that undoubtedly gives effect to a plausible object and purpose of the Protocol, other States Parties and IHL experts appear to have adopted a more limited understanding of Article 70. AP I States Parties' and non-States Parties' military manuals, while acknowledging significant responsibilities toward facilitating relief actions, ultimately conclude that operation of relief actions is entirely contingent on the consent of the Parties to the conflict.<sup>73</sup> IHL experts conclude similarly, noting, "As long as an agreement by all concerned lies at the root of relief actions, one cannot speak of a genuine obligation to allow, or a genuine right to obtain, humanitarian assistance. At most, article 70 (1) may be construed as precluding refusal of agreement to relief for arbitrary or capricious reasons."<sup>74</sup>

The result appears to be a preference for evacuation over relief during siege. That is, while Article 70 prescribes relief requirements that ultimately remain subject to the consent of the parties, IHL removal and evacuation standards, particularly in light of the prohibition on starvation, are comparatively compulsory. The U.K. Law of Armed Conflict Manual supports the result, opining that,

The military authorities of the besieged area might decide not to agree to the evacuation of civilians or the civilians themselves might decide to stay where they are. In those circumstances, so long as the besieging commander left open his offer to allow civilians and the wounded and sick to leave the besieged area, he would be justified in preventing any supplies from reaching that area.<sup>75</sup>

There is compelling military and humanitarian logic to this result. While evacuation presents the possibility of besieged forces sneaking out some of their number for sabotage of the besieging force or future action, this threat seems tactically preferable to the likelihood of a relief action's supplies being converted to military use by the besieged force to prolong or tip the balance of a closely contested siege. From a humanitarian perspective, evacuation may be preferable to relief access also as a means of ensuring adequate life support and medical treatment, while simultaneously removing civilians from the zone of hostilities. The advantages of evacuation are, of course, contingent on adequate housing and support outside the besieged area. And while uprooting a civilian population from homes and neighborhoods is a vexing contingency, in most cases, it seems, ensuring facilities and relief will be comparatively easier to provide in an area not actively contested by belligerent parties.

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<sup>73</sup> UK LOAC MANUAL, *supra* note 24, ¶9.12.1 (noting that relief to besieged areas is conditional on the besieging party "being satisfied that there is no serious reason for fearing that: a) the consignments may be diverted from their destination; b) control may not be effective; or c) the provision of these goods would lead to a definite advantage accruing to the military efforts or economy of the enemy."); FM 27-10, *supra* note 21, ¶44a.

<sup>74</sup> Yoram Dinstein, *The Right to Humanitarian Assistance*, NAVAL WAR COLLEGE REV. 77, 84 (2000).

<sup>75</sup> U.K. LOAC MANUAL, *supra* note 24, ¶5.34.3.

It should be emphasized that the above civilian treatment rules operate additionally to the general Geneva tradition rules that protect the civilian population, particularly during IAC. Besieging and particularly besieged forces must bear in mind that they may owe more specific obligations to civilians under their control. The elaborate Fourth Convention treatment regime applicable to protected persons and to situations of belligerent occupation imposes significant, frankly onerous, treatment obligations on Parties during IAC.<sup>76</sup> Evacuation and relief obligations during siege may be significantly altered to the extent a besieged force is unable to meet its obligations to Fourth Convention protected persons.

It is also again worth considering briefly the extent to which the above IHL relief and evacuation scheme reflects customary international law. The point is relatively moot with respect to the universally ratified 1949 Geneva Convention relief and evacuation obligations. However, as previously mentioned, AP I is not yet universally ratified. The ICRC study of customary IHL asserts that Article 70 reflects customary international law.<sup>77</sup> A U.S. memo concurs with this assessment.<sup>78</sup> One finds, however, the same disagreement as to the obligational nature of Article 70 relief access in statements of custom. To its credit, the ICRC study mentions the Article 70 qualifier requiring consent of the parties to the conflict but only with respect to exerting control measures rather than with respect to the access of relief actions at all.

Finally with respect to IHL Geneva tradition obligations operative during siege, there is the question of rules applicable to NIAC. Common Article 3 of the 1949 Conventions, the bedrock of humane treatment, and applicable to all situations of NIAC, acknowledges that impartial humanitarian organizations may offer their services to the Parties during NIAC. The article also encourages parties to endeavor to conclude supplementary relief agreements.<sup>79</sup> And, as with respect to targeting operations, AP II provides treatment obligations applicable during NIAC siege operations, especially with respect to relief and evacuation. While the drafters of AP II explicitly rejected any form of required access for humanitarian operations,<sup>80</sup> Article 18 addresses humanitarian relief access in terms nearly identical to AP I Article 70.

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<sup>76</sup> See Geneva Convention IV, *supra* note 14, Part III.

<sup>77</sup> CUSTOMARY IHL STUDY, *supra* note 57, at 193-94.

<sup>78</sup> U.S. AP I Memo, *supra* note 56.

<sup>79</sup> Geneva Convention I, *supra* note 17, art. 3; Geneva Convention II, *supra* note 17, art. 3; Geneva Convention III, *supra* note , art. 3; Geneva Convention IV, *supra* note 17, art. 3

<sup>80</sup> See Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 33, *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-Draft-additional-protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf); ICRC ADDITIONAL PROTOCOL COMMENTARY, *supra* note 29, at ¶4870 (observing “During the Diplomatic Conference, States in many cases showed themselves to be more concerned with preserving their national sovereignty than with undertaking to facilitate relief actions in all circumstances.”); VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977) 145-50 (summarizing State representatives’ concerns with obliging acceptance of relief actions during NIAC).

Other underappreciated AP II protections—including Article 4 (3) obligations with respect to children, particularly the duty to remove them from hostile areas; Article 13 (1) general obligations to protect civilians from the dangers of military operations; and Article 14 prohibitions of starvation and destruction of indispensable items prohibited—augment the humanitarian protections of civilians as well. Most encouragingly for humanitarian considerations during NIAC siege conditions, as mentioned previously AP II includes the prohibition on civilian starvation, including by implication its attendant duty to evacuate or permit evacuation of civilians to prevent starvation.<sup>81</sup>

In sum, one finds in current IHL significant obligations with respect to both targeting operations and the treatment of civilians applicable to urban siege operations whether in IAC or NIAC. Through the principle of distinction and a series of precautions in attack, besieging and besieged forces are required to greatly temper their targeting operations to minimize incidental effects on civilian populations and objects. Most importantly, besieging forces' prerogative to resort to starvation and much of the attendant physical isolation of traditional siege operations is now effectively prohibited in all respects. With regard to civilian treatment, IHL includes strong encouragement to besieging and besieged forces alike to grant access to a broad range of humanitarian relief efforts. When parties withhold consent to relief actions, IHL evacuation obligations, particularly those resulting from the starvation prohibition, fill in to provide significant humanitarian relief to civilian populations in besieged areas. Overall, one finds in current IHL a legal regime that greatly constrains siege operations as classically conceived and executed. Whether these restraints can and will actually be observed by armed forces faced with limited resources and compelling demands of military necessity remains to be seen.

#### **4. UNITED NATIONS SECURITY COUNCIL RESOLUTION 2139**

The ongoing armed conflict in the Syrian Arab Republic and international reactions to it provide a glimpse into States' humanitarian expectations of armed forces engaged in urban siege operations. Despite significant disagreement over the legality of State intervention in the ongoing armed conflict in Syria, the international community appears to be universally frustrated with the conduct of hostilities by parties in Syria. In particular, siege operations have drawn widespread condemnation and ire. A Secretary General's report observes, "Around 175,000 people are besieged by government forces and 45,000 by opposition forces."<sup>82</sup> The report further notes severely limited humanitarian access to besieged areas.<sup>83</sup>

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<sup>81</sup> AP II, *supra* note 23, art. 14.

<sup>82</sup> Report of the Secretary-General on the Implementation of Security Council Resolution 2139, S/2014/208, at 5, para. 23, Mar. 24 (2014).

<sup>83</sup> *Id.* at 4, para. 19.

In February of 2014, the Security Council adopted Resolution 2139, the latest in a series of resolutions directed at hostilities in the Syrian Arab Republic.<sup>84</sup> Resolution 2139 includes specific demands on the parties to the Syrian NIAC. Prominent among the Security Council's reactions are instructions to alter the parties' practices in siege operations and even to lift conditions of siege altogether. The resolution "[d]emands that all parties . . . facilitat[e] the expansion of humanitarian relief operations, in accordance with international humanitarian law . . ."<sup>85</sup> The resolution further "[c]alls upon all parties to immediately lift the sieges of populated areas . . . and *demands* that all parties allow the delivery of humanitarian assistance . . . and enable the rapid, safe and unhindered evacuation of all civilians who wish to leave."<sup>86</sup>

It is worth considering briefly the extent to which the Resolution 2139 reflects a call to observe existing obligations with respect to siege operations or, instead, reflects application of heightened obligations in excess of the generally applicable IHL provisions relevant to siege operations. The resolution might be understood to depart from or augment the general IHL obligations applicable to siege in significant respects. This is particularly true with respect to the Syrian parties' 2139 obligations to accept humanitarian relief operations and lift their siege operations. As the preceding section on IHL siege provisions made clear, humanitarian access to besieged areas remains subject to the consent of parties. Notwithstanding the non-international character of the armed conflict, Resolution 2139 leaves the Syrian regime little prerogative with respect to either a limited notion of the targeting principle of distinction or to rejecting or controlling access of relief efforts. The unequivocal and obligatory language of the resolution is all the more noteworthy considering the UN Charter's prominent Article 2 (7) qualification with respect to the organization's intervention in "matters which are essentially within the domestic jurisdiction of any state . . ." The resolution itself recounts as much, "[r]eaffirming its strong commitment to the sovereignty, independence, unity and territorial integrity of the United Nations . . ." The best reading probably understands the Council to have judged the humanitarian conditions in the besieged areas no longer "matters which are essentially within the domestic jurisdiction" of Syria. That is, the Council seems to have concluded that by virtue of creating conditions of deplorable suffering, the humanitarian situation in the besieged areas the parties have converted the issue to a matter of international concern.

Still, it is highly unlikely that Resolution 2139 reflects actual alterations to or amendments of IHL applicable to all States. The resolution certainly should not be understood to prohibit or outlaw siege operations generally. Nor should it be understood to mandate humanitarian access beyond that envisioned by existing IHL. Instead, the resolution's unequivocal demands for an end to Syrian and rebel siege operations reflect a

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<sup>84</sup> See S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sep. 27, 2013); S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012); S.C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012). The UN Security Council also addressed conditions of siege in Bosnia and Herzegovina. See S.C. Res. 761, U.N. Doc. S/RES/761 (June 21, 1992); S.C. Res. 859, U.N. Doc. S/RES/859 (Aug. 24, 1993).

<sup>85</sup> S.C. Res. 2139, *supra* note 84 (emphasis in original).

<sup>86</sup> *Id.* (emphasis in original).

political consensus by Council members—namely, that parties to armed conflicts who deliberately flout or disregard existing IHL humanitarian obligations during siege will, where the Council so decides, face as a growing international intolerance for the inevitable human suffering associated with unrestrained urban siege warfare.

## 5. Conclusion

Well-meaning humanitarian advocates often find IHL inadequate to the task of ensuring protection for vulnerable populations in armed conflict. It is tempting to advocate understandings of IHL not bargained for by States in order to achieve the greater good of humanity in war. Experience shows, however, that far greater humanitarian influence can be accomplished through sound and informed characterizations of belligerent parties' IHL obligations in armed conflict. By the same token, IHL detractors and skeptics tend to inflate the impact of IHL on armed forces' ability to carry out hostilities efficiently and effectively. Hyperbolic and disingenuous allegations that legal restraints are the source of increased military risk regularly overstate their case. Far more often, doctrine, national policy, diplomacy, political will, public affairs, and resource or fiscal considerations—and even human emotion—provide the operative restraints on military operations.

Siege operations, as traditionally practiced, however, are a species of military operations that while not technically prohibited are now significantly limited by IHL in both IAC and NIAC. Distinction-based limits on targeting severely constrain bombardments of besieged areas. And treatment-based obligations, particularly the IHL prohibition on starvation, render the physical isolation of besieged areas nearly impracticable from a legal standpoint. Moreover, as recent UN Security Council decisions concerning Syria make clear, international political opinion seems to have increasingly little patience, at least in connection to some contexts, for the human suffering and deprivation involved in urban sieges.

To be sure, traditional siege operations featured a number of practices whose passing should not be mourned. Humanitarian organizations now have in IHL an effective legal ally in their campaigns to advocate for humanity during siege operations. Yet because the military necessity of siege operations remains undisputed, it is fair to ask whether IHL has struck a sustainable balance between humanity and military necessity. Successful humanitarian advocacy should surely not hesitate to seek respect for IHL limits on siege operations. But whether the current Syrian siege experience reflects abject or categorical disdain for IHL or an IHL somewhat out of touch with the demands of military necessity is certainly worthy of consideration.

## **ABOUT**

The Project on Counterterrorism and Humanitarian Engagement (CHE Project) is based at the Harvard Law School. The CHE Project undertakes legal research, policy analysis, and engagement initiatives in order to identify and develop — as well as to facilitate networks to support — sustainable, principled, and practical solutions to the challenges of large-scale humanitarian operations conducted in areas where listed armed groups are active and counterterrorism laws affect humanitarian action.

This publication is part of the CHE Project's Research and Policy Paper series, which is intended to inform the humanitarian community regarding critical issues of law, policy, and practice related to counterterrorism and humanitarian action.

The CHE Project seeks to inform and shape debate regarding the intersecting trajectories of counterterrorism norms and humanitarian action. The Project does so principally by:

- Producing independent analyses of emerging and foundational challenges and opportunities concerning humanitarian engagement in situations involving listed non-state armed actors; and
- Engaging actors across international humanitarian NGOs, intergovernmental agencies, academic centers, and governments to capture, examine, and inform their perspectives and approaches.

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