



CONDUCT OF HOSTILITIES BY ARMED NON- STATE ACTORS

Report from the 2020 Garance Talks

**The
Garance
Series:
Issue 3**



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IMPRESSUM

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About Geneva Call

Geneva Call is a neutral, impartial and independent humanitarian organization working to promote respect by armed non-state actors (ANSAs) for international humanitarian norms in armed conflict and other situations of violence.¹

The key tool of engagement that Geneva Call uses is an innovative instrument known as the *Deed of Commitment*, which allows ANSAs – as they cannot sign international treaties – to commit to abide by specific humanitarian norms and to be held accountable for complying with these norms. Four of such *Deeds of Commitment* have been developed to date: the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* in 2000,² the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* in 2010,³ the *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination*⁴ in 2012 and the *Deed of Commitment for the Protection of Health Care in Armed Conflict* in 2018.⁵ Geneva Call also provides training to ANSAs on international humanitarian norms and encourages them to integrate these provisions into their codes of conduct and other internal regulations.

Since its creation in 2000, Geneva Call has engaged in dialogue with more than 150 ANSAs worldwide. Almost half of them have signed one or several *Deeds of Commitment* or made similar pledges. Geneva Call monitors and supports the implementation of these humanitarian commitments.

¹ Geneva Call uses the term ‘international humanitarian norms’ as including both international humanitarian law and international human rights law. Further information about Geneva Call and its work can be found online at Geneva Call, ‘How we work’, available at <https://www.genevacall.org/how-we-work/>.

² Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, available at <https://www.genevacall.org/wp-content/uploads/2019/07/DoC-Banning-anti-personnel-mines.pdf>

³ Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict, available at [https://www.genevacall.org/wp-](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf)

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[content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf](https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf).

⁴ Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination, available at <https://www.genevacall.org/wp-content/uploads/2019/07/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf>.

⁵ Deed of Commitment under Geneva Call for the Protection of Health Care in Armed Conflict, available at <https://www.genevacall.org/wp-content/uploads/2019/07/Deed-of-Commitment-for-the-protection-of-health-care-in-armed-conflict-final-version-4.pdf>.

The *Garance* Talks

In the course of its work, Geneva Call has witnessed several challenges faced by ANSAs in their efforts to implement international humanitarian norms. These include the absence of an incentive to abide by the applicable framework and their lack of knowledge of the law, among others.⁶ It has been noted that concepts familiar to military lawyers or IHL experts, such as the principle of proportionality, “may not be well understood by members of ANSAs, both at senior and at lower operational levels”.⁷ ANSAs’ fragmented structures, their lack of a centralized command authority and their capacity to implement the applicable framework can also present important challenges for humanitarian norms’ compliance.⁸ Furthermore, ANSAs may have different interpretations of specific legal provisions, and their understanding may not be the same as the one foreseen in international law.

With these issues in mind, Geneva Call launched the *Garance* Talks, a series of meetings that are held at the *Villa Garance*, Geneva Call’s headquarters. The *Garance* Talks bring together ANSAs and experts to discuss about the applicable legal framework and identify ways forward in order to enhance ANSAs’

compliance with international law. One important added value that the *Garance* Talks generate is an understanding of these non-State actors’ perspectives on the legal and policy discussions that concern them. They aim to complement on-going international processes which either do not or cannot, for institutional reasons, involve ANSAs or even address issues related to them.

The initiative was launched in September 2014 during a preview session organized by Geneva Call with the support of the International Institute of Humanitarian Law on the occasion of the XXXVII San Remo roundtable on current issues of international humanitarian law (IHL). The first edition of the *Garance* Talks took place in 2015 and examined the positive international law obligations of ANSAs.⁹ The second edition, held in 2017, addressed the issue of the administration of justice and detention by ANSAs.¹⁰

This third edition, which took place on 18 February 2020, focused on the conduct of hostilities by ANSAs. Representatives of four ANSAs from various regions of the world attended, together with experts from academia and international humanitarian organizations. The discussions were held under the Chatham House Rule.¹¹ Unlike previous editions,

⁶ The examples included here should not be seen as ruling out situations when ANSAs deliberately breach some of their international obligations. For other reasons, see Olivier Bangerter, ‘Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not’ (2011) 93 International Review of the Red Cross 353.

⁷ Geneva Academy of International Humanitarian Law and Human Rights, ‘Rules of Engagement. Protecting Civilians through Dialogue with Armed Non-State Actors’ (2011) 6 <https://www.geneva-academy.ch/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf>.

⁸ Hichem Khadhraoui, ‘Fragmentation of Armed Non-State Actors in Protracted Armed Conflicts: Some Practical Experiences on How to Ensure Compliance with Humanitarian Norms’ [2020] International Review of the Red Cross 1. In the context of Geneva Call’s child protection work, see Pascal Bongard and Ezequiel Heffes, ‘Engaging Armed Non-State Actors on the Prohibition of Recruiting and Using Children in Hostilities: Some Reflections from Geneva Call’s Experience’ (2019) 101 International Review of the Red Cross 603. See also generally Pascal Bongard, ‘Can Non-State Armed Groups Comply with IHL in Today’s Armed Conflicts?’, *Proceedings*

of the Bruges Colloquium. Legal and Operational Challenges Raised by Contemporary Non-International Armed Conflicts, 2018 (Bruges, College of Europe/ICRC 2019).

⁹ Geneva Call, *The Garance Series: Issue 1, Positive Obligations of Armed Non-State Actors: Legal and Policy Issues*, available at http://genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf.

¹⁰ Geneva Call, *The Garance Series: Issue 2, Administration of Justice by Armed Non-State Actors*, available at https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf.

¹¹ The Chatham House Rule reads as follows: ‘When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed’. Chatham House, Chatham House Rule, available at <https://www.chathamhouse.org/chatham-house-rule>. Consent to appear on pictures was given by some of the participants by a signed form.

this session of the *Garance Talks* was organized in the context of a research project currently undertaken by Geneva Call and the Geneva Academy of International Humanitarian Law and Human Rights, which aims at understanding ANSAs' practice and interpretation of various humanitarian rules, including those related to the protection of civilians from attacks and the conduct of hostilities.¹²



@Geneva Call. *Garance Talks 2020*.

The theme of the 2020 *Garance Talks*: The Conduct of Hostilities by ANSAs

Geneva Call's approach to the theme

Since its creation in 2000, Geneva Call has engaged with ANSAs on the conduct of hostilities from a variety of perspectives. The *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* binds ANSAs to prohibit the use, development, production, acquisition, stockpiling, retention, and transfer of anti-personnel mines, under any circumstances. The *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* recognizes "that children associated with armed forces are at

particular risk of exposure to attacks by opposing forces" and requires signatory ANSAs to "avoid using for military purposes schools or premises primarily used by children". The *Deed of Commitment for the Prohibition of Sexual Violence and Towards the Elimination of Gender Discrimination* acknowledges that "women and girls are particularly targeted and face additional risks". The *Deed of Commitment for the Protection of Health Care in Armed Conflict* commits signatory ANSAs to not deliberately attack the wounded and sick, health care personnel, facilities and transports, and to give due warning in the case that these are used "outside their humanitarian functions to commit harmful acts, allowing them necessary time to remedy the situation or to safely evacuate". Principles governing the conduct of hostilities have been also dealt with by Geneva Call in the context of its IHL campaign "Fighter, not killer", which includes: (i) the prohibition of attacking civilians, civilian property or civilian buildings; (ii) the prohibition of attacking if "civilian collateral damage is expected to be greater than the military advantage"; and (iii) the need to take precautionary measures "to protect civilians before and during attacks". The prohibition of using certain weapons and engaging in unlawful methods of war is also envisaged.¹³

¹² For further information on the research project, see Geneva Academy of IHL and Human Rights, 'From Words to Deeds: A Study of Armed Non-State Actor's Practice and Interpretations of International Humanitarian and Human Rights Norms', available at [https://www.geneva-](https://www.geneva-academy.ch/research/publications/detail/505-from-words-to-deeds-a-study-of-armed-non-state-actors-practice-and-interpretations-of-international-humanitarian-and-human-rights-norms)

[academy.ch/research/publications/detail/505-from-words-to-deeds-a-study-of-armed-non-state-actors-practice-and-interpretations-of-international-humanitarian-and-human-rights-norms](https://www.geneva-academy.ch/research/publications/detail/505-from-words-to-deeds-a-study-of-armed-non-state-actors-practice-and-interpretations-of-international-humanitarian-and-human-rights-norms).

¹³ <http://fighternotkiller.org>.

The legal framework

ANSAs engage in hostilities against persons and objects on a regular basis.¹⁴ In this context, it is widely accepted that IHL, as the legal framework applicable in non-international armed conflicts (NIACs), addresses how hostilities must be conducted. Generally, parties rely on certain means and methods to do so. While the former refers to the weapons used by the parties in conflict settings, the latter involves attacks¹⁵ –and how they are conducted–. Two major notions are relevant for the analysis of this topic: (i) parties to the conflict are limited when choosing their methods or means of warfare, and they must take “all feasible precautions” in their choice “with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”;¹⁶ and (ii) there is a legal equality between the parties based on IHL that grants the same rights and imposes “the same obligations on both the State and the non-State party, all of which are of a purely humanitarian character”.¹⁷

IHL, in this sense, determines who may lawfully be targeted in armed conflicts and who is protected from attack. Key principles include the rules related to distinction, proportionality and precaution.

¹⁴ For the purpose of this report, ‘hostilities’ is defined as encompassing all forms of hostile acts between a party to the conflict against the enemy. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2016) 2.

¹⁵ ‘Attack’ has been defined as those ‘acts of violence against the adversary, whether in offence or in defence’. Additional Protocol I to the 1949 Geneva Conventions, Article 49(1).

¹⁶ ICRC Customary IHL Study, Rule 17.

¹⁷ ICRC, *Commentary on the First Geneva Convention. Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 504.

¹⁸ Additional Protocol I to the 1949 Geneva Conventions, Article 48; ICRC Customary IHL Study, Rule 1. Although discussions related to the principle of distinction from a gender perspective were not held during the 2020 *Garance Talks*, various authors have explored it, raising relevant points that deserve further exploration. In this regard, see Matilda Arvidsson, ‘Targeting, Gender, and

The Principle of Distinction

The principle of distinction between civilians and combatants is a fundamental rule of IHL. It generally prohibits attacks on civilians or civilian objects during international armed conflicts (IACs) or NIACs. The 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I), as well as Customary IHL, affirms that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives”.¹⁸ Based on this, “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”,¹⁹ and they shall not “be the object of attack”.²⁰ Whether in IACs or NIACs, the protection of civilians has been described as “the bedrock of modern humanitarian law”.²¹

This principle has been included in numerous agreements or commitments undertaken by ANSAs. The 2015 Rules of War of the People’s Alliance for a Free and Sovereign Congo (*Alliance du Peuple pour un Congo Libre et Souverain*, APCLS) affirm that “in situations of armed conflict”, they would respect IHL, notably by “only fighting against combatants”.²² The 2009 agreement between the Government of the Philippines and the Moro Islamic Liberation Front (MILF), similarly, affirms that “[t]he parties reconfirm their obligations under

International *Posthumanitarian Law and Practice: Framing The Question of the Human in Interantional Humanitarian Law* (2018) 44 Australian Feminist Law Journal 9. See also Orly Maya Stern, *Gender, Conflict and International Humanitarian Law. A critique of the ‘principle of distinction’* (Routledge 2019).

¹⁹ Additional Protocol II to the 1949 Geneva Conventions, Article 13(1).

²⁰ Additional Protocol II to the 1949 Geneva Conventions, Article 13(2).

²¹ *Prosecutor v Kupreškić et al* (2000) IT-95-16-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [521].

²² APCLS, ‘Règles de La Guerre Dans Le Mouvement Alliance Du Peuple Pour Un Congo Libre et Souverain (ACPLS)’

http://theirwords.org/media/transfer/doc/apcls_regle_d_e_la_guerre_2015-de43f439e7bb54263caec76dcbf0a2bd.pdf accessed 22 May 2020.

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”.²³ A 2002 agreement between the Government of Sudan and the Sudan People’s Liberation Movement (SPLM) also included that the parties “reconfirm their obligations under international law, including common Article 3 of the 1949 Geneva Conventions, to take constant care to protect the civilian population, civilians and civilian objects against the dangers arising from military operations”.²⁴

Although many ANSAs have publicly supported that civilians should be respected and not deliberately targeted, the definition of who is a “civilian” has been problematic in a number of contexts. ANSAs may define this category in different ways, sometimes more narrowly than international law.²⁵ For certain ANSAs, for instance, an individual working as an informer of the State’s armed forces or police might be a legitimate military target. Conversely, other ANSAs may consider those individuals as civilians to be protected from attacks, but to be punished through various other means. The notions of civilians and military objectives, therefore, are not interpreted uniformly by all ANSAs.

Box 1: Response by the Islamic Emirate of Afghanistan to the 2012 Annual Report on the Protection of Civilians published by the UN Assistance Mission in Afghanistan (UNAMA):²⁶

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.²⁷

²³ Government of the Republic of the Philippines and the MILF, ‘Agreement on the Civilian Protection Component of the International Monitoring Team (IMT)’ art. 1 <https://www.hdcentre.org/wp-content/uploads/2016/06/Agreement-on-the-civilian-protection-component-of-the-International-Monitoring-Team-IMT.pdf#:~:text=AGREEMENT%20ON%20THE%20CIVILIAN%20PROTECTION%20COMPONENT%20OF%20THE,Parties%20reconfirm%20their%20obligations%20under%20humanitarian%20law%20and> accessed 22 May 2020.

²⁴ Government of the Republic of Sudan and the SPLM, ‘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’ art. 1 http://theirwords.org/media/transfer/doc/sd_splm_a_20_02_09-aca3835caf6b2926ed2df65b66ae9acb.pdf accessed 22 May 2020.

²⁵ Geneva Academy of International Humanitarian Law and Human Rights, ‘Reactions to Norms Armed Groups and the Protection of Civilians’ (2014) 31 https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Policy%20Briefing/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf accessed 22 April 2020.

²⁶ UN Assistance Mission in Afghanistan (UNAMA), ‘Afghanistan. Annual Report 2012. Protection of Civilians in Armed Conflict’ (2013) <https://www.refworld.org/docid/512b26a92.html> accessed 22 May 2020.

²⁷ Islamic Emirate of Afghanistan/Taliban, ‘An Open Letter to the UNAMA about the Biased Behavior of This Organization’ <https://blogs.mediapart.fr/lynx/blog/010313/open-letter-unama-about-biased-behavior-organization> accessed 22 May 2020.

The International Committee of the Red Cross (ICRC) has attempted to provide some guidance in this regard by defining who could potentially be targeted under IHL. To put it simply, the ICRC has examined under what conditions a civilian can lose his or her protection from attack. In its Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL, it holds that, in NIACs, “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’).”²⁸ It also requires for the individuals to have a “lasting integration” into the respective ANSA’s military wing.²⁹ On this ground, the ICRC argues that “IHL deprives them of protection against direct attack for as long as they remain members of that group”.³⁰ By contrast, civilians are “entitled to protection against direct attack unless and for such time as they take a direct part in hostilities”.³¹ It has also been said that “[c]ooking 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”.³² In case of doubt, the person must be presumed to be protected against direct attack. Individuals who continuously accompany or support an “organized armed group”, but whose function does not involve direct participation in hostilities (DPH), are not considered members of that group under IHL, thus remaining civilians assuming support functions.³³

Although certain aspects of what constitutes DPH remain controversial, the Interpretive Guidance asserts that, in order to reach the threshold of harm that is required to qualify as DPH, an act must: i) be likely to adversely affect the military operations or military capacity of a party to an armed conflict (such as sabotage) or, alternatively, to inflict death, injury or destruction on persons or objects against direct attack (threshold of harm); ii) be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and iii) be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).³⁴

The prohibition on attacks against civilians is a norm of customary international law which has also been included in various ANSAs’ statements, internal regulations and other policy documents. For instance, the Justice and Equality Movement (JEM) of Sudan and the Sudan Liberation Army (SLA), in this sense, issued a statement in 2008 reaffirming their “commitment to refrain from targeting [...] civilian populations”.³⁵ Similarly, the Ogaden National Liberation Front (ONLF) of Ethiopia affirmed its “opposition to engaging civilians and non-combatants”, indicating that, as a matter of policy, it “shall not engage non-combatants or civilian targets”.³⁶ In 2007, the *Mouvement des Nigériens pour la Justice* stated that their weapons must be strictly used during their official missions “and only against the Nigerian army”.³⁷

²⁸ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 16 <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> accessed 22 April 2020.

²⁹ *ibid* 34.

³⁰ *ibid* 76.

³¹ *ibid* 16.

³² Geneva Academy of International Humanitarian Law and Human Rights (n 25) 32.

³³ Melzer (n 28) 34.

³⁴ *ibid* 16.

³⁵ ‘The Geneva/Darfur Humanitarian Dialogue, Statement by the Opposition Movements’ http://theirwords.org/media/transfer/doc/1_sd_jem_slm_a_unity_2008_18-9786ecfeda2b4605ff60bc4a4b48b2.pdf accessed 22 May 2020.

³⁶ ONLF, ‘Political Programme of the Ogaden National Liberation Front (ONLF)’ pt 2, art. 2E http://theirwords.org/media/transfer/doc/et_onlf_02-3c7a7281a188e37a9c88003e82188845.pdf accessed 22 May 2020.

³⁷ MNJ, ‘Mouvement Des Nigérien Pour La Justice’ http://theirwords.org/media/transfer/doc/sc_ne_mnj_20

According to the Kurdistan Worker's Party (PKK), "organized forces of the state, military organizations and counter-organizations that support them with their armed forces and those establishments that participate in war, the warmongers and those who attack civilian people shall be targeted".³⁸ In a statement on a bombing near the capital of Myanmar, the Karen National Union (KNU) categorically rejected an accusation of attacking civilians, affirming that they do not have a "policy of letting members of its armed wing, the [Karen National Liberation Army], to engage in heinous acts of harming or killing civilians".³⁹

An associated rule is the prohibition on attacks against civilian objects,⁴⁰ which applies through the principle of distinction and as a "necessary corollary to the protection of the civilian population".⁴¹ "Civilian objects" are defined in AP I as those that are not military objectives.⁴² These are described as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling

at the time, offers a definite military advantage".⁴³

Finally, in addition to the prohibition of attacking the civilian population and civilian objects, indiscriminate attacks are forbidden. These have been defined as those attacks that are not directed against military objectives, that is, those that are the result of the use of indiscriminate means of combat, which "cannot be directed at a specific military objective", and those that take place through the use of indiscriminate methods of combat, which cannot either be directed "at a specific military objective".⁴⁴ Certain objects benefit from particular protections, such as medical units and transports,⁴⁵ cultural property,⁴⁶ dams, dykes, and nuclear electrical generating stations.⁴⁷

[07_02-6a65c778b81b9a97bc00625f78681044.pdf](https://www.genevacall.org/wp-content/uploads/2017/10/Cultural_Heritage_Study_Final_HIGHRES.pdf)

accessed 22 May 2020.

³⁸ PKK, 'To Geneva Call. Rules for the Conduct of Warfare.' http://theirwords.org/media/transfer/doc/ut_tr_pkk_hpg_2011_04_eng-c4389828932861eb8ccc1dd849ae7603.pdf

accessed 22 May 2020.

³⁹ KNU, 'KNU Statement on Bombing near Capital of Burma's Dictators' http://theirwords.org/media/transfer/doc/mm_knu_2011_50-457ce751124110996fd28eef57e9eedf.pdf accessed 22 May 2020.

⁴⁰ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 342.

⁴¹ *Prosecutor v Hadžihasanović and Kubura Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98Bis Motions for Acquittal* [2005] International Criminal Tribunal for the former Yugoslavia, Appeals Chamber IT-01-47-AR73.3 [17].

⁴² Additional Protocol I to the 1949 Geneva Conventions, Article 52(1). See also ICRC Customary IHL Study, Rule 9. There is an obvious difficulty when dealing with objects that are used simultaneously for civilian and military purposes. Such objects are referred to as "dual-use" objects, which is not a legal notion *per se*. From a legal standpoint, an object is either a military objective or a civilian object, and no other category is acknowledged. For further information, see ICRC, 'The Principle of Proportionality in the Rules Governing the Conduct of

Hostilities Under International Humanitarian Law' (2018) 37-40 <https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality?platform=hootsuite> accessed 3 April 2020.

⁴³ Additional Protocol I to the 1949 Geneva Conventions, Article 52(2); ICRC Customary IHL Study, Rule 8.

⁴⁴ Additional Protocol I to the 1949 Geneva Conventions, Article 51(4); Convention on Certain Conventional Weapons, Amended Protocol II, Article 3(8).

⁴⁵ Additional Protocol II to the 1949 Geneva Conventions, Article 11(1); ICRC Customary IHL Study, Rules 28 and 29.

⁴⁶ ICRC Customary IHL Study, Rules 38-40. For further analysis on this issue, Geneva Call, 'Culture Under Fire: Armed Non-State Actors and Cultural Heritage in Wartime' (2018) https://www.genevacall.org/wp-content/uploads/2017/10/Cultural_Heritage_Study_Final_HIGHRES.pdf accessed 22 May 2020.

⁴⁷ Additional Protocol II to the 1949 Geneva Conventions, Article 15. The ICRC Customary IHL Study notes that the customary equivalent of this reads as follows: "[p]articular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population". ICRC Customary IHL Study, Rule 42.

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The Principle of Proportionality

Although neither Common Article 3 of the 1949 Geneva Conventions (CA3), nor the 1977 Additional Protocol II (AP II) include a provision on proportionality in the conduct of hostilities, this is considered as reflecting a customary rule applicable both in IACs and NIACs.⁴⁸ This principle states that, even when a lawful military objective is targeted, “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”.⁴⁹ For this rule to be applicable, a number of conditions need to be met: i) the harm must be incidental – that is, “it must occur in the course of an

attack directed against a military objective”;⁵⁰ ii) the harm “must be expected to arise as a result of ‘an attack’ as this term is understood in IHL”;⁵¹ and iii) “only certain types of incidental harm are expressly referred to as falling within the scope of the rule: death or injury of civilians, and damage to civilian objects”,⁵² or a combination thereof. Despite these conditions were traditionally limited to the immediate effects of an attack, it is nowadays accepted that longer-term ones also have to be considered.

In essence, this principle recognizes that, in the conduct of hostilities, “causing incidental harm to civilians and civilian objects is often unavoidable”,⁵³ yet it places a limit on the extent of incidental civilian harm that is permissible. This is done by stating how military necessity and

⁴⁸ ICRC Customary IHL Study, Rule 14.

⁴⁹ *ibid.*

⁵⁰ Emanuela-Chiara Gillard, ‘Proportionality in the Conduct of Hostilities. The Incidental Harm Side of the Assessment’ (Chatham House 2018) 8 <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>

[ations/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf](https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf) accessed 20 April 2020.

⁵¹ *ibid.* 8.

⁵² *ibid.*

⁵³ ICRC (n 42) 8.

considerations of humanity must be balanced in such situations.⁵⁴ Once these two opposing criteria have been identified, the test is whether the expected death or injury of civilians, and damage to civilian objects, would be “excessive” in relation to the military advantage anticipated. The ICRC’s Commentary on Article 51(5) of AP I deals with the notion of “excessive” by stating that

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.⁵⁵

As regards as the concept of military advantage, the Commentary notes that it “can only consist in ground gained and in annihilating or weakening the enemy armed forces”.⁵⁶ It shall be mentioned that the obligation to comply with the principle of proportionality lies with either “those who plan or decide upon an attack”,⁵⁷ or those who execute the attack.⁵⁸

Although the existence of this principle is undisputed, it has been said that given its formulation in general terms, its application to a particular set of circumstances may be challenging

“because the comparison is often between unlike quantities and values”.⁵⁹ Indeed, there is no formula to determine relative values in this balancing act and, consequently, it is difficult to give further clarity towards the implementation of the rule.⁶⁰ This is why it has been said that the determination of “relative values must of that of the ‘reasonable military commander’”. Although there will be room for discussion, “there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained”.⁶¹

There are a number of ANSAs’ statements or agreements which refer to this principle of proportionality. The *Frente Farabundo Martí para la Liberación Nacional* (FMLN), from El Salvador, reported in 1988 that it had “suspended some actions because of having foreseen that they could cause damage to the population or to property of a civilian nature that would be excessive in relation to the realizable concrete and direct military advantage”.⁶² The abovementioned 2009 agreement between the Government of the Philippines and the MILF obliges the parties to “avoid acts that would cause collateral damage to civilians”.⁶³ This rule, however, is not of easy application. ANSAs, in this sense, may lack the actual capacity and knowledge of how to conduct the proportionality assessment.⁶⁴

⁵⁴ *ibid.*

⁵⁵ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross & Martinus Nijhoff 1987) paras 1979–1980.

⁵⁶ *ibid.* 2218.

⁵⁷ Additional Protocol I to the 1949 Geneva Conventions, Article 57(2)(a).

⁵⁸ Sandoz, Swinarski and Zimmermann (n 55) para 2220, referring to Additional Protocol I to the 1949 Geneva Conventions, Article 57(2)(b).

⁵⁹ International Criminal Tribunal for the former Yugoslavia, ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’ <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> accessed 22 May 2020.

⁶⁰ By referring to Kalshoven and Zegveld, the ICRC has noted that the lack of precision in the principle leads military commanders who are planning for and conducting attacks to greatly vary. ICRC (n 42) 8.

⁶¹ International Criminal Tribunal for the former Yugoslavia (n 59).

⁶² FMLN, ‘The Legitimacy of Our Methods of Struggle’ 7.

⁶³ Government of the Republic of the Philippines and the MILF, ‘Agreement on the Civilian Protection Component of the International Monitoring Team (IMT)’ art. 1(a) <https://www.hdcentre.org/wp-content/uploads/2016/06/Agreement-on-the-civilian-protection-component-of-the-International-Monitoring-Team-IMT.pdf#:~:text=AGREEMENT%20ON%20THE%20CIVILIAN%20PROTECTION%20COMPONENT%20OF%20THE,Parties%20reconfirm%20their%20obligations%20under%20humanitarian%20law%20and> accessed 22 May 2020.

⁶⁴ Geneva Academy of International Humanitarian Law and Human Rights (n 7) 6.

They may not know, for instance, how to balance between the military advantage they envisage with the collateral damage – a notion that is sometimes challenging for ANSAs to operationalize. Indeed, the “reasonable military commander” standard may be of difficult application for certain ANSAs.

The Principle of Precaution

Finally, even if an attack is directed against a legitimate target and respects the proportionality rule, the attacking party, be it a State or an ANSA, must take all feasible precautionary measures in attack to avoid and minimize the dangers to the civilian population and civilian objects caused by its military operations.⁶⁵ Article 57 of AP I explains the precautionary measures an attacking party must take if they are feasible. The ICRC has recognized that these have a customary nature both in IACs and NIACs.⁶⁶ Article 58 of the same treaty also provides that a defending party shall, to the maximum extent feasible, take precautionary measures to protect the “civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. This means that for instance, parties must, wherever possible, remove civilian and civilian objects “from the vicinity of military objectives” and avoid “locating military objectives within or near densely populated areas”;⁶⁷ choose to use more accurate weapons; and carry out the attack when they are least likely to cause civilian casualties and affect civilian objects.⁶⁸

There is documented practice on the application of this rule by ANSAs. The

abovementioned 2015 rules of the APCLS note that this group’s members should take all “precautions” to “achieve military objectives causing the least harm to the life and property of civilians”.⁶⁹ In 1988, the FMLN of El Salvador indicated that it took measures “[t]o take effective precautions to spare the civilian population” during its attacks, setting out a variety of measures it had taken as regards to the use of mines, which included maps of mined areas and issuing warnings through radio stations.⁷⁰ The 2010 Code of Conduct of the Islamic Emirate of Afghanistan states that “[t]he persons responsible in the provinces and districts, squad leaders and all other Mujahids should take maximum measures to avoid deaths and injuries among common people, as well as the loss of their vehicles and other properties”.⁷¹ The rule has also been included in certain agreements. For instance, in the abovementioned 2009 agreement between the Government of the Philippines and the MILF, the parties agreed to “[t]ake all precautions feasible to avoid incidental loss of civilian life, injury to civilians, and danger to civilian objects”.⁷² The Chin National Front (CNF) of Burma, in its internal Code, includes that the attacking of military objectives “without proper analyses or identification [...] is strictly prohibited. Even while attacking care should be taken to only target [the military objective] without killing civilians or damaging civil[ian] propert[y]”.⁷³ Similarly, the 2008 statement by the JEM and SLM in Sudan stated that “[w]e will do our utmost to guarantee the protection of civilian populations in accordance with the

⁶⁵ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 348.

⁶⁶ ICRC Customary IHL Study, Rule 15.

⁶⁷ Additional Protocol I to the 1949 Geneva Conventions, Article 58.

⁶⁸ Geneva Academy of International Humanitarian Law and Human Rights (n 25) 43..

⁶⁹ APCLS (n 22).

⁷⁰ FMLN (n 62) 7 and 24. See also Sivakumaran (n 40) 352.

⁷¹ Muhammad Munir, ‘The Islamic Emirate of Afghanistan. The Layha [Code of Conduct] For Mujahids’ (2011) 93 *International Review of the Red Cross* 103, 117.

⁷² Government of the Republic of the Philippines and the MILF, ‘Agreement on the Civilian Protection Component of the International Monitoring Team (IMT)’ art. 1(d) <https://www.hdcentre.org/wp-content/uploads/2016/06/Agreement-on-the-civilian-protection-component-of-the-International-Monitoring-Team-IMT.pdf#:~:text=AGREEMENT%20ON%20THE%20CIVILIAN%20PROTECTION%20COMPONENT%20OF%20THE,Parties%20reconfirm%20their%20obligations%20under%20humanitarian%20law%20and> accessed 22 May 2020.

⁷³ Referred to in Sivakumaran (n 40) 354.

principles of human rights and international humanitarian law". Furthermore, they "recognize that placing military assets and personnel in close proximity to civilian areas increases the risk that civilians will be caught up in hostilities or even targeted [and] will therefore continue [their] policy of maintaining a proper physical separation between [their] armed forces and the civilian population".⁷⁴

Box 2: Guidelines on the Law of Armed Conflict – National Transitional Council/Free Libyan Army, 2011. Rules on targeting and the use of violence:⁷⁵

- ONLY target Qadhafi 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 allow persons who are less than 18 years of age to fight, even if they have volunteered to do so.
- AVOID as far as possible any effect on civilians of an attack against Qadhafi forces.
- DO NOT target fighters who are surrendering or are no longer fighting.
- DO NOT target civilians or places where there are only civilians.
- DO NOT target medical personnel, facilities, transports or equipment. These may be searched if you need to verify they are genuine, but REMEMBER that medical personnel are allowed by law to carry small arms to protect their patients.
- DO NOT target religious personnel.
- DO NOT target UN / ICRC / Red Crescent personnel or facilities.
- DO NOT harm cultural, educational and religious buildings and historic sites unless Qadhafi forces are using them for hostile purposes, and such harm is absolutely necessary.

- Only use the Red Crescent symbol to indicate medical personnel, facilities and transport and under direction of the competent authorities.

**REMEMBER! FIGHT ONLY FIGHTERS.
ATTACK ONLY MILITARY TARGETS.
SPARE CIVILIANS**

As can be noted, situations in which ANSAs would be willing to affirm their commitment with certain rules on the conduct of hostilities exist. Yet they sometimes lack the capacity, knowledge or resources to implement all those obligations accordingly. Many ANSAs do not have legal advisers that would express concerns over a specific attack. In addition, oftentimes ANSAs' military training is either very limited or only aimed at the highest ranks. Addressing these issues is therefore essential but sensitive, as it is often seen from the perspective of providing ANSAs with military support.

Views from ANSAs

The core sessions of the 2020 *Garance* Talks addressed the three principles of the conduct of hostilities: distinction, proportionality and precautions. The sessions included presentations by the four ANSA representatives participating.⁷⁶

The Principle of Distinction

The first session dealt with the application of the principle of distinction (notions of military objectives, civilians and civilians directly participating in the conflict).

The representative of an ANSA stated that its fighters were upholding the distinction between civilians and combatants at all times. He noted that, according to its code of conduct, civilians could not be the target of attacks. Civilians are those who

⁷⁴ 'The Geneva/Darfur Humanitarian Dialogue, Statement by the Opposition Movements' (n 35).

⁷⁵ National Transitional Council/Free Libyan Army, 'Rules on Targeting and the Use of Violence' 3 http://theirwords.org/media/transfer/doc/ly_ntc_2011_0

[9-344f847e0eb8a2e16e10099309e91005.pdf](https://www.garance.org/9-344f847e0eb8a2e16e10099309e91005.pdf) accessed 22 May 2020.

⁷⁶ As this report follows the Chatham House Rule, the transcript is not attributed to any specific representative or individual.

are not members of the armed forces: “[a]ll persons are civilians except when they directly participate in hostilities. When they do, they lose their protection from attacks”. To determine if an individual is an enemy, the ANSA in question would do a case by case assessment. Yet they have sufficient elements to distinguish civilians from fighters: wearing uniforms, carrying weapons openly and announcements that the specific individual is an enemy of the movement. Direct participation in hostilities, according to this representative, would be measured as a matter of degrees: a minimum collaboration with the enemy, for instance, would not constitute direct participation in hostilities. “Enemy informants, however, may become military targets if their activity causes harm to the group”. Attacks, he added, “may only be directed against combatants and not civilians”. Attacking civilians and civilian objects is prohibited for the group “no matter the circumstance”. He claimed that this was applicable even before they had heard about IHL. A participant inquired whether shop keepers could be targeted should they cause “big harm”. This was replied negatively, adding that informants “are a different category. This is because disclosing critical information on the group poses a great risk for the movement’s mere existence”. When asked about the action taken against informants, he replied that they would warn that person, reminding him/her not to interfere. If he/she continues, “as they have no detention facilities they would execute the individual in question”.

The representative of another ANSA affirmed that a “civilian is someone that does not belong to any military force. During hostilities, it is evident who is a military target. Anyone with a uniform carrying weapons openly is a military target”. With respect to the informants, he stated that “they have courts that follow rules and regulations, and these courts would determine if informers are actually spies”. If this is the case, then the “police”

would be in charge of detaining those individuals. The representative further stated that if “civilians are working with the enemy, they are making a mistake. They should be arrested, as they are considered as criminals and should be brought to courts”. He also noted that “all buildings where civilians are present cannot be considered as military targets. Of course, this would change when schools are emptied and filled with fighters. The group would then attack”. On attacks against hospitals, he affirmed that “even if it has only one doctor inside, this cannot be considered a military target”.

A representative of a different ANSA explained that “military objectives are clear for them. Usually, the enemy wears uniforms. If not, and they are spying on behalf of the enemy, we have intelligence units that will confine them and bring them to courts”. He added that “anyone who does not take part in hostilities and does not help the enemy is a civilian and is protected from attack. If someone is against the movement and does not share its ideology, he/she is still a civilian. He/she becomes a target only if he/she provides the enemy a military advantage”. If there is a doubt, the person should be considered to be a civilian. On the informant’s issue, according to this ANSA there are two types of situations: “those that provide information that is military harmful and those that pose no military risk”. This representative also noted that if shopkeepers/contractors are supplying gasoline to the enemy, then “they become a military target, but the group would warn these individuals first”. They would be arrested and detained and, in case they repent, they would be released. For this ANSA, transporting equipment to the enemy would also be considered “militarily harmful”, and therefore face similar consequences, if there is repeated collaboration despite warning. This movement considers State’s representatives “as civilians, but those placed at higher levels are not. Usually high-level officials have military powers

and have an armed escort that protects them”. Regarding civilian objects, schools, hospitals and cultural sites are not considered military objectives unless they are used by the enemy.

The representative of the fourth ANSA explained that attacks are based “on the proved acts of a person or because the person is part of the conflict. Sometimes civilians are targeted on the basis of their ethnicity but we try to discipline this”. The representative of this ANSA explained that “there are civilian leaders such as heads of villages who collaborate with the enemy. According to the regulations of the group, its intelligence service has to establish evidence of whether the suspected civilian is directly participating in the conflict’ and “if this is the case, he/she will be judged and punished”. On the issue of shopkeepers, since they often have no choice than selling goods for all parties to conflict, the group tries to “find a middle ground”. “If shopkeepers are transporting uniforms, munitions or weapons, then justice must take over. Selling food to the enemy may be considered as direct participation in the conflict”.



@Geneva Call. IHL training. 2020.

The Principle of Proportionality

The second session dealt with the application of the principle of proportionality (collateral damage, military advantage).

The representative of an ANSA explained that they may choose a target according to “its importance” and the danger it presents to the group. “The nature and danger”, he affirmed, “will decide the procedure to follow in order to target the objective”. The ANSA often tries to collect information about the target that would “help to determine the choice of weapons and timing of the attack and anticipate issues such as the evacuation of the wounded”. After the “reconnaissance and intelligence gathering stages are over, then the group would consider carrying out an offensive operation and plan accordingly”. The success of the military operations, in any case, “are not measured by the number of casualties but by the political changes that will result”. Before attacks, the ANSA would ask civilians to leave unsafe areas. When inquired about whether he thinks that IHL is too permissive, as a certain degree of collateral damage is accepted, he replied by noting that “the issue is not regarding IHL permissiveness but to fight for human values, though zero casualties is not possible”. In any case, he added that “civilians, regardless if they are affiliated to the enemy or not, must be protected. Targeting should avoid indiscriminate losses. This is why information is sent to the leadership, so it can draw plans that would lead to a professional implementation of an operation”.

Another ANSA representative noted that “when they want to carry out an attack against the enemy, but there are civilians around, the group would change its target in order to spare civilians”. Sometimes, however, it “would keep the target and change the position from where the attack would come from”. Alternatively, the ANSA would spread “rumors” among the civilian population to encourage it to

escape and isolate the enemy forces. If the enemy resists, the group “may decide to infiltrate it and attack from behind”. Since this may lead to a greater harm, the ANSA would use “guerrilla methods with small weapons, to cause as few civilian casualties as possible”. According to this same representative, “good intelligence is key to anticipate field conditions and enemy situation before launching attacks”.

The representative of another ANSA affirmed that they have “internal procedures in place during military operations regarding choice of targets, weapons and time of attacks. Their fighters are trained to avoid carrying out attacks if excessive civilian harm is anticipated”. He also claimed that the group would attack only if the presence of military objectives is confirmed by reconnaissance, and they would use only “small weapons, such as M-16”. He also explained that they use “remote controlled bombs for accurate targeting, but not landmines”. This group also tends to attack during the night so they can easily retreat. In the event they plan to carry out a military operation in a “crowded area”, they would “release a warning so that people avoid gathering in those places”. The ANSA would also carry out attacks when people are praying, “because this is the time when they are not in the streets”. After an attack is conducted, the group “makes an assessment on whether it was a legitimate target and what the group has gained”. This ANSA defines collateral damage as the “unintended death and injury to civilians”. The representative also noted that they limit the use of bullets depending on the targets and if fighters use more, he said, “they receive a disciplinary sanction”.



@Geneva Call. Burned village in the DRC 2018.

The fourth ANSA present at the *Garance* Talks explained that “there are two types of military operations: (i) when they are attacking a military base, the target is clear and they know what type of weapon to use; and (ii) when there are civilians around, investigations are conducted before carrying out a military operation”. Commanders, in this sense, are deployed “to investigate the area, to evaluate potential civilian casualties, to see whether there are shops, schools, health centers, and if the target can be attacked without affecting civilian life”. This information is then submitted to the “military council”, which analyzes it together with maps of the area to be attacked, suggests the choice of weapons and does “a proportionality assessment”. Fighters “should not use more than a bullet when they can, as Islam allows to spend only what is needed to achieve an objective”. This is also in light of the fact that the group does not “have a lot of weapons and artillery”. The ANSA also has set up a commission which receives complaints from the community on violation of humanitarian norms by all parties. This body follows investigations in case there are civilian casualties: it also has a hotline where violations can be reported by members or non-members of the ANSA, and it produces regular reports on violations by all parties to the conflict. If commanders or fighters do not respect the rules, they may be detained and judged. He added that “if we know for sure that planned attacks are expected to

cause many casualties, then we suspend or cancel the attack out of concern for civilians". With regards to suicide attacks, we are "very cautious about their impact on civilians". The leadership would "identify" the people who could carry them out to verify that they are qualified. They would consider the following elements: "enough courage, able to reach the location, enough training, age requirement, among others. If an individual does not fulfill those requirements, then they will not accept him as a suicide bomber". Those operations, he claimed, "will mainly be conducted either early in the morning or at night so as to avoid civilians. This is always planned. Although a lot of people might be waiting to become suicide bombers, they might not be allowed to do so". Furthermore, these should only be carried out against "high-value" targets, and the suicide attacks must be authorized by the leadership. According to this ANSA, collateral damage is defined in the following terms: "if the military advantage is significant and collateral damage limited, we will move forward with the attack". This group also added that civilians should be differentiated from "civilian objects". Regarding the latter, they "would just go forward with the attack". The ANSA is "more flexible when it comes to the damage of civilian objects. For civilians, the situation is different".

The Principle of Precaution

The final session explored the application of precautionary measures.

The representative of one ANSA noted that its fighters wear uniforms "at all levels" and used mostly personal weapons. Fighters "do not target civilians and can never do it. Killing civilians is a war crime". Furthermore, he stated that they gather "intelligence" before the operation to verify that targets are military objectives, and that there are three types of battles: "behind the line of the enemy, surprise attacks and defensive attacks".

The type of battle determines the type of weapons that need to be used. "Precautionary measures are taken to spare civilians. If a commander makes a mistake, he may be demoted". This ANSA also claimed to locate its military forces outside civilian areas.

The representative of another ANSA expressed its confusion between "proportionality" and "precautionary measures". He said that "there are steps taken to minimize collateral damage". Fighters rarely use uniforms because as the ANSA does not have territorial control, "it would make easier for the enemy to distinguish the group's members". The representative claimed that the ANSA does post-attack assessment.

The representative of another ANSA stated that they "need to be informed about civilians being present in certain areas". He also noted that there is an "internal directive affirming that civilian areas should be avoided" when carrying out military operations and that fighters "must treat the population well". The representative pointed out that the ANSA has "different commissions for the protection of civilians. The movement has appointed important leaders for each commission and hold their people accountable for causing harm to civilians". Those found responsible, he added, "are convicted and punished". Before carrying out operations, fighters assess the area. They also avoid using indiscriminate weapons, as they have "people that know how to prepare bombs with material that will not cause excessive or disproportionate harm". The representative claimed that "the time of operations is also very important". He also noted that fighters do not use uniforms at all times, yet they carry weapons openly, and use a flag so they can be identified.



@Geneva Call. Garance Talks 2020.

The representative of the fourth ANSA explained that they plan attacks on the basis of reliable intelligence. They consider four aspects: “the timing the location and presence of civilians, the means and methods and the expected result of the attack. This allows the leader to decide whether the attack would cause collateral damage and if it is actually worth it. If it is green lighted, then the fighters move forward”. After the attack, the representative claimed, the group assesses the advantages (both military and political) and costs of the operation and imposes sanctions “if the assessment result in excessive costs compared to the advantage gained”. In all wars, he affirmed, “you need to gain territory and there may be political interests at stake. It is important to understand what type of military equipment you have and what you expect to gain”. Yet the ANSA has specific instructions on this issue, as its fighters would often “wear civilian clothing with a distinctive military element, and they would change it so these cannot be identified by the enemy forces”. These could include, for instance, using a military jacket in a different way, such as with one sleeve rolled up. This ANSA also claimed to locate its military forces outside civilian areas.

Conduct of Hostilities, International Humanitarian Law and the Challenges for ANSAs

The different experiences raised by the representatives of the four ANSAs demonstrate the need to better understand their practice and interpretation of the law applicable upon them. This is particularly relevant for two reasons.

First, from a “capacity” perspective, it remains unclear whether these non-State actors have the capacity to implement rules that were primarily designed for the armed forces of States, which usually – although not always – have a more sophisticated level of organization than ANSAs. There is an assumption, however, that parties to the conflict: i) will be able to use a certain type of uniform to differentiate their fighters from those not participating in the hostilities; ii) will have the knowledge on how to undertake a proportionality assessment; and iii) will be able to apply precautionary measures, both in the planning and execution of an attack and those against the effects of attacks, as envisaged in IHL. This assumption is related to the way in which the application of IHL in NIACs is conceived, as one of the factors needed to determine whether an armed group is organized enough to be a party to a conflict is to have “a certain level of hierarchy and discipline and the *ability to implement the basic obligations of IHL*”.⁷⁷ The rules on the conduct of hostilities are certainly part of these obligations.

Second, despite the existence of these practical difficulties, the discussions held at the 2020 *Garance Talks* demonstrate a general agreement among ANSAs present on the importance of these rules, notably the principle of distinction. All ANSAs affirmed, in this sense, that civilians should not be targeted if they do not participate in hostilities. This rule is actually present in the internal regulations

⁷⁷ ICRC (n 17) para 429. Emphasis added.

of each movement. Yet the definition of “civilian” and “direct participation in hostilities” varied, showing the existence of interpretative differences between the ANSAs themselves. This disagreement was not perceived when dealing with the rules related to proportionality and precautions, where commonalities across the ANSAs were more apparent. For instance, there was a broad agreement on the importance of the choice of targets, the intelligence gathering, careful planning and timing of the attack. Several representatives expressed that their movement had suspended or cancelled attacks out of concern for civilians.

Identifying these scenarios is an important contribution to the research project on ANSAs’ practice and interpretation of IHL undertaken by Geneva Call and the Geneva Academy of International Humanitarian Law and Human Rights. By compiling and analysing these non-State actors’ views and understanding of the applicable legal framework, the research will shed light on the causes of violations or, *a contrario*, on the factors that are conducive to compliance. It is expected that these findings will generate useful information for humanitarian actors, contributing to the design of more effective protection strategies and programming.

Methodologically, the project will first map the different sources used by ANSAs to express their views on and commitments to international law. The research team will look in particular at the database www.theirwords.org, which contains more than 574 commitments made by 253 ANSAs from all around the world. Documents include unilateral declarations, public statements, codes of conduct, command orders, penal codes, legislations, decrees, memoranda of understanding, special agreements, as well as peace and ceasefire agreements. The research project will also entail a number of case studies, based notably on

field interviews, which will serve to understand in more depth ANSAs’ policies and interpretation of norms. The following questions have been identified as essential to support the project:

- 1) Knowledge and understanding: Are ANSAs familiar with the international rules applicable upon them in armed conflicts? Do they have different degrees of knowledge according to the rule under analysis? How do they understand these rules? Do they share the same interpretations States or other ANSAs have?
- 2) Ownership and internalization: Do ANSAs agree with the international rules applicable upon them in armed conflict? Are these rules reflected in their internal policies or codes of conduct? What factors contribute to their acceptance or rejection of specific humanitarian norms (e.g. local values, influence of different stakeholders)? If they disagree, why and on what rule or aspect of the rule?
- 3) Capacity: What are the practical challenges ANSAs face in complying with the international rules applicable to them? Are some of these difficulties linked to their organizational structure, the way norms are drafted (e.g. fair trial procedures based on states’ infrastructure and capacity), or the lack of technical assistance?
- 4) Situational: What are the reasons why ANSAs follow certain rules while, at the same time, disregarding others? What are the situational factors that influence both scenarios? What conclusions can be drawn from these scenarios of respect or lack thereof?
- 5) Reflective: What are the issues ANSAs would be willing to regulate in the future (e.g. protection of the environment, ban on anti-vehicle mines, etc.)? How would they regulate these (e.g. through an agreement with the other parties to conflict, an internal regulation of the group, elaboration of new international norms)?

Annex 1: Agenda

The *Garance* Talks 2020

Conduct of Hostilities by Armed Non-State Actors

18 February 2020

The meeting was held under the Chatham House Rule.

9.30 – 9.45	Welcome and opening remarks
9.45 – 10.30	Presentation of the legal framework applicable to the conduct of hostilities in non-international armed conflicts
10.30 – 11.00	<i>Break</i>
11.00 – 12.30	Session 1: The principle of distinction (notions of military objectives, civilians and civilians directly participating in the conflict)
12.30 – 13.30	<i>Lunch</i>
13.30 – 15.00	Session 2: The principle of proportionality (collateral damage, military advantage)
15.00 – 15.30	<i>Break</i>
15.30 – 17.00	Session 3: Precautionary measures (types of measures, active/passive precautions)
17.00 – 17.30	Closing remarks

Annex 2: Selected IHL Provisions

Conduct of Hostilities under the 1977 Additional Protocol II

Article 13 – Protection of the civilian population

“1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities”.

Article 14 – Protection of objects indispensable to the survival of the civilian population

“Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.

Article 15 – Protection of works and installations containing dangerous forces

“Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population”.

Article 16 – Protection of cultural objects and of places of worship

“Without prejudice to the provisions of The Hague Convention for the Protection of Cultural Property in the event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort”.

Conduct of Hostilities under Customary IHL

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 2: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”.

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

Rule 6: “Civilians are protected against attack, unless and for such time as they take a direct part in hostilities”.

Rule 7: “The parties to the conflict must at all times distinguish between military 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".

Rule 10: "Civilian objects are protected against attack, unless and for such time as they are military objectives".

Rule 11: "Indiscriminate attacks are prohibited".

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".

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".

Rule 16: "Each party to the conflict must do everything feasible to verify that targets are military objectives".

Rule 17: "Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects".

Rule 18: "Each party to the conflict must do everything feasible to assess whether the attack 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".

Rule 19: "Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack 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".

Rule 20: "Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit".

Rule 22: "The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks".

Rule 97: "The use of human shields is prohibited".

Annex 3: Further Reading

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