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PRECAUTIONS IN ATTACK UNDER INTERNATIONAL HUMANITARIAN LAW

Master thesis

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LIST OF ABBREVIATIONS

Amended Mines Protocol	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996
API	Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts of June 8, 1977
Conference of Government Experts	Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1972)
Diplomatic Conference of 1974–1977	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974–1977)
Draft API	Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts
GCI	Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of August 12, 1949
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GCIII	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
GCIV	Geneva Convention on Civilian Persons in Time of War of August 12, 1949
HCIV	Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of October 18, 1907
HCIX	Convention (IX) concerning Bombardment by Naval Forces in Time of War of October 18, 1907
ICRC	International Committee of the Red Cross

ICRC Draft Rules	Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War of October 15, 1956
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IDF	Israel Defense Forces
IHL	International Humanitarian Law
ILASG	International Law Association Study Group on the Conduct of Hostilities in the 21st Century
NATO	North Atlantic Treaty Organization
PHPCR	Program on Humanitarian Policy and Conflict Research at Harvard University
UK	United Kingdom of Great Britain and Northern Ireland
UK Military Manual	United Kingdom Joint Service Manual of the Law of Armed Conflict
UN	United Nations
UNFFM on the Gaza Conflict	United Nations Fact Finding Mission on the Gaza Conflict
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

INTRODUCTION

Problem of research

Precautions in attack have been initially codified as additional prioritized guarantees of a compliance with the most crucial prohibitions existing in international humanitarian law (IHL) on, *inter alia*, indiscriminate attacks and attacks directed against objectives under special protection. That is why precautionary measures are attached a significant importance for ensuring consistency and integrity of the protection being granted to civilians, civilian objects and other exhaustively enumerated objectives. However, an assessment of precautions' effectiveness or their sufficiency for mitigating civilian risks related to an attack launching or even an ascertainment of the mere fact of their application is sophisticated if not precluded by the fact that circumstances influencing precautions' application usually include secret information not disclosed by belligerents. It is also worth noting that despite extensively formulated provisions with regard to precautionary measures enshrined in the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 (API), there is a considerable number of interpretative declarations and reservations formulated to Article 57 of API by States when ratifying or acceding to API.[1] The analysis of researches wholly or partially dedicated to the issues of precautions in attack provides substantial grounds to assert that interpretative conclusions reached by respective scholars with regard to rather crucial aspects are contradictory, e.g. regarding the scope of objectives as anticipated collateral damage influencing a proportionality assessment, the possibility to trigger the mechanism of precautions' application before an attack launched by one person etc. Moreover, the provisions of Article 57 of API are phrased not only by the use of the most interpreted terms of IHL, including the ones of "civilians" and "military objective," but also by invoking several evaluative qualifiers which are open to controversial interpretation because of their contingency on various contextual factors. Taking into account an interpretative tendency of resorting to a restrictive interpretation of rules by obliged actors and an extensive interpretation by beneficiaries of rules, all of the above-mentioned may cause a distortion of initial intentions of API drafters regarding a manner of a

[1] Declarations or reservations interpreting the terms "feasible" and "military advantage" from Article 57(2)(a)(i) and 57(2)(b) respectively were formulated by Algeria (1552 U.N.T.S. 382, August 16, 1989), Austria (1289 U.N.T.S. 303, August 13, 1982), Belgium (1435 U.N.T.S. 367, May 20, 1986), Canada (1591 U.N.T.S. 462, November 20, 1990), Germany (1607 U.N.T.S. 526, February 14, 1991), Ireland (2073 U.N.T.S. 28, May 19, 1999), Italy (1425 U.N.T.S. 438, February 27, 1986), the Netherlands (1477 U.N.T.S. 299, June 26, 1987), New Zealand (1499 U.N.T.S. 358, February 8, 1988) and Spain (1537 U.N.T.S. 389, April 21, 1989) when ratifying or acceding to API.

proper application of precautions in attack. Consequently, the main problems of the present research are (1) interpretative ambiguities in material, personal and temporal scopes of precautions in attack and (2) conditions of permissible application of contextual evaluative qualifiers "feasible" and "unless circumstances do not permit."

Relevance of the final thesis

The necessity of precautions in attack to be properly applied could not be underestimated having regard to statistical figures concerning civilian casualties in the course of contemporary armed conflicts, especially those happened in urban and densely populated areas. In 2017 the United Nations (UN) recorded more than 26,000 civilian deaths and injuries inflicted in the course of the armed conflicts in Afghanistan, Iraq, Somalia, Yemen, the Central African Republic and the Democratic Republic of the Congo.[2] Having allowed for some percentage of the mentioned civilian casualties to be either legitimate killings of civilians directly participating in hostilities or proportional "collateral damage," the civilian casualty ratio is still too high to be justified by any possible military necessity. Moreover, immutably increasing tendency of the mentioned quantitative data is influenced by a proliferation of urbanized asymmetrical armed conflicts characterized by a distorted inequality of belligerents' technological capabilities and even of overall strength of their armed forces or other organized armed groups. In order to alter existing balance of power in their favor, less powerful parties to an armed conflict usually resort to taking advantages of the urban environment by exposing civilians, civilian objects and objectives under special protection to greater risk of being affected at least by indirect effects of impending attacks. The UN reported that 68% of the world's population is expected to live in urban areas by 2050, in comparison with 55% nowadays.[3] Therefore, an existence of a considerable number of ongoing asymmetrical armed conflicts and their inevitable urbanization support the conclusion that there are no prerequisites for inverse process regarding the further magnification of the mentioned civilian casualty ratio. Currently, interpretative ambiguities decrease the effectiveness of precautions in attack and, as a result, of fundamental IHL principles of distinction and proportionality, creating additional loopholes for their non-application. Consequently, it is of a particular significance for the international community to enhance the level of civilian protection by improving existing legal framework with regard to precautions in

[2] U.N. Secretary–General, *Protection of Civilians in Armed Conflict*, para. 10, U.N. Doc. S/2018/462 (May 14, 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/N1812444.pdf.

[3] U.N. Department of Economic and Social Affairs, *World Urbanization Prospects: The 2018 Revision* (May 16, 2018), https://population.un.org/wup/Publications/Files/WUP2018-KeyFacts.pdf.

attack through the elimination of all possible inconsistencies and ensuring a unified practice of its proper implementation.

Scientific novelty, originality and overview of the research on the selected topic

There is a considerable number of researches of Laurent Gisel, Jann Kleffner, Wolff Heintschel von Heinegg, Rogier Bartels, William J. Fenrick, Ian Henderson and Kate Reece, Isabel Robinson and Ellen Nohle, Luke A. Whittemore and Emanuela-Chiara Gillard devoted to an examination of the principle of proportionality in IHL. And despite the fact that Ian Henderson and Rogier Bartels supported the opposite opinion, a majority of the mentioned scholars concluded that military medical personnel and objects as well as military wounded, sick and shipwrecked shall be taken into account in the course of a proportionality assessment process. Pnina Sharvit Baruch and Noam Neuman having dedicated their research to the profound analysis of advance warning rules compiled the most comprehensive summarized list of criteria for a proper assessment of a warning's effectiveness. However, none of the mentioned researchers did examine the scope of other precautions in attack enshrined in Article 57 of API or other international agreements.

Ian Henderson, Jean-François Quéguiner, Théo Boutruche, Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, the International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILASG) and Alexandre Cabral Campelo Hierro Lopes, having devoted their researches to the analysis of all precautions in attack enumerated in Article 57 of API, reached important conclusions on various debatable issues. Ian Henderson recognized a possibility to assess an act of violence of a single soldier as an attack for the purposes of Article 49(1) of API depending on the context in which the act was conducted[4] and proposed to interpret the phrase "may affect the civilian population" set forth in Article 57(2)(c) of API narrowly to mean direct effect in the sense of civilians possibly being injured or killed.[5] However, the passive personal scope of precautions in attack was not even briefly determined by Ian Henderson. The ILASG made important conclusions with regard to an identification of dual-use objects as military objectives[6] and an assessment of financial implications as a relevant factor in

[4] Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I,* International Humanitarian Law Series, vol. 25 (Leiden, NL: Martinus Nijhoff Publishers, 2009), 161, doi:10.1163/ej.9789004174801.i-268.

[5] Ibid., 188.

[6] International Law Association Study Group on the Conduct of Hostilities in the 21st Century, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare," *International Law Studies* 93 (2017): 336 (hereafter cited as *ILASG Report*).

the determination of feasibility,[7] whereas the issues of responsible persons for the application of precautions concerned were omitted. Théo Boutruche, having focused, *inter alia*, on a proper qualification of mistakes made in the course of a feasibility assessment process,[8] examined neither a passive personal scope nor a temporal scope of application of precautions in attack. Jean-François Quéguiner disregarded an evaluation of a feasibility caveat, whereas Michael Bothe, Karl Josef Partsch and Waldemar A. Solf excluded the issues of attack warnings from the scope of their researches.

Consequently, even the researches of fundamental nature devoted to the analysis of all precautions in attack did not purposefully cover some of their aspects. Therefore, the conclusions reached upon a comprehensively conducted analysis of the scope of feasible precautions in attack enumerated in Article 57 of API and other international agreements will be of significant scientific novelty because currently the problems of the present research were addressed only fragmentarily or superficially and never examined in such a comprehensive manner. Moreover, the results of the present research will be substantially original because none of the existing researches having focused wholly or partially on the issues concerned have aimed at analyzing and interpreting respective provisions of Article 57 of API with a view to separately determine the main scopes of application of precautions in attack, namely *ratione materiae*, *ratione personae* and *ratione temporis.*

Significance of research

Conclusions emanated from the present interpretative analysis of currently ambiguous and controversial aspects of the scope of precautions in attack could be applied by persons assuming a complete responsibility for the proper fulfilment of precautionary obligations on behalf of belligerents as "a check-list" for an evaluation of any definitive decision in the course of an attack planning or any action carried out directly on the battlefield for their compliance with IHL rules and standards. Taking into consideration substantial extent of interpretative challenges faced by warring parties in their endeavors to ensure proper application of precautions in attack, the results of the present research could be employed by respective national authorities as detailed guidelines for drafting or amending of military manuals, instructions, disciplinary

[7] Ibid., 378.

[8] Théo Boutruche, "Expert Opinion on the Meaning and Scope of Feasible Precautions under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the Context of the Operation "Protective Edge," *Diakonia International Humanitarian Resource Centre Publications* (2015): 22–23, https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opionions/precautions-under-international-humanitarian-law-of-the-operation-protective-edge.pdf.

regulations or other internal acts. Moreover, recommendations formulated on the basis of a comprehensively conducted analysis of the issues concerned could be followed by any State Party to API for proposing relevant amendments to the analyzed provisions in compliance with the procedural requirements stipulated in Article 97 of API.

The aim of research

The present research is aimed at defining the scope of precautions in attack and ascertaining the scope of circumstances for legally permissible non-application of precautionary rules by invoking caveats referred to as "do everything feasible" and "unless circumstances do not permit."

The objectives of research

The present research is aimed at the achievement of the following objectives:

- to ascertain the allocation of responsibility for the application of precautions in attack between belligerents and to determine the scope of persons assuming a responsibility for a proper fulfilment of each precautionary obligation on behalf of warring parties;
- to delineate the scope of persons and objects entitled to a protection granted by the precautionary rules, focusing on the interpretation of the terms "civilians," "civilian population," "civilian objects" and "objectives" which are "subject to special protection";
- to define a temporal scope of an application of precautionary measures with particular attention being paid to a detailed analysis of the legal definition of "attacks";
- to clarify the nature of caveats defined with the expressions "do everything feasible," "take all feasible precautions" and "unless circumstances do not permit";
- to identify applicable standards of a proper fulfillment of the obligation to give an effective advance warning of an attack.

Research methodology

The following methods are used for the attainment of the aim and the objectives of the present research:

- **comparative historical method** used to evaluate a development of precautionary obligations from the historical perspective by identifying the main advantages and

deficiencies of the rules being historical predecessors of the present precautions in attack;

- **comparative method** employed, *inter alia*, for defining declarations formulated by the United Kingdom of Great Britain and Northern Ireland (UK) and France as reservations by their comparison with the valid provisions of Article 57 of API;
- **interpretative methods** employed, *inter alia*, for a determination of an active personal scope of the obligations enshrined in Article 57(1), 57(2)(c), 57(3) and 57(4) of API, for an ascertainment of drafters' intentions who deliberately used different terms of "feasible" and "reasonable" precautions in Article 57(2)(a)(ii) and 57(4) of API respectively;
- **method of structural analysis** applied to substantiate the conclusion that the limitation of the personal scope with the expression "those who plan or decide upon an attack" refers only to the precautions in attack mentioned in Article 57(2)(a) of API;
- **statistical method** used for a determination of increasing tendencies of civilian casualty ratio and urbanization of contemporary armed conflicts;
- **analytical method** employed for making summarized conclusions after the analysis of different viewpoints expressed by scholars, international bodies and international courts.

Structure of research

The present research consists of the introduction, four chapters, conclusions, recommendations and the list of bibliography.

The historical background and the content of *travaux préparatoires* for valid legal regulation with regard to precautions in attack are analyzed in Chapter 1, in addition to an assessment of a current status of API and reservations established by its States Parties.

Chapter 2 provides a comprehensive analysis of the ambit of precautions in attack. An allocation of responsibility for the application of precautions in attack between belligerents and a determination of persons responsible for a fulfilment of each precautionary obligation is carried out in subchapter 2.1. The scope of persons and objects entitled to the protection by the precautionary rules is delineated in subchapter 2.2, whereas a *ratione temporis* of an application of precautions in attack is ascertained in subchapter 2.3.

Chapter 3 is dedicated to the analysis of feasibility caveats defined with the expressions "do everything feasible" and "take all feasible precautions" with particular attention being paid to the standards of a proper feasibility assessment process.

The main factors for a proper assessment of an effectiveness of an attack warning, a caveat defined with the expression “unless circumstances do not permit” and legal consequences of the advance warning rule’s application are comprehensively assessed in Chapter 4.

Defence statements

- Any person having discretion to plan or decide upon the way the attack is launched is responsible for taking of precautions in attack in accordance with Article 57(2)(a) of API, irrespective of such person’s military rank and official position in armed forces or other organized armed groups.
- Military medical personnel and objects as well as wounded, sick and shipwrecked military persons shall be taken into account in the course of a proportionality assessment as anticipated collateral damage along with civilians and civilian objects.
- Standards of feasible precautions applicable to technologically advanced armed forces and less advanced ones shall be different, taking into account access to technologically improved weaponry and military equipment.
- Civilians who have not followed the instructions to evacuate set forth in an effective advance warning of an attack shall not be treated as voluntary human shields.

1. HISTORICAL DEVELOPMENT AND CURRENT LEGAL FRAMEWORK FOR PRECAUTIONS IN ATTACK UNDER INTERNATIONAL HUMANITARIAN LAW

The historical background and the content of *travaux préparatoires* for valid legal regulation with regard to precautions in attack will be thoroughly analyzed in this Chapter in order to find *raisons d'être* for the precautionary rules to have been codified in API, irrespective of their fragmentary codification in other international agreements. Moreover, valid legal sources, current status of API and reservations established by States Parties to API will be also assessed in the present Chapter for more accurate delineation of the ambit of precautions in attack in Chapter 2.

"According to the Swiss Federal Office for Civilian Protection, the ratio of persons killed during the First World War was 200 military:1 civilian, in the Second World War nearly 1:1, in the Korean War 1:5, and in the Vietnam War 1:20."[9] Robert Ross Smith exemplified such a devastating tendency by the bloodiest battle of the Philippines campaign in the course of the Second World War, namely by the Battle of Manila (February 3, 1945–March 3, 1945) since "the bodies of 100,000 Filipino civilians were found in the rubble, most of them killed in the exchange of fire between American and Japanese forces,"[10] whereas only 17,000 combatants were died.[11] It is worth noting that the increase of civilian casualty ratio was happening amid existing international and national rules partially codified few of the current precautions in attack.

The first references to the precautions in attack or, more precisely, to the rule of prior warning in case of attack could be found in the Instructions for the Government of Armies of the United States in the Field of April 24, 1863, referred to as 'Lieber Code' or 'Lieber Instructions' which are treated to be "a first attempt to codify the laws of war."[12] Pursuant to Article 19 of the Lieber Code, "[c]ommanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war

[9] Marco Sassòli and Antoine A. Bouvier, eds., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 2nd ed., vol. 1 (Geneva: International Committee of the Red Cross, 2006), 173n.

[10] Robert Ross Smith, *The War in the Pacific: Triumph in the Philippines* (Washington, DC: Office of the Chief of Military History Department of the Army, 1993), 307.

[11] Ibid., 306.

[12] Dietrich Schindler and Jiří Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, NL: Martinus Nijhoff Publisher, 1988), 3.

to omit thus to inform the enemy. Surprise may be a necessity."[13] Notwithstanding, Pnina Sharvit Baruch and Noam Neuman underlined the fact even the provisions of the Presidential Order, whose observance was guaranteed by the enforcement mechanism, were inadequate to mitigate the risks for civilian population during the American Civil War.[14]

At the international level mostly precautions in attack were enshrined in international treaties. Pursuant to Article 2(1)(a) of the Vienna Convention on the Law of Treaties of May 23, 1969 (VCLT), "[t]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[15] From amongst fourteen treaties adopted during the Second International Peace Conference (The Hague, 1907) only two conventions include provisions dedicated to precautionary rules, namely the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of October 18, 1907 (HCIV), and the Convention (IX) concerning Bombardment by Naval Forces in Time of War of October 18, 1907 (HCIX).

According to Article 26 of Regulations annexed to HCIV, "[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities."[16] The same rule of advance warning was enshrined in Article 6 of HCIX in somewhat different formulation of the exception phrased with more ambiguous expression "if the military situation permits, […]."[17] It should be mentioned that the Hague Rules of Air Warfare[18] drafted by a Commission of Jurists did not involve similar rule regarding

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[13] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Washington, DC: Government Printing Office, 1898), 8–9, https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf.

[14] L. Lynn Hogue, "Lieber's Military Code and Its Legacy," in *Francis Lieber and the culture of the mind*, ed. Charles R. Mack and Henry H. Lesesne (Columbia, SC: University of South Carolina Press, 2005), 57–58, quoted in Pnina Sharvit Baruch and Noam Neuman, "Warning Civilians Prior to Attack under International Law: Theory and Practice," *International Law Studies* 87 (2011): 395n1.

[15] Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (hereafter cited as VCLT).

[16] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 26, October 18, 1907, 36 Stat. 2227, T.S. No. 539 (hereafter cited as HCIV).

[17] Convention (IX) concerning Bombardment by Naval Forces in Time of War, art. 6, October 18, 1907, 36 Stat. 2351, T.S. No. 542 (hereafter cited as HCIX).

[18] International Committee of the Red Cross [ICRC], *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities: Collection of Treaties and Other Instruments* (Geneva: International

a prior warning in case of aerial attack. And despite the fact that the Hague Rules have never been adopted as a binding international agreement, their provisions serve as an important evidence of States' *opinio juris* towards the scope of precautions in aerial attacks. Pnina Sharvit Baruch and Noam Neuman reasonably explained such distortion in the following way:

> "[S]ince the authorities of the besieged area had no practical means of protecting the military objectives being targeted, surprise was not required and attacking troops had little problem in giving an advance warning; however, when attacks through aerial bombardment commenced early in the twentieth century, surprise was considered a critical condition for success. As a consequence, as reflected by the absence of a warning provision in the 1923 Air Warfare Rules, apparently no rule existed at that time requiring warnings prior to aerial attacks."[19]

This particular gap concerning advance warnings in case of aerial attacks was filled by API because "attacks from the sea or from the air against objectives on land are subject to the restrictions and conditions imposed by the Protocol I."[20]

As to the other precautions in attack specified in the Hague Conventions, Article 27(1) of Regulations annexed to HCIV is devoted to the following general requirements for both belligerent parties: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."[21] Article 27(2) of Regulations annexed to HCIV also expanded the scope of obligations imposed on a defending party referred to as 'the besieged' with the duty "to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand."[22] Eric Talbot Jensen made a well-founded conclusion that

> "Article 27 represents quite a progressive approach to the defender's duties [. . .]. The fact that the first codified provision of IHL dealing with duties of the defender required marking of buildings or places during a siege might seem a minimal obligation toward civilian protection, but it nevertheless is evidence of

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Committee of the Red Cross, 2005), 104–17, https://reliefweb.int/sites/reliefweb.int/files/resources/377B43E87565C0FBC125742C00473FFE-icrc_dec2005.pdf.

[19] Baruch and Neuman, "Warning Civilians Prior to Attack," 361.

[20] 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* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1898, at 606.

[21] HCIV, art. 27(1).

[22] Ibid., art. 27(2).

> the principle of the defender's special obligations and has great applicability to current armed conflicts."[23]

What is more, pursuant to Article 2(3) of HCIX, "[i]f for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that [. . .] the commander shall take all due measures in order that the town may suffer as little harm as possible."[24]

Therefore, the brief analysis of relevant provisions with regard to precautions in attack set forth in HCIV and HCIX revealed sufficient grounds to reaffirm the fact that the main objective of 'Hague law' was not to "deal extensively with the fate of persons who have ceased to fight or have fallen into the power of the adversary"[25] but to "limit warfare to attacks against objectives which are relevant to the outcome of military operations."[26] And even wordings of the Hague Conventions' provisions support the conclusion that they were drafted with a decisive predominance of military necessity rather than distinction requirements or humanitarian reasons.

In the aftermath of the First World War, there were several initiatives towards the conclusion of international agreements with provisions which were more similar with the present precautions in attack by their essence. For instance, a committee of the International Law Association prepared the Draft Convention for the Protection of Civilian Populations Against New Engines of War which was approved at the Fortieth Conference of the International Law Association (Amsterdam, 1938). Article 10 of this Draft Convention proposed the following possibility at a State's discretion:

> "For the purpose of better enabling a State to obtain protection for the non-belligerent part of its civil population, a State may, if it thinks fit, declare a specified part or parts of its territory to be a "safety zone" or "safety zones" and, subject to the conditions following, such safety zones shall enjoy immunity from attack or bombardment by whatsoever means, and shall not form the legitimate object of any act of war."[27]

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[23] Eric Talbot Jensen, "Precautions Against the Effects of Attacks in Urban Areas," *International Review of the Red Cross* 98, 901 (April 2016): 152, doi:10.1017/S1816383117000017.

[24] HCIX, art. 2(3).

[25] Hans-Peter Gasser, "International Humanitarian Law: an Introduction," in *Humanity for All*, ed. Hans Haug (Geneva: International Committee of the Red Cross and Henry Dunant Institute, 1993), https://www.icrc.org/en/doc/resources/documents/misc/57jm93.htm.

[26] Ibid.

[27] International Law Association, *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, art. 10, (September 2, 1938), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/29DF95181E9CC0FDC12563CD002D6A9B/FULLTEXT/IHL-48-EN.pdf.

The Draft Convention for the Protection of Civilian Populations Against New Engines of War has never been adopted partially because, as A. P. V. Rogers noticed, "the ICRC [International Committee of the Red Cross] and others were concerned it [provision of Article 10 of the Draft Convention] would be read to provide belligerents with "an excuse not to take any precautions for the protection of the civilian population outside such zones."[28]

In response to comparably considerable civilian casualties occurred during the Second World War, the Diplomatic Conference (Geneva, 1949) was held aimed at reaffirming, modifying and improving existing treaty rules of IHL enshrined in the Hague Conventions. As a result, a historical milestone was reached from the humanitarian perspective with the adoption of GCIV outlining the rules concerning treatment of civilians in wartime in a comprehensive manner. Unfortunately, the item regarding precautions in attack was left beyond the agenda of the conference.

In 1956 the International Committee of the Red Cross (ICRC) proposed the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War (the ICRC Draft Rules) amended at the Nineteenth Conference of the Red Cross (New Delhi, 1957).[29] They were drafted to safeguard "the civilian population from the destruction with which it is threatened as a result of technical developments in weapons and methods of warfare."[30] Pursuant to Article 8 of the ICRC Draft Rules,

> "[t]he person responsible for ordering or launching an attack shall, first of all:
> (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified. When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population;
> (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9 [regarding precautions to be taken in carrying out the attack], is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated:

[28] A. P. V. Rogers, *Law on the Battlefield*, 2nd ed. (Manchester, GB: Manchester University Press, 1996), 71.

[29] International Committee of the Red Cross [ICRC], *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, at 4 (September 1956), https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-rules-limitation.pdf (hereafter cited as ICRC Draft Rules).

[30] Ibid., at 7.

(c) whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter."[31]

The main achievement of the ICRC Draft Rules is that precautionary measures codified fragmentarily in different legal instruments were for the first time amalgamated under the term 'precautions' used in the title of Article 8 "Precautions to be taken in carrying out the attack." And in spite of a title having no independent legal existence and as such having no legal force, it denotes an important stage in the historical development of precautions in attack which relates to the comprehensive understanding of their legal nature. It should be emphasized that a considerable number of the ICRC Draft Rules were partially or totally transferred into the text of API. For instance, the definitions of attacks as "acts of violence committed against the adverse Party by force of arms, whether in defence or offence"[32] and of the civilian population as "all persons not belonging to one or other of the following categories [of civilians]"[33] were almost *verbatim* repeated in Articles 49(1) and 50(2) of API respectively. The concept of 'open towns'[34] evolved by the ICRC is a historical predecessor of 'non-defended localities' in accordance with Article 59 of API. Moreover, the above-mentioned precautions in attack in conformity with Article 8(a), 8(b) and 8(c) were reflected in Article 57(2)(a)(i), 57(2)(a)(iii) and 57(2)(c) of API respectively *in extenso*. Consequently, the present rules with regard to precautions in attack could have entered into force twenty years earlier than the conclusion of API. But the ICRC Draft Rules have never been adopted because of unwillingness of States to expand their obligations at that point of time.

Hereupon the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1972) (the Conference of Government Experts), the ICRC prepared a Report on the work of the conference which comprised, *inter alia*, of the proposals of States Parties to the Geneva Conventions for a new legal instrument to be drafted by the ICRC. According to the initial version of the 1972 ICRC Draft, Article 49 "Precautions when attacking" was formulated as follows:

"So that the civilian population, as well as objects of a civilian character, who might be in priximity [*sic*] to a military objective be spared, those who order or launch an attack shall, when planning and carrying out the attack, take the following precautions:

[31] ICRC Draft Rules, art. 8.

[32] Ibid., art. 3.

[33] Ibid., art. 4.

[34] Ibid., art. 16.

> (a) they shall ensure that the objectives to be attacked are not civilians, nor objects of a civilian character but are identified as military objectives; if this precaution cannot be taken, they shall refrain from launching the attack;
>
> (b) they shall warn, whenever circumstances permit, and sufficiently in advance, the civilians threatened, so that the latter may take shelter."[35]

In comparison with Article 8 of the ICRC Draft Rules, the scope of precautions in attack specified in the above-mentioned provision of the 1972 ICRC Draft was narrowed because of the necessity to reach a compromise between conference participants from seventy-seven States Parties to the Geneva Conventions as "several experts spoke in favour of stronger wording or additional provisions, while others advocated less categoric terms."[36] The differences between the respective provisions of the ICRC Draft Rules and the 1972 ICRC Draft led to the following conclusions as to the efficacy of the ICRC work and its progress towards humanitarian trends of that time:

> "[I]n the present text, as compared with the 1956 Draft Rules, the ICRC had taken into account the objections previously made by certain military experts. So far as sub-paragraph (b) was concerned, on the other hand, the military experts had considered that the warning principle was almost totally out of date and that it would be acceptable only if accompanied by a reservation leaving a degree of latitude to the military personnel involved."[37]

Consequently, the ICRC was entrusted with a difficult task to find the utmost appropriate solution in the conditions of the co-existence of contradictory divergences expressed at the Conference of Government Experts. In June 1973 "the result of several years' joint effort"[38] was presented by the ICRC "in the form of two draft Additional Protocols to the 1949 Geneva Conventions; [. . .]. Their sole aim is to provide an adequate basis for discussion at the forthcoming Diplomatic Conference convened by the Swiss Federal Council, the Government of the State depositary of the Geneva Conventions."[39] As to the provisions dedicated to precautions

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[35] International Committee of the Red Cross [ICRC], *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol. 1 (Geneva: International Committee of the Red Cross, 1972), 117, https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-1.pdf.

[36] Ibid., para. 3.186, at 152.

[37] Ibid., para. 3.192, at. 152–53.

[38] International Committee of the Red Cross [ICRC], Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (Geneva: International Committee of the Red Cross, 1973), 1, http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf (hereafter cited as Draft API).

[39] Ibid.

in attack, Article 50 of the Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Draft API) consisted of three following paragraphs:

> "1. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. In the planning, deciding or launching of an attack the following precautions shall be taken:
>
> (a) Proposal I
>
> those who plan or decide upon an attack shall ensure that the objectives to be attacked are duly identified as military objectives within the meaning of paragraph 1 of Article 47 and may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated;
>
> Proposal II
>
> those who plan or decide upon an attack shall take all reasonable steps to ensure that …
>
> (b) those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated;
>
> (c) whenever circumstances so permit, advance warning shall be given of attacks which may affect the civilian population. Such warnings do not, however, in any way limit the scope of the obligations laid down in the preceding paragraphs.
>
> 2. All necessary precautions shall be taken in the choice of weapons and methods of attack so as not to cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked.
>
> 3. When a choice is possible between several objectives, for obtaining a similar military advantage, the objective to be selected shall be that which will occasion the least danger to civilian lives and to civilian objects."[40]

Sub-paragraph 1(a) including two alternative proposals "for the steps to be taken for the identification of objectives [to be attacked]"[41] illustrates a scale of debates among States Parties to the Geneva Conventions as to the precautions in attack. In order to substantiate this

[40] Draft API, 64.

[41] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2186, at 679.

conclusion, it should be mentioned that only three articles out of ninety in the Draft API contained such alternative provisions, namely Articles 5, 50 and 59.

After introduction of amendments to Article 50 of the Draft API by the delegations during the twenty-first plenary meeting of the Committee III,[42] the Working Group in its Report to the Committee III identified the following debatable words and phrases in the text of the Article:

> "Certain words created problems, particularly the choice between "feasible" and "reasonable" in 2(a)(i) and 2(a)(ii). The Rapporteur understands "feasible," which was the term chosen by the Working Group, to mean that which is practicable, or practically possible. "Reasonable" struck many representatives as too subjective term. The Working Group was unable to reach agreement on the choice of phrase, "cause" or "create a risk of" in sub-paragraphs 2(a)(iii) and 2(b). In fact, the Rapporteur is unable to illuminate the difference in meaning of the two terms, but each has its supporters, and the Committee will have to decide. Similarly, the Committee will have to choose between the two bracketed phrases ["whenever circumstances permit" and "unless circumstances do not permit"] in sub-paragraph 2(c). The difference here is one of nuance whether to imply that warning will usually be possible or that it will only sometimes be possible."[43]

Subsequently, during the thirty-first plenary meeting of the Committee III the phrases "cause" for sub-paragraphs 2(a)(iii) and 2(b) and "unless circumstances do not permit" for sub-paragraph 2(c) were adopted, having received more votes from the delegates.[44] Finally, Article 50 of the Draft API was adopted by the Committee III "as a whole [. . .] by 66 votes to none, with 3 abstentions,"[45] whereas the final adoption of this Article happened during the forty-second

[42] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 14, at 181–95, CDDH/III/SR.21 (February 17, 1975), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-14.pdf.

[43] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 15, at 353, CDDH/III/264/Rev.I (February 3–April 18, 1975), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-15.pdf.

[44] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 14, at 302–3, CDDH/III/SR.31 (March 14, 1975).

[45] Ibid.

plenary meeting of the Diplomatic Conference of 1974–1977. It was adopted as Article 57 of API "by 90 votes to none, with 4 abstentions."[46]

API in its current version was adopted by the Diplomatic Conference on June 8, 1977, and opened for signature on December 12, 1977.[47] Pursuant to Article 95 of API, "this Protocol shall enter into force six months after two instruments of ratification or accession have been deposited."[48] It entered into force on December 7, 1978, after the instruments of ratification were deposited with the Swiss Federal Council by Ghana and Libyan Arab Jamahiriya.[49] However, for the profound evaluation of a sufficiency of Article 57 of API to guarantee a universal application of precautionary rules, the present status of API should be assessed more precisely.

As for December 13, 2018, 174 States are States Parties to API.[50] As API, being a "treaty" under the definition of Article 2(1)(a) of VCLT, contains no provisions apropos of reservations, the general rules set forth in Articles 19–33 of VCLT shall be applicable. According to Article 2(1)(d) of VCLT, "[r]eservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[51] Pursuant to Article 19 of VCLT,

> "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) The reservation is prohibited by the treaty;
>
> (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

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[46] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 6, para. 39, at 211, CDDH/SR.42 (May 27, 1977), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-6.pdf.

[47] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 1, para. 12, at 12 (June 10, 1977), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-1.pdf.

[48] Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 95, June 8, 1977, 1125 U.N.T.S. 3 (hereafter cited as API).

[49] Ibid.

[50] International Committee of the Red Cross [ICRC], *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 13-Dec-2018*, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/40A136003DC07770C125830B00388739/%24File/IHL_and_other_related_Treaties.pdf?Open.

[51] VCLT, art. 2(1)(d).

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."[52]

Oliver Dörr and Kirsten Schmalenbach defined that "Article 19(a) and 19(b) deal with express regulations of reservations, while Article 19(c) contains a general provision which provides for guidelines in the absence of an express regulation of the issue."[53] Consequently, only Article 19(c) of VCLT could be applicable to the reservations established by States Parties to API in order to assess their legal effect.

Mostly the reservations to Article 57 formulated by States when ratifying or acceding to API have interpretative character, namely declarations and reservations of Algeria,[54] Austria,[55] Belgium,[56] Canada,[57] Germany,[58] Ireland,[59] Italy,[60] the Netherlands,[61] New Zealand[62] and Spain,[63] because the terms "feasible" and "military advantage" from Article 57(2)(a)(i) and 57(2)(b) respectively were construed therein. They have no legal effect of reservations, irrespective of their titles, as they neither exclude nor modify the legal effect or the scope of Article 57 of API.[64] At the same time, declarations made by France, Switzerland and the UK cause some doubts as to their genuine legal nature. Pursuant to the ratification instrument of the UK, "[t]he United Kingdom understands that the obligation to comply with paragraph 2 (b) [of Article 57] only extends to those who have the authority and practical possibility to cancel or suspend the attack."[65] For France, the obligation "calls only for due diligence to cancel or suspend that attack, on the basis of the information available to the person deciding on the

[52] Ibid., art. 19.

[53] Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: a Commentary* (Berlin, DE: Springer-Verlag, 2012), 255, doi:10.1007/978-3-642-19291-3.

[54] 1552 U.N.T.S. 382, August 16, 1989.

[55] 1289 U.N.T.S. 303, August 13, 1982.

[56] 1435 U.N.T.S. 367, May 20, 1986.

[57] 1591 U.N.T.S. 462, November 20, 1990.

[58] 1607 U.N.T.S. 526, February 14, 1991.

[59] 2073 U.N.T.S. 28, May 19, 1999.

[60] 1425 U.N.T.S. 438, February 27, 1986.

[61] 1477 U.N.T.S. 299, June 26, 1987.

[62] 1499 U.N.T.S. 358, February 8, 1988.

[63] 1537 U.N.T.S. 389, April 21, 1989.

[64] Dörr and Schmalenbach, *Commentary*, 240.

[65] 2020 U.N.T.S 75, January 28, 1998, 78.

attack."[66] Switzerland went even further, having specified in its ratification instrument that "[t]he provisions of article 57, paragraph 2, create obligations only for battalion or group commanders and higher-echelon commanders."[67] But having used the provision of Article 22(1) of VCLT, Switzerland withdrew the mentioned reservation.[68] The reservations established by France and the UK to modify the scope of their obligations under Article 57 of API will be analyzed in more details in Chapter 2.

In addition to HCIV, HCIX and API, there are other multilateral international agreements in force with provisions devoted to precautions in attack, namely Article 7 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 26, 1999,[69]Article 3(10) and 3(11) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 (amended Mines Protocol),[70] and Article 1(5) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons of October 10, 1980.[71]

Despite all of the above-mentioned achievements with regard to the codification of precautions in attack in Article 57 of API and other international agreements, there is still a considerable number of States currently involved in different armed conflicts but not expressed their consent to be bound by API, namely Eritrea, Islamic Republic of Iran, Israel, Myanmar, Pakistan, Somalia, the United States of America (USA) etc. However, the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) in the *Prosecutor v. Kupreškić* underlined the customary character of precautions in attack as follows:

> "In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care

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[66] Julie Gaudreau, "The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims," *International Review of the Red Cross* 85, 849 (2003): 20, https://www.icrc.org/en/doc/assets/files/other/irrc_849_gaudreau-eng.pdf.

[67] 1271 U.N.T.S. 408, February 17, 1982.

[68] 2326 U.N.T.S. 133, June 17, 2005.

[69] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 7, March 26, 1999, 2253 U.N.T.S. 172.

[70] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, art. 3(10), 3(11), May 3, 1996, 2048 U.N.T.S. 93 (hereafter cited as Amended Mines Protocol).

[71] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), art. 1(5), October 10, 1980, 1342 U.N.T.S. 137.

> must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, [. . .], has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now *part of customary international law*, not only because they specify and flesh out general pre-existing norms, but also because *they do not appear to be contested by any State, including those which have not ratified the Protocol* (emphasis added)."[72]

Consequently, even those States which have not expressed their consent to be bound by API and other above-mentioned international treaties are bound by respective customary IHL rules of the scope reflected in Article 57 of API. The same standards are applicable to those States which have expressed their consent to be bound by API but established reservations modifying the legal effect of respective provisions.

Summarizing all of the analyzed in this Chapter, it should be emphasized that the issues of precautions in attack have received due attention from international community, and their present form has been evolved through a considerable number of proposals, initiatives and endeavors towards displacement of their main focus from the protection of military necessity to the protection of the civilian population. Taking into account existing international agreements and customary IHL rules as well as the number of States having expressed their consent to be bound by those agreements, precautions in attack could be defined as universal rules applicable in any armed conflict, irrespective of belligerents' consent. But immutably increasing tendency of civilian casualties during armed conflicts confirms the assertion that even in case of sufficiency of current legal framework the deficiencies of the content of respective rules could be the main maintaining mechanism for the growth of civilian casualties.

[72] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, para. 524 (Int'l Crim. Trib. for the Former Yugoslavia January 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

2. THE SCOPE OF PRECAUTIONS IN ATTACK UNDER INTERNATIONAL HUMANITARIAN LAW

An adequate application of prescribed rules and a fulfilment of imposed obligations in good faith are indispensable for the attainment of the IHL objectives. But the ambiguities of the scope of IHL rules decrease their effectiveness and create additional loopholes for their non-application. Moreover, there is an interpretative tendency of resorting to a restrictive interpretation of rules by obliged actors and an extensive interpretation by beneficiaries of rules which may cause a distortion of the initial intentions of their drafters. Consequently, the precise determination of the active personal scope of subjects who are obliged to apply precautions in attack in particular circumstances, and of the passive personal scope of persons and objects entitled to the protection by the precautionary rules are the main objectives of this Chapter. What is more, a *ratione temporis* of an application of precautions in attack will be also ascertained in this Chapter with particular attention being paid to the most controversial aspects of the mentioned scopes.

Pursuant to Article 57 of API, the material scope of precautions in attacks is defined as follows:

> "1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
> 2. With respect to attacks, the following precautions shall be taken:
> (a) those who plan or decide upon an attack shall:
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from deciding to launch any 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;
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection 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;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."[73]

It is worth noting that in comparison with other provisions of Article 57 of API which will be comprehensively analyzed in the next chapters the material scope of the obligation to take constant care to spare the civilian population, civilians and civilian objects is sufficiently broader. Because, as the ILASG reaffirmed, "Article 57(2)–(5) [of] API should [. . .] be understood as derivative specifications of the general obligation stipulated in Article 57(1) [of] API. They can be derived from and partially overlap with Article 57(1) [of] API without, however, exhausting the broader meaning of this provision."[74] Jean-François Quéguiner characterized the mentioned obligation as "a direct consequence of the fundamental rule of distinction. Yet this duty remains relatively abstract, which explains why it is found in the opening paragraph of Article 57. [. . .] This first duty therefore constitutes the legal link between the general obligation of distinction and the operational practicalities of taking precautions in attack."[75] The same viewpoint was substantiated by Alexandre Cabral Campelo Hierro Lopes,[76] Stuart Casey-Maslen,[77] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf.[78]

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[73] API, art. 57 (see chap. 1, n. 48).

[74] *ILASG Report*, 380 (see introduction, n. 6).

[75] Jean-François Quéguiner, "Precautions under the law governing the conduct of hostilities," *International Review of the Red Cross* 88, 864 (December 2006): 796, doi:10.1017/S1816383107000872.

[76] Alexandre Cabral Campelo Hierro Lopes, "Conduct of Hostilities: Precautions in Attack" (master thesis, Universidade Católica Portuguesa, 2015), 13, http://hdl.handle.net/10400.14/20456.

[77] Stuart Casey-Maslen, ed., *Weapons under International Human Right Law* (Cambridge: Cambridge University Press, 2014), 269, doi:10.1017/CBO9781139227148.

2.1. Active Personal Scope of Application of Precautions in Attack

API defines the active *ratione personae* of application of precautions in attack with the expressions "those who plan or decide upon an attack" and "each party to the conflict" in Article 57(2)(a) and 57(4) respectively.

As to the allocation of responsibility for the application of precautions in attack between belligerents, only in the conduct of military operations at sea and in the air the burden of taking all reasonable precautions is explicitly and equally divided between all parties to an armed conflict, irrespective of their status in a particular attack.[79] Taking into consideration the rules of interpretation set forth in VCLT,[80] the obligation to take constant care to spare the civilian population, civilians and civilian objects under Article 57(1) of API is imposed on each party to an armed conflict because neither Article 57 nor other provisions of API give rise to the contrary interpretation. Therefore, the majority of obligations to take precautions in attack are required to be fulfilled by an authorized person who has been entitled to plan and launch attacks for and on behalf of the attacking party.

In order to justify such an apparent distortion sideward of the attacking party, it is worth to mention that the capacities of attacking and defending sides have relevance neither to the application of *jus ad bellum* rules nor to reasons of an armed conflict's commencement. Moreover, each party to an armed conflict may be treated as defending or attacking one depending on the circumstances of a particular attack, and the scope of its obligations will change respectively. This rationale was likely behind the use of the expression "each party to the conflict" for all precautions in attack without division of obligations between attacking and defending parties in Article 7 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

Except insofar as the defending party decides to launch a counter attack, the scope of its obligations remain unalterable covering those enshrined in Article 57(1) and 57(4) of API. Article 27(2) of Regulations annexed to HCIV enlarges the scope of obligations imposed on the defending side with an additional duty "to indicate the presence of such buildings or places [dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and

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[78] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Nijhoff Classics in International Law, vol. 1 (Leiden, NL: Martinus Nijhoff Publishers, 2013), para. 2.8.2, at 408, doi: 10.1163/9789004254718.

[79] API, art. 57(4).

[80] VCLT, art. 31–33 (see chap. 1, n. 15).

places where the sick and wounded are collected] by distinctive and visible signs, which shall be notified to the enemy beforehand."[81] Furthermore, as Laurie R. Blank specified, "[r]ecognizing that the party in control of the territory where the conflict is taking place is often best situated to protect civilians from the unfortunate consequences of war, Additional Protocol I places obligations on the defending party as well."[82] Because in addition to and not in lieu of the mentioned obligations, both parties to an armed conflict are required to take precautions against the effects of attack referred to as 'passive precautions,'[83] namely they

> "shall, to the maximum extent feasible [. . .] endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives, avoid locating military objectives within or near densely populated areas and take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[84]

After the allocation of obligations between belligerents persons assuming a complete responsibility for their proper fulfilment on behalf of each party to an armed conflict have to be determined. API defines these obliged actors in Article 57(2)(a) by the expression "those who plan or decide upon an attack," whereas in Article 26 of Regulations annexed to HCIV the expression "[t]he officer in command of an attacking force" is set forth. More abbreviated term of "the commander" is enshrined in Articles 2(3) and 6 of HCIX.

Despite the fact that similar terminology constantly appeared in the ICRC Draft Rules[85] and Draft API,[86] representatives of several States were dissatisfied with the proposed expression even after the definitive adoption of Article 57 of API at the forty-second plenary meeting of the Diplomatic Conference of 1974–1977. For instance, Austrian delegation asserted that "the precautions envisaged could only be taken at a higher level of military command, in other words by the high command. Junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of

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[81] HCIV, art. 27(2) (see chap. 1, n. 16).

[82] Laurie R. Blank, "Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare," *Case Western Reserve Journal of International Law* 43, 1 (2010): 300.

[83] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2241, at 692 (see chap. 1, n. 20).

[84] API, art. 58.

[85] "The person responsible for ordering or launching an attack shall […]." ICRC Draft Rules, art. 8 (see chap. 1, n. 29).

[86] "[T]hose who launch an attack shall, […]." Draft API, art. 50(1)(b) (see chap. 1, n. 38).

proportionality during an attack."[87] Swiss delegation criticized the provisions of adopted Article 57(2) because the used expression "might well place a burden or responsibility on junior military personnel which ought normally to be borne by those of higher rank. The obligations set out in Article 50 [Article 57 of API in its final version] could concern the high commands only – the higher grades of the military hierarchy."[88] ICRC experts described the course of discussions concerning active personal scope of precautions in attack at the Diplomatic Conference of 1974–1977 as follows:

> "A very large majority of delegations at the Diplomatic Conference wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects."[89]

Albeit disapproving viewpoints were being expressed during the whole negotiation process with regard to Article 57(2)(a) of API, currently none of States Parties to API have modified or excluded the legal effect of its provisions.

First and foremost, following the requirements of Article 57(2)(a) of API, an approximate scope of persons involved in the process of planning and deciding upon attacks shall be identified. Christopher M. Ford defined a three-tier system of military operations which are conducted in the course of any armed conflict, namely strategic, operational and tactical "levels of warfare."[90] Christopher M. Ford explained that "[s]trategic operations synchronize instruments of power to achieve overall objectives, while operational-level operations plan and implement strategies and campaigns designed to employ tactical forces to achieve strategic objectives. Tactical operations concern the employment of forces on the battlefield."[91] Consequently, planning and deciding upon attacks are carried out at each of the mentioned levels by respective military commanders. Moreover, a determination of responsible persons is even more complicated by the sophisticated nature of modern warfare because those who plan or decide upon an attack and those who launch that attack on the battlefield are usually different persons. And in comparison with the provisions of the ICRC Draft Rules[92] and Draft API[93]

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[87] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 6, para. 46, at 212, CDDH/SR.42 (May 27, 1977).

[88] Ibid., para. 43, at 212.

[89] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2197, at 681.

[90] Christopher M. Ford, "Autonomous Weapons and International Law," *South Carolina Law Review* 69, 2 (April 11, 2017): 447.

[91] Ibid.

[92] "The person responsible for ordering or launching an attack shall […]." ICRC Draft Rules, art. 8.

explicitly imposing obligations on persons responsible for launching an attack, Article 57 of API is silent on this point. It should also be emphasized that the analysis of the structure of Article 57 of API gives reasons to imply that the limitation of the personal scope with the expression "those who plan or decide upon an attack" refers only to the precautions in attack mentioned in Article 57(2)(a) of API. If it were otherwise, this phrase would be enshrined in Article 57(2) of API to cover all 3 subparagraphs. This viewpoint is upheld by a number of scholars, e.g., by Eric C. Husby,[94] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf.[95]

The highest military rank in the hierarchy of armed forces shall not be considered as a mandatory prerequisite for officers in order to be treated as "those who plan or decide upon an attack" for the purposes of Article 57(2)(a) of API. Because, as Vaios Koutroulis noticed, "in view of the text of the provision, there does not seem to be any reason to limit the scope of application [. . .] only to high-level commanding officers. Everyone who has the ability to plan and decide upon an attack is capable of applying the relevant precaution(s)."[96] William H. Boothby even acknowledged that "the term 'those who plan or decide upon an attack' would seem to include, inter alia, anyone who fires a weapon as part of the attack, anyone who directs a munition such as a rocket, missile, or bomb, anyone who plans the attack at the tactical level, those on whose orders the particular attack proceeds, and those who approve the attack plan."[97]

Consequently, neither a military rank nor an official position in armed forces shall be considered *per se* as decisive factors in the determination process of persons being responsible for taking of precautions in attack in conformity with Article 57(2)(a) of API. The UK Joint Service Manual of the Law of Armed Conflict (the UK Military Manual) proposed the following criterion in lieu of the mentioned ones:

> "Those who plan or decide upon attacks are the planners and commanders [. . .]. Whether a person will have this responsibility will depend on whether he has any *discretion in the way the attack is carried out* and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative. Those who do not have this discretion but merely carry out orders for an attack also have a responsibility: to cancel or suspend the attack if it

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[93] "[T]hose who launch an attack shall, […]." Draft API, art. 50(1)(b).

[94] Eric C. Husby, "A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders," *Army Lawyer*, no. 5 (May 2012): 12.

[95] Bothe, Partsch and Solf, *Commentary*, para. 2.4.1, at 404.

[96] Vaios Koutroulis, "All Feasible Precautions in the Choice of Means and Methods," in *Collegium*, no. 46 (Autumn 2016): 46.

[97] W. H. Boothby, *The Law of Targeting* (Oxford, GB: Oxford University Press, 2012), 121, doi: 10.1093/law/9780199696611.001.0001.

turns out that the object to be attacked is going to be such that the proportionality rule would be breached (emphasis added)."[98]

Vaios Koutroulis suggested the similar indicator of "*the ability* to plan and decide upon an attack (emphasis added)."[99] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf specified that "[t]he obligations of subpara. 2(a) [of Article 57 pf API] would [. . .] apply at whatever level *the regulated functions are being performed* (emphasis added)."[100]

Summarizing all of the above-mentioned, it should be concluded that any person having discretion to plan or decide upon the way the attack is launched is responsible for taking of precautions in attack in accordance with Article 57(2)(a) of API, irrespective of such person's military rank and official position in armed forces or other organized armed groups.

As to the scope of persons obliged to cancel or suspend an attack in cases exhaustively enumerated in Article 57(2)(b) of API, originally this obligation pursuant to Article 50(1)(b) of Draft API was explicitly addressed to "those who launch an attack."[101] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf explained the changes made in the text of this provision in the following way: "The Committee expressed the obligation in the passive voice so that it would apply to all commanders who have the authority to cancel or suspend attacks, including those at higher echelons who frequently have better intelligence sources than those actually engaged. But it also applies to the commander of military organizations actually engaged in combat."[102] ICRC experts clearly advocated the same position, having underlined that this rule "applies not only to those planning or deciding upon attacks, but *also and primarily, to those executing them* (emphasis added)."[103] And, as Jean-François Quéguiner noticed, "[t]he precision with which the obligation is worded implies that instructions that are issued in advance of an attack can never be definite: a soldier cannot avoid responsibility for acts committed in violation of the law simply by saying that he was following orders."[104]

Therefore, the obligation to cancel or suspend an attack if it becomes apparent that the objective is not a military one or is subject to special protection should be fulfilled by any person

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[98] United Kingdon, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004), para. 5.32.9, at 85, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP383200 4Edition.pdf (hereafter cited as *UK JSP 383*).

[99] Koutroulis, "All Feasible Precautions," 46.

[100] Bothe, Partsch and Solf, *Commentary,* para. 2.4.3, at 405.

[101] Draft API, 64.

[102] Bothe, Partsch and Solf, *Commentary,* para. 2.8.1, at 408.

[103] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2220, at 686.

[104] Quéguiner, "Precautions," 804.

having discretion to plan or decide upon the way the attack is launched as well as by any person launching the attack on the battlefield. Jean-François Quéguiner illustrated the mentioned conclusion with the following situation:

> "Where aircrew are following an order to destroy what is believed to be a command and control centre, but at a later stage discover that the designated target is displaying a protective emblem [e.g. a red cross or red crescent, or an emblem designating cultural property, works or installations containing dangerous forces], the aircrew will be under an obligation to suspend operations, report their observations to their superiors and request confirmation of the nature of the target before proceeding with the bombing raid. If the aircrew receive [*sic*] no additional information confirming the military nature of the objective, then the attack must be suspended."[105]

However, in case of the necessity to cancel or suspend an attack if it becomes apparent 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, the determination of obliged persons becomes more sophisticated. Jean-François Quéguiner, having analysed this debatable issue, reached the following conclusions:

> "[I]n a concerted or coordinated operation, it is not possible to ask every individual tank driver or pilot to measure the concrete and direct military advantage expected from the attack against the collateral casualties and damage that is likely to result. First, a military operation of this scale demands discipline and swift action, and cannot allow a tank or air squadron to operate in a disorganized manner or temporarily to suspend the attack in order to discuss the practical application of the rule. Moreover, in such circumstances the proportionality must be assessed in the light of the attack as a whole. [. . .] while each driver or pilot may judge that his own action is disproportionate, the operation as a whole may meet the proportionality requirement. [. . .] it is not sufficient to assert that those who carry out the attack must assume that the planners and deciders have correctly assessed the situation and that all that is required of them is faithfully to follow the instructions they have received. [. . .] if, before launching a first salvo against a bridge, a tank driver notices that a crowd of fleeing civilians have taken refuge under the targeted bridge, the driver

[105] Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, May 11, 2006, para. 8.36, quoted in Quéguiner, "Precautions," p. 803–4.

> cannot assume that the planners have correctly considered the principle of proportionality and continue his mission in wilful blindness and impunity. He must, at the very least, suspend his attack in order to allow the civilians to evacuate, or to request that his orders be confirmed in the light of these new circumstances."[106]

From the analysis of the above-mentioned conclusions of Jean-François Quéguiner, it is obvious that the obligation to cancel or suspend an attack if it becomes apparent that the latter will not be proportional should be fulfilled by any person having discretion to plan or decide upon the way the attack is launched. However, the same standard shall not be equally applicable to persons launching the attack on the battlefield because of the inevitable inaccessibility for them to the whole range of information necessary to carry out a proper proportionality assessment. And the necessity to fulfil the obligation enshrined in Article 57(2)(b) of API by persons launching the attack should be evaluated on a case-by-case basis, taking into account the apparentness of a disproportional character of the attack to be launched.

Nevertheless, not all States Parties to API approved the above-mentioned extensive interpretation of the active personal scope of Article 57(2)(b). The UK and France while having expressed their consent to be bound by API even purposefully modified the legal effect of this provision by means of reservations. Pursuant to the ratification instrument of the UK, "[t]he United Kingdom understands that the obligation to comply with paragraph 2(b) [of Article 57] only extends to *those who have the authority and practical possibility* to cancel or suspend the attack (emphasis added)."[107] For France, the obligation "calls only for due diligence to cancel or suspend that attack, on the basis of the information available to *the person deciding on the attack* (emphasis added)."[108] Consequently, the UK limited the scope of persons obliged to cancel or suspend an attack to cover only those ones who have the authority to act in such a manner in accordance with particular internal acts. It means that an ordinary soldier without such legislative authorization is not eligible to cancel or suspend an attack even in case of its apparent illegality. France narrowed this ambit even further with the exclusion of those who plan the attack and those who launch the attack from active personal scope of Article 57(2)(b) of API.

Taking into consideration the rules of interpretation set forth in VCLT,[109] the obligations enshrined in Article 57(1), 57(2)(c), 57(3) and 57(4) of API are imposed *pari passu*

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[106] Quéguiner, "Precautions," 804–5.

[107] 2020 U.N.T.S 75, January 28, 1998, 78.

[108] Gaudreau, "Reservations to Protocols," 20 (see chap. 1, n. 66).

[109] VCLT, art. 31–33.

on persons having discretion to plan or decide upon the way the attack is launched as well as on those ones launching the attack on the battlefield.

Summarizing all of the analyzed in this subchapter, it should be pointed out that the obligations to take constant care to spare the civilian population, civilians and civilian objects as well as to take all reasonable precautions in the conduct of military operations at sea and in the air under Article 57(1) and 57(4) of API respectively are equally imposed on each party to an armed conflict. The majority of obligations in accordance with Article 57(2) and 57(3) of API are imposed exclusively on the attacking party. As to the persons assuming a responsibility for their fulfilment on behalf of each party to an armed conflict, any person having discretion to plan or decide upon the way the attack is launched is responsible for taking of precautions in attack in accordance with Article 57(2)(a) of API, irrespective of such person's military rank and official position in armed forces or other organized armed groups. The obligation to cancel or suspend an attack if it becomes apparent that the objective is not a military one or is subject to special protection should be fulfilled by any person having discretion to plan or decide upon the way the attack is launched as well as by any person launching the attack on the battlefield. The obligation to cancel or suspend an attack if it becomes apparent that the latter will not be proportional should be fulfilled by any person having discretion to plan or decide upon the way the attack is launched. However, the necessity to fulfil this obligation by persons launching the attack should be evaluated on a case-by-case basis, taking into account the apparentness of a disproportional character of the attack to be launched. The obligations set forth in Article 57(1), 57(2)(c), 57(3) and 57(4) of API are imposed *pari passu* on persons having discretion to plan or decide upon the way the attack is launched as well as on those ones launching the attack on the battlefield.

2.2. Passive Personal Scope of Application of Precautions in Attack

The scope of persons and objects entitled to the protection by the precautionary rules is determined in Article 57 of API by the expressions "civilians," "civilian population," "civilian objects" and "objectives" which are "subject to special protection."[110]

Pursuant to Article 50(1) of API, a civilian is defined as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."[111] As Michael Bothe, Karl Josef Partsch and Waldemar A. Solf emphasized, the used negative approach aims at "excluding from the scope of the term all persons described as members of the armed forces as defined in Art. 43 of

[110] API, art. 57.

[111] API, art. 50(1).

Protocol I as well as members of the Regular Armed Forces described in Arts. 4A(1) and (3) of the Third Convention and the irregular combatants described in Arts. 4A(2) and (6) of that Convention."[112] According to Article 4(A) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GCIII), the following persons are excluded from the above-mentioned definition of civilian, thereby precluding them from the protection by the precautionary measures:

> "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. [. . .]
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."[113]

Superseding the mentioned criteria, Article 43(1) of API defines armed forces of a Party to a conflict as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, 'inter alia,' shall enforce compliance with the rules of international law applicable in armed conflict."[114]

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[112] Ibid., art. 43.

[113] Geneva Convention relative to the treatment of prisoners of war (III), art. 4(A), August 12, 1949, 75 U.N.T.S. 135.

[114] API, art. 43(1).

It is worth to underline that the term "civilian" is opposed to the one of "member of armed forces" instead of "combatant." Because Article 43(2) of API explicitly specifies that medical personnel and chaplains who are considered as members of armed forces shall not be treated as combatants having the right to participate directly in hostilities.[115] Committee III of the Diplomatic Conference of 1974–1977 in its Report emphasized that "the term "members of the armed forces" is all-inclusive and includes both combatants and non-combatants."[116] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf delineated that "[t]he only non-combatant members of the armed forces [. . .] are medical personnel and chaplains who have special protection under the Conventions and the Protocol."[117] Therefore, medical personnel and chaplains being members of armed forces shall not be treated as civilians, but they are also eligible to the protection in conformity with Article 57 of API as "objectives" which are "subject to special protection."

Consequently, the category of civilians for the purposes of Article 57 of API should be interpreted broader to include "everybody physically present in a territory,"[118] apart from members of armed forces. The Trial Chamber of the ICTY in the *Prosecutor v. Blaškić* defined civilians as "persons who are not, or no longer, members of the armed forces."[119] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf categorized the following actors as civilians:

> "(a) Persons directly linked to the armed forces, including those who accompany the armed forces without being members thereof, such as civilian members of military aircraft crews, supply contractors, members of labour units, or of services responsible for the welfare of the armed forces, members of the crew of the merchant marine and the crews of civil aircraft employed in the transportation of military personnel, material or supplies [in accordance with Article 4(A)(4) and 4(A)(5) of GCIII],
>
> (b) Released prisoners of war, reservists and retired members of the armed forces in occupied territory [in accordance with Article 4(B)(1) of GCIII], and
>
> (c) Civilians employed in the production, distribution and storage of munitions of war."[120]

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[115] Ibid., art. 43(2).

[116] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 15, para. 42, at 390, CDDH/236/Rev.1.

[117] Bothe, Partsch and Solf, *Commentary,* para. 2.4.2, at 273.

[118] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1917, at 611.

[119] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, para. 180 (Int'l Crim. Trib. for the Former Yugoslavia March 3, 2000), http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf.

[120] Bothe, Partsch and Solf, *Commentary,* para. 2.2.1, at 334–35.

It is worth to mention that the Appeals Chamber of the ICTY in *Prosecutor v. Galić* unambiguously clarified that

> "[e]ven *hors de combat*, however, they [combatants] would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention; as such, they are not civilians in the context of Article 50, paragraph 1, of Additional Protocol I. Common Article 3 of the Geneva Conventions supports this conclusion in referring to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause."[121]

Consequently, officially remaining to be members of armed forces, neither persons being *'hors de combat'* nor wounded, sick and shipwrecked nor prisoners of war shall be considered as civilians.

Civilians' eligibility for the protection by precautionary rules is subject to a condition, namely on their refraining from any hostile act[122] because "civilians shall enjoy the protection afforded by this Section [Articles 48–67 of API], unless and for such time as they take a direct part in hostilities."[123] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf reaffirmed the fact that civilians directly participating in hostilities retain their civilian status but lose, *inter alia*, "the benefits of precautions in attack."[124] ICRC experts having dedicated six years of expert discussions and research to the issues of civilians' direct participation in hostilities identified three following cumulative criteria which shall be thoroughly applied in order to exclude a particular civilian from the passive personal scope of precaution in attack:

> "1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> 2. there must 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

[121] Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, 68n437 (Int'l Crim. Trib. for the Former Yugoslavia November 30, 2006), http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

[122] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1942, at 618.

[123] API, art. 51(3).

[124] Bothe, Partsch and Solf, *Commentary,* para. 2.4.1, at 343.

> 3. the act must 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)."[125]

What is more, ICRC experts characterized the loss of civilians' protection as "temporary [and] activity-based"[126] because "civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called "revolving door" of civilian protection)."[127]

Therefore, as long as civilians directly participate in hostilities in accordance with the mentioned criteria, they are excluded from the scope of Article 57 of API as is the case with members of armed forces. ICRC experts also suggested acting in the following manner in case of simultaneous presence of protected civilians and civilians directly participating in hostilities:

> "[I]n the case of the concurrent presence of fighters and/or civilians directly participating in hostilities, as well as civilians who have not lost their protection against direct attack, a *"parallel approach"* should be adopted. This means that IHL rules on the conduct of hostilities would govern the use of force against lawful targets, i.e. the fighters and civilians directly participating in hostilities, [. . .]. Any concomitant use of force against persons protected against direct attack would remain governed by the more restrictive rules on the use of force in law enforcement operations (emphasis added)."[128]

Article 50(2) of API defines civilian population as "all persons who are civilians."[129] Laurie R. Blank specifically pointed out that "the obligation to take "constant care" [under Article 57(1) of API] applies to *the entirety of the civilian populations* affected by the conflict and is not limited only to the civilian population of the attacked party. Parties have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy (emphasis added)."[130] The Military Manual of the Netherlands even

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[125] Nils Melzer, ed., *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009), 46.

[126] Ibid., 44.

[127] Ibid., 70.

[128] International Committee of the Red Cross [ICRC], *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 35–36, 32IC/15/11 (October 31, 2015), https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf.

[129] API, art. 50(2).

[130] Blank, "The Goldstone Report, Gaza and Lawfare," 300.

explicitly outlined that "the civilian population of one's own, as well as the adversary's, side must be spared and protected."[131]

An important provision was enshrined in Article 50(3) of API, according to which "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[132] The ICRC having drafted this provision specified the rationale behind it as follows:

> "Whereas the civilian population comprises all persons who are civilians, it often happens that certain persons who do not fall within the definition given in paragraph 1 (i.e. members of the armed forces) are present together with civilians. [. . .] [I]n an armed conflict it was inevitable that there would be at times some members of the armed forces mingling with the civilian population. Unless the definition of the civilian population were [*sic*] to lose all substance and the protection to which it was entitled were to be invalidated, it must be recognized that *the presence of single individuals* not answering to the definition of civilians should not in any way modify the civilian character of a population (emphasis added)."[133]

The Trial Chamber of the ICTY in the *Prosecutor v. Tadić* emphasized that "the targeted [civilian] population must be *of a predominantly civilian nature*. The presence of certain non-civilians in their midst does not change the character of the population (emphasis added)."[134] As to the criteria for the estimation of civilians' predominance, the Appeals Chamber of the ICTY in the *Prosecutor v. Galić* concluded that the evaluation should be based "on the proportion of civilians and combatants within it [civilian population],"[135] whereas in *Prosecutor v. Blaškić* stated that "the number of soldiers, as well as whether they are on leave, must be examined."[136]

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[131] Netherlands, *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, para. 0507, quoted in "Customary IHL: Practice Relating to Rule 15," ICRC, accessed December 15, 2018.

[132] API, art. 50(3).

[133] Draft API, 56.

[134] Prosecutor v. Tadić, Case No. IT-94-1-T, Judgement and Opinion of Judge McDonald, para. 638 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

[135] Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, para. 137 (Int'l Crim. Trib. for the Former Yugoslavia November 30, 2006), http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

[136] Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, para. 115 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004), http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

Moreover, the fact that "[t]he status of a population may change due to the flow of civilians and combatants"[137] shall also be taken into account in order to obtain accurate results.

Article 52(1) of API defines civilian objects, using the negative approach, as "all objects which are not military objectives as defined in paragraph 2 [of Article 52 of API]."[138] According to Article 52(2) of API, "military objectives are limited to 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."[139] This definition encompasses four requirements which shall be satisfied simultaneously for an object to be qualified as a "military objective" for the purposes of Article 52(2) of API.[140] These criteria were defined as "two-pronged test" by Horace B. Jr. Robertson[141] as well as by Michael Bothe, Karl Josef Partsch and Waldemar A. Solf.[142]

Consequently, a particular object shall (1) make an effective contribution to military action (2) by its nature, location, purpose or use, and (3) its total or partial destruction, capture or neutralization shall offer a definite military advantage (4) in the circumstances ruling at the time. And the following contentious aspects should be examined at length, namely the scope of objects being appropriate for the assessment against the above-mentioned criteria, the essence of the requirements "an effective contribution to military action," "a definite military advantage" and "in the circumstances ruling at the time." Because in case of their absence, an alleged military objective could transform into a civilian object being granted a protection under Article 57 of API.

As ICRC experts justifiably clarified, armed forces of the adversary, including a single combatant, also fall within the scope of "military objectives" despite the latter being defined as "objects" in Article 52(2) of API.[143] The same viewpoint is enshrined in a considerable number of States' military manuals as "evidence of state practice and *opinio juris*"[144] with regard to the

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[137] Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgement, para. 894 (Int'l Crim. Trib. for the Former Yugoslavia December 12, 2007), http://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf.

[138] API, art. 52(1).

[139] Ibid., art. 52(2).

[140] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2018, at 635.

[141] Horace B. Jr. Robertson, "The Principle of the Military Objective in the Law of Armed Conflict," *Journal of Legal Studies* 8 (1997): 40.

[142] Bothe, Partsch and Solf, *Commentary,* para. 2.4.1, at 365.

[143] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2017, at 635.

[144] Nobuo Hayashi, ed., *National Military Manuals on the Law of Armed Conflict,* 2nd ed., FICHL Publication Series, no. 2 (Oslo, NO: Torkel Opsahl Academic EPublisher, 2010), 6.

analyzed issue, e.g. in Germany's Military Manual,[145] in Italy's IHL Manual,[146] in the Military Manual of the Netherlands,[147] in the USA Naval Handbook.[148] Furthermore, Uruguay's Law on the Cooperation with the International Criminal Court explicitly excluded "protected objects" from the scope of military objectives[149] reaffirming the provision of Article 57(2)(a)(ii) of API, pursuant to which it is necessary to verify "that it is not prohibited by the provisions of this Protocol to attack them [military objectives]."[150]

Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, having explained the standard required by Article 52(2) of API concerning "an effective contribution to military action," asserted that "a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only *indirectly* related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party's overall war effort (emphasis added)."[151]

As to the expression of "a definite military advantage" which is of crucial importance for the evaluation of objects' nature, ICRC experts concluded that the term in question is similar to the one of "the concrete and direct military advantage anticipated" enshrined in Article 57(2)(a)(iii) of API.[152] Experts of the Program on Humanitarian Policy and Conflict Research at Harvard University (PHPCR) defined military advantage as "any consequence of an attack which

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[145] Germany, *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, August 1992, para. 442, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule8.

[146] Italy, *Manuale di diritto umanitario, Introduzione e Volume I, Usi e convenzioni di Guerra*, SMD-G-014, Stato Maggiore della Difesa, I Reparto, Ufficio Addestramento e Regolamenti, Rome, 1991, vol. 1, para. 12, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[147] Netherlands, *Humanitair Oorlogsrecht: Handleiding*, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, para. 0225, 0509, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[148] United States, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995, para. 8.1.1, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[149] Uruguay, *Law on the Cooperation with the International Criminal Court*, Diario Oficial No. 27091, October 4, 2006, art. 26.3.50, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[150] API, art. 57(2)(a)(ii).

[151] Bothe, Partsch and Solf, *Commentary*, para. 2.4.3, at 365–66.

[152] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2024, at 636.

directly enhances friendly military operations or hinders those of the enemy,"[153] having emphasized that it "refers only to advantage which is directly related to military operations and does not refer to other forms of advantage [. . .] which is solely political, psychological, economic, financial, social, or moral in nature."[154] ICRC experts asserted that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."[155] Moreover, as PHPCR outlined, "[t]he principle of proportionality is not dealing with hindsight. What counts is not hindsight, but *foresight*. […] "Expected" collateral damage and "anticipated" military advantage, for these purposes, mean that that outcome is probable, i.e. *more likely than not*. [. . .] They are "judged in the light of the information reasonably available" at the time (emphasis added)."[156]

The requirement to take a definitive decision as to the nature of objects "in the circumstances ruling at the time" imposes a significant restriction on the discretion of those planning and deciding upon the attack as well as on those ones launching the attack. Because in changeable circumstances of modern warfare objects which met all requirements for military objective at the moment of attack planning may no longer be considered as such during the launching of attack on the battlefield, and *vice versa*.[157] And ICRC experts confirmed that "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."[158]

It is worth noting that some objects meeting the requirements of "military objective," especially those which make an effective contribution to military action by their location, purpose and use, simultaneously serve military and civilian needs. Concerning an identification of the nature of such mixed objects, the ILASG concluded the following:

> "[O]nce an object is used in such a way as to fulfill the definition of military objective, the entire object becomes a lawful target. For the purpose of identifying whether the object fulfills the definition of military objective, it is irrelevant whether such use amounts to more than 50%. Beyond the question of the identification of the object, *the principles of proportionality and precautions in attack remain obviously applicable* when targeting such a dual-use object. [. . .] [A]n object used for military action qualifies as a military objective but [. . .] it

[153] Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge: Cambridge University Press, 2010), para. (w)(3), at 45 (hereafter cited as *PHPCR Commentary*).

[154] Ibid., para. (w)(4), at 45.

[155] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2024, at 636.

[156] *PHPCR Commentary*, para. 14.5–14.6, at 91–92.

[157] Bothe, Partsch and Solf, *Commentary,* para. 2.4.6, at 367.

[158] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2024, at 636.

still may not be attacked if collateral damage to civilians is expected to be excessive (emphasis added)."[159]

The same conclusions are applicable to the qualification of an object as "a military objective" in case of presence of civilians inside it. Frédéric de Mulinen affirmed this assertion, having noticed that "[a] military objective remains a military objective even if civilian persons are in it."[160] The Military Manual of the Netherlands identified status of civilians within military objectives as follows: "Acts such as the manufacturing and transport of military materiel in the hinterland certainly *do not constitute a direct participation in hostilities* (emphasis added),"[161] mainly because of the lack of direct causal link between the acts of civilians and the harm to the adversary. The above-mentioned positions were set forth in Australia's Manual on Law of Armed Conflict,[162] in Germany's Military Manual,[163] in the USA Naval Handbook[164] and other States' military manuals.

The most indefinite group of subjects and objects entitled to the protection by the precautionary rules is determined in Article 57(2)(a)(i) and 57(2)(b) of API by the expression "objectives" which are "subject to special protection." As Michael Bothe, Karl Josef Partsch and Waldemar A. Solf,[165] Robert Kolb[166] and Kubo Mačák[167] confirmed, the term "objectives"

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[159] *ILASG Report*, 336.

[160] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (Geneva: International Committee of the Red Cross, 1987), para. 56.

[161] Netherlands, *Toepassing Humanitair Oorlogsrecht*, Voorschrift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993, V-5, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[162] Australia, *Manual on Law of Armed Conflict*, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, para. 526, 532, 550, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[163] Germany, *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, August 1992, para. 445, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[164] United States, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995, para. 11.2–11.3, quoted in "Customary IHL: Practice Relating to Rule 8," ICRC, accessed December 15, 2018.

[165] Bothe, Partsch and Solf, *Commentary*, para. 2.11, at 291.

[166] Robert Kolb, "Military Objectives in International Humanitarian Law," *Leiden Journal of International Law* 28, 3 (September 2015): 691, doi:10.1017/S0922156515000369.

[167] Kubo Mačák, "Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law," *Israel Law Review* 48, 1 (March 2015): 64, doi:10.1017/S0021223714000260.

covers both persons and objects. Consequently, both specifically protected objects and specifically protected persons shall be considered as "objectives" which are "subject to special protection."

From the analysis of the provisions of API, four Geneva Conventions and other relevant international agreements, it should be concluded that the following objects, being subjects to special protection,[168] shall be considered as eligible for the protection by precautionary rules:

- military fixed establishments and mobile medical units of the Medical Service (Article 19 of the Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of August 12, 1949 (GCI);
- civilian hospitals (Article 18 of GCIV);
- medical units including civilian ones (Article 12 of API);
- the material of mobile medical units and the buildings, material and stores of fixed medical establishments of the armed forces (Article 33 of GCI);
- medical establishments ashore entitled to the protection of GCI (Article 23 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949 (GCII);
- medical vehicles (Article 21 of API);
- medical transports and vehicles of wounded and sick or of medical equipment (Article 35 of GCI);
- convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases (Article 21 of GCIV);
- vessels, their lifeboats and small craft, and coastal rescue craft built or equipped by the Powers specially and solely with a view to assisting the civilian and military wounded, sick and shipwrecked, to treating them and to transporting them (Article 22 of API and Article 22 of GCII);
- small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations and fixed coastal installations used exclusively by these craft for their humanitarian missions (Article 27 of GCII);
- all other medical ships and craft with the exception of those covered by Article 22 of API and with the exception of those covered by Article 38 of GCII (Article 23 of API);

[168] Andrew J. Carswell, ed., *Handbook on International Rules Governing Military Operations* (Geneva: International Committee of the Red Cross, 2013), 159–70.

- hospital ships entitled to the protection of GCII (Article 20 of GCI);
- hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons of Parties to the conflict and of neutral countries (Article 24 and 25 of GCII respectively);
- medical aircraft (Article 24 of API, Article 36 GCI and Article 39 of GCII);
- aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment (Article 22 of GCIV);
- the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples (Article 53 of API);
- cultural property as it is defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (Article 4 of this Convention and Article 12 of its Second Protocol);
- 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 54 of API);
- the natural environment (Article 55 of API);
- works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations (Article 56 of API);
- civilian civil defence organizations, buildings and 'matériel' used for civil defence purposes and shelters (Article 62 of API).

As to the scope of persons as "objectives" which are "subject to special protection,"[169] the following categories of actors are covered by the passive personal scope of precautions:

- members of armed forces who have laid down their arms and those placed *'hors de combat'* by sickness, wounds, detention, or any other cause (Article 3, common to four Geneva Conventions and Article 41 of API);
- members of the armed forces and other persons mentioned in the Article 13 of GCI who are wounded or sick (Article 12 of GCI);
- members of the armed forces and other persons mentioned in the following Article 13 of GCII who are at sea and who are wounded, sick or shipwrecked (Article 12 of GCII);
- the wounded and sick, as well as the infirm, and expectant mothers (Article 16 of GCIV);

[169] Carswell, *International Rules Governing Military Operations*, 157–59.

- all the wounded, sick and shipwrecked, whether military or civilian (Article 10 of API);
- prisoners of war (Article 13 of GCIII);
- medical personnel, exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces (Article 24 of GCI);
- members of the armed forces specially trained for employment as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick (Article 25 of GCI);
- the staff of National Red Cross Societies and that of other Voluntary Aid Societies duly recognized and authorized by their Governments who may be employed on the same duties as the personnel named in Article 24 of GCI (Article 26 of GCI);
- medical personnel and chaplains (Article 33 of GCIII);
- the religious, medical and hospital personnel of hospital ships and their crews (Article 36 of GCII);
- persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases (Article 20 of GCIV);
- civilian medical personnel and civilian religious personnel (Article 15 of API);
- persons parachuting from an aircraft in distress (Article 42 of API);
- personnel of civilian civil defence organizations (Article 62 of API);
- personnel participating in relief actions (Article 71 of API);
- civilian journalists (Article 79 of API).

It should be emphasized that as is the case with civilians, the eligibility for the protection of above-mentioned objects and persons, *inter alia*, by precautionary rules is not absolute. Therefore, the following circumstances will inevitably result in the exclusion of a particular organization or a person from the passive personal scope of precaution in attack:

- commission of "any act of hostility" for wounded, sick and shipwrecked) (Article 8(1)(a) and 8(1)(b) of API);
- commission of "any hostile act" for *'hors de combat'* combatants (Article 41(2) of API);

- "engaging in a hostile act" for persons parachuting from an aircraft in distress (Article 42(2) of API);
- being "used to commit, outside their humanitarian function, acts harmful to the enemy" for civilian medical units (Article 13(1) of API);
- being "used to commit or commit, outside their proper tasks, acts harmful to the enemy" for civilian civil defence organizations, their personnel, buildings, shelters and 'matériel' (Article 65(1) of API).[170]

It is also worth to underline that one of the most controversial issue with regard to the passive personal scope of precautions in attack is the ambit of persons and objects covered by the expression "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof" also referred to as "collateral damage" for the purposes of Article 57(2)(a)(iii) and 57(2)(b) of API. Because the literal interpretation of the used wordings specifically designating a civilian status of as a condition to fall "into the collateral damage side of the proportionality equation"[171] confirm the assertion that only civilians, including civilian medical and religious personnel, civilian wounded, sick and shipwrecked, and civilian objects are protected by the prohibition of disproportional attacks. However, despite the fact that Ian Henderson[172] and Rogier Bartels[173] supported the opposite opinion, a considerable number of scholars having devoted their researches wholly or partially to the issues of proportionality in IHL concluded that military medical personnel and objects as well as military wounded, sick and shipwrecked mentioned as "objectives" which are "subject to special protection" shall be taken into account in the course of a proportionality assessment process. ICRC expert also emphasized that

> "in view of the specific protections accorded to the wounded and sick, [. . .], *a fortiori* they should also benefit from the protection accorded to civilians. In other words, if civilians are to be included in the proportionality assessment all the more so should the wounded and sick. Indeed, if the wounded and sick were not to be considered for purposes of the proportionality principle, their presence in the

[170] Bothe, Partsch and Solf, *Commentary*, para. 2.4.2.2, at 343.

[171] Jann Kleffner, "Transatlantic Workshop on International Law and Armed Conflict: Wounded and Sick and the Proportionality Assessment," Intercross: The Podcast, 12 October 2017, http://intercrossblog.icrc.org/blog/transatlantic-workshop-on-international-law-and-armed-conflict-wounded-and-sick-and-the-proportionality-assessment/.

[172] Henderson, *Contemporary Law of Targeting*, 195–96 (see introduction, n. 4).

[173] Rogier Bartels, "Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials," *Israel Law Review* 46, 2 (July 2013): 304–5, doi:10.1017/S0021223713000083.

> vicinity of legitimate military objectives would be legally irrelevant. However, this would contradict the explicit obligation to respect them in all circumstances and the basic rationale of according special protection to them. [. . .]. Accordingly, the presence of wounded and sick members of the armed forces in the vicinity of a military objective is to be taken into consideration when carrying out a proportionality assessment prior to an attack (italics in the original)."[174]

The same viewpoint with respect to the necessity to include in an assessment of incidental harm was expressed by ICRC experts regarding military medical personnel and objects because "the proposition that military medical personnel and objects do not enjoy protection under the rules of proportionality in attack and precautions, while civilian medical personnel and objects do, runs counter to the fundamental purpose of the relevant rules of Additional Protocols I and II, which specifically envisage uniform protections for these categories of persons and objects."[175] The Committee established to review the North Atlantic Treaty Organization (NATO) Bombing Campaign against the Federal Republic of Yugoslavia, having applied the principle of proportionality, employed the phrase "the injury to *non-combatants* and/or the damage to civilian objects (emphasis added)"[176] as opposing one to "the military advantage," taking into consideration the fact that the used term covers not only civilians but also medical personnel and chaplains who are considered as members of armed forces but not as combatants. Michael Bothe, Karl Josef Partsch and Waldemar A. Solf,[177] Laurent Gisel,[178] Jann Kleffner,[179] the ILASG,[180] William H. Boothby, Wolff Heintschel von Heinegg[181] also confirmed the above-mentioned conclusions of ICRC experts.

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[174] International Committee of the Red Cross, *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*, 2nd ed. (Cambridge: Cambridge University Press, 2016), para. 1357, doi:10.1017/9781316755709.

[175] ICRC, *Challenges of Contemporary Armed Conflicts*, 32 (see chap. 2, n. 128).

[176] International Criminal Tribunal for the Former Yugoslavia [ICTY], *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 50 (June 13, 2000), http://www.icty.org/x/file/Press/nato061300.pdf.

[177] Bothe, Partsch and Solf, *Commentary*, para. 2.2.1, at 253.

[178] Laurent Gisel, "Can the Incidental Killing of Military Doctors Never Be Excessive?" *International Review of the Red Cross* 95, 889 (March 2013): 229–30, doi:10.1017/S1816383114000174.

[179] Kleffner, "Transatlantic Workshop," (see chap. 2, n. 171).

[180] *ILASG Report*, 358–59.

[181] William H. Boothby and Wolff Heintschel von Heinegg, *The Law of War: a Detailed Assessment of the U.S. Department of Defense Law of War Manual* (Cambridge: Cambridge University Press, 2018), 184–85, doi:10.1017/9781108639422.

Summarizing all of the analyzed in this subchapter, it should be concluded that the passive personal scope of objects and persons entitled to the protection by the precautionary rules covers civilians, civilian population, civilian objects and objectives under special protection including both objects and persons. The category of civilians consists of all persons physically present in a territory, apart from members of armed forces. Officially remaining to be members of armed forces, neither persons being *'hors de combat'* nor wounded, sick and shipwrecked nor prisoners of war shall be considered as civilians. Civilians directly participating in hostilities lose, *inter alia*, the protection by precautions in attack. Civilian population defined as all persons who are civilians shall be protected in its entirety by both parties to an armed conflict. The civilian character of the population shall be assessed in the context of the proportion of civilians and members of armed forces within it. Civilian objects are determined as all objects which are not military objectives. To be qualified as a "military objective" a particular object shall (1) make an effective contribution to military action (2) by its nature, location, purpose or use, and (3) its total or partial destruction, capture or neutralization shall offer a definite military advantage (4) in the circumstances ruling at the time. Armed forces of the adversary, including a single combatant, fall within the scope of military objectives by their nature. All other objects, except for objectives under special protection, may be defined as military ones provided that all the mentioned requirements are met simultaneously "in the circumstances ruling at the time." Dual use of a military object as well as the presence of civilians within it does not change its status of a lawful target provided that the estimated collateral damage is not expected to be excessive. The following objects, being subjects to special protection, shall be considered as eligible for the protection by precautionary rules: military and civilian medical units, their hospitals, buildings and materials, vehicles, vessels, ships, craft and medical aircraft; cultural property; objects indispensable to the survival of the civilian population; the natural environment; works or installations containing dangerous forces; civilian civil defence organizations, buildings and 'matériel' used for civil defence purposes and shelters. The following categories of actors are covered by the passive personal scope of precautions: members of armed forces who have laid down their arms and those placed *'hors de combat'* by sickness, wounds, detention, or any other cause; all the wounded, sick and shipwrecked, whether military or civilian; the infirm and expectant mothers; prisoners of war; military and civilian medical personnel; military and civilian religious personnel and chaplains; persons parachuting from an aircraft in distress; personnel of civilian civil defence organizations; personnel participating in relief actions and civilian journalists. Military medical personnel and objects as well as military wounded, sick and shipwrecked shall also be taken into account in the course of a proportionality assessment as anticipated collateral damage along with civilians and civilian

objects. But the mentioned objectives under special protection enjoy the protection by precautions in attack as long as they refrain from any hostile act in violation of their functions.

2.3. Temporal Scope of Application of Precautions in Attack

Unless a particular obligation has a continuing character, a majority of obligations in IHL shall not to be fulfilled on a daily basis throughout the duration of an armed conflict. Therefore, an unequivocal determination of their temporal scope is of great importance for persons assuming a complete responsibility for their proper fulfilment in order to act fully in compliance with the required standards. API concisely defines a *ratione temporis* of an application of particular precautions in attack with the expressions "[i]n the conduct of military operations" and "[w]ith respect to attacks" in Article 57(1) and 57(2) respectively, omitting the temporal scope of other provisions. Therefore, an ascertainment of the scope of "military operations," a detailed analysis of the legal definition of "attacks" and a filling of the lacunas with regard to the temporal scope of the precautions in attack enshrined in Article 57(3) and 57(4) of API are the main objectives of this subchapter to be attained.

The temporal scope of the obligation to take constant care to spare the civilian population, civilians and civilian objects, pursuant to Article 57(1) of API, is delineated with the expression "[i]n the conduct of military operations."[182] The same term is enshrined in Article 57(4) of API with regard to taking all reasonable precautions to avoid losses of civilian lives and damage to civilian objects in the course of military operations at sea and in the air.[183] Taking into consideration the rule of interpretation set forth in Article 33(3) of VCLT, according to which "[t]he terms of the treaty are presumed to have the same meaning in each authentic text,"[184] the term "military operation" shall be defined identically in both of the above-mentioned provisions of Article 57 of API.

ICRC experts defined "military operation" in Draft API as "offensive and defensive movements by armed forces in action,"[185] whereas in the ICRC Commentary to API the ambit of this term was extended to "any movements, manœuvre and other activities whatsoever carried out by the armed forces with a view to combat."[186] Jean-François Quéguiner characterized *ratione temporis* of application of Article 57(1) of API as covering "troop movements,

[182] API, art. 57(1).

[183] Ibid., 57(4).

[184] VCLT, art. 33(3).

[185] Draft API, 10.

[186] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2191, at 680.

manoeuvres and other deployment or retreat activities carried out by armed forces before actual combat."[187] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf maintained the same position, having stated that "[m]ilitary operations" as used in Protocol I involve both fire and movement. [. . .] the term "attacks" as used in Art. 57 [of API] deals with the fire aspect of the operation, not necessarily the movement part."[188] The ILASG pointed out that "the obligation to take constant care to spare the civilian population applies to the entire range of military operations and not only to attacks," [189] having confirmed this conclusion by "the clear wording of the provision and [by] the fact that reducing its scope of application to that of attacks would deprive the provision of most of its meaning."[190] As to States' national practice with regard to the analyzed issue, the USA Department of Defense Dictionary of Military and Associated Terms defines "operation" as "(1) a military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission [and] [t]he process of carrying on combat, including movement, supply, attack, defense, and maneuvers needed to gain the objectives of any battle or campaign."[191] The UK Military Manual explicitly clarified that "[c]onduct of military operations has a wider connotation than 'attacks' and would include the movement or deployment of armed forces."[192]

It should be reiterated that in comparison with other provisions of Article 57 of API the material scope of the obligation to take constant care to spare the civilian population, civilians and civilian objects is sufficiently broader. Consequently, the extensive character of this obligation as an apparent corollary of the foundational principle of distinction indispensably requires wider temporal scope in order to be fulfilled on a permanent basis. Therefore, the obligation to take constant care to spare the civilian population, civilians and civilian objects shall be fulfilled not only during attacks but also during any movements, manœuvre and other activities of armed forces for any combat or campaign throughout the duration of an armed conflict.

Precautionary measures prescribed in Article 57(2) of API are required to be applied restrictedly only "with respect of attacks" which are defined in Article 49(1) of API as "acts of

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[187] Quéguiner, "Precautions," 797.

[188] Bothe, Partsch and Solf, *Commentary*, para. 2.8.2, at 408.

[189] *ILASG Report*, 380.

[190] Ibid.

[191] United States, the U.S. Department of Defense, *Dictionary of Military and Associated Terms* (Joint Publication 1-02, April 12, 2001, as amended through 9 June 2004), 384, https://www.cia.gov/library/abbottabad-compound/B9/B9875E9C2553D81D1D6E0523563F8D72_DoD_Dictionary_of_Military_Terms.pdf.

[192] *UK JSP 383*, 81n187.

violence against the adversary, whether in offence or in defence."[193] Jean-François Quéguiner underlined that the same *ratione temporis* is applicable "by analogy to the third paragraph [of Article 57 of API], which can be understood only in the context of an attack."[194] The ILASG even characterized both obligations set forth in Article 57(2) and 57(3) of API as "attack-specific."[195]

ICRC experts construed the notion of "attack" in Draft API in the following manner: "Every time the term "attack" is employed, it is related to only *one specific military operation, limited in space and time* (emphasis added)."[196] In the ICRC Commentary to API attack was succinctly defined as "combat action."[197] Eric C. Husby unequivocally underlined that "[a]cts of violence" refer to *uses of physical force,* and do not include such things as military information support to operations (emphasis added)."[198] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf reached the same interpretive conclusion, having asserted that "the concept of "attacks" does not include dissemination of propaganda, embargoes or other non-physical means of psychological, political or economic warfare."[199] Consequently, attack shall be considered as one of the forms of military operations which is inherently associated with the use of physical force against adversaries.

Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, having analyzed the nature of combat actions to be treated as "attacks" for the purposes of Article 49(1) of API, concluded that this term was referred to "*co-ordinated acts of violence* against the adversary *by a specific military formation* engaged in a specific military operation (emphasis added)," [200] rather than to "each act of violence of the individual combatants who are members of that formation."[201] In order to substantiate their viewpoints on this matter, Michael Bothe, Karl Josef Partsch and Waldemar A. Solf relied on the use of plural form in the definition of "attacks" in Article 49(1) of API. William J. Fenrick reached the same conclusions, having noticed that despite the fact that "this definition [of "attacks" under Article 49(1) of API] is broad enough to designate the act

[193] API, art. 49(1).

[194] Quéguiner, "Precautions," 797n9.

[195] *ILASG Report,* 381.

[196] Draft API, 54.

[197] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1880, at 603.

[198] Husby, "A Balancing Act," 11 (see chap. 2, n. 94).

[199] Bothe, Partsch and Solf, *Commentary,* para. 2.2.2, at 329.

[200] Ibid.

[201] Ibid., para. 2.2.1, at 329.

of a single soldier shooting a rifle as an attack," [202] the act of a single combatant would not constitute an attack for the purposes of Articles 51(5)(b) and 57(2) of API.[203]

However, Ian Henderson criticized the mentioned positions of William J. Fenrick, having stated that "[w]hether an act of violence by a sniper or single bomber aircraft amounted to an attack or not would depend upon *the context in which the act was conducted* (emphasis added)."[204] Having resorted to the researches of A. P. V. Rogers,[205] Ian Henderson corroborated his opposite position as follows:

> "[W]here a pilot has been tasked to fly over an area of operations and attack targets of opportunity, then the pilot will have to comply with the obligations imposed by article 57 [of] API. However, where a squadron of strike aircraft are [*sic*] tasked against a military installation, each aircraft is contributing to the attack but the actions of a single aircraft against its assigned target(s) are not considered in isolation as an attack."[206]

Eric C. Husby maintained the same position as Ian Henderson, having asserted that "when the entirety of an attack consists of a special operative acting alone, or an individual aircraft dropping bombs, that attack still meets the Article 49 [of API] definition"[207] but "[i]ndividual, uncoordinated acts of violence are not considered part of an "attack." [208]

Summarizing all of the above-mentioned, it should be concluded that the coordinated use of physical force against the adversary by a single member of armed forces will constitute an "attack" triggering the mechanism of the application of precautionary measures in accordance with Article 57(2) and 57(3) of API if this attack was initially planned to be launched by a single member of armed forces.

Furthermore, the definition of attack in compliance with Article 49(1) of API is limited exclusively to those acts of violence which are launched against the adversary, and, as a result, "destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack [. . .], as such acts, though they may be acts of violence, are not mounted "against the adversary."[209] Moreover, pursuant to Article 49(3) of API, "[t]he provisions of this

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[202] William J. Fenrick, "The Rule of Proportionality and Protocol in Conventional Warfare," *Military Law Review* 98 (1982): 102.

[203] Ibid.

[204] Henderson, *Contemporary Law of Targeting*, 161.

[205] Rogers, *Law on the Battlefield*, 68–69 (see chap. 1, n. 28).

[206] Henderson, *Contemporary Law of Targeting*, 161.

[207] Husby, "A Balancing Act," 11.

[208] Ibid.

[209] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1890, at 605.

Section [Section I of Part IV of API] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to *all attacks from the sea or from the air against objectives on land* but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air (emphasis added)."[210] Michael Bothe, Karl Josef Partsch and Waldemar A. Solf interpreted the mentioned limitation of the scope of "attacks" for the purposes of API in the following way: "Paragraph 3 [of Article 49 of API] limits the protections of Section I of Part IV [of API] to civilians and civilian objects located on land against the effects of land, sea or air warfare. [. . .] Thus, it has no application to ship-to-ship or air-to-air combat, nor to attacks from the surface against aircraft in flight or attacks from land against ships at sea."[211] ICRC experts additionally specified that "the expression "on land" in this context also applies to rivers, canals and lakes"[212] in accordance with international law standards regarding State territory.

Consequently, precautions in attack in accordance with Article 57(2) and 57(3) of API shall be applied in case of the coordinated use of physical force against military objectives and armed forces of the adversary, provided that the latter are situated on land territory, irrespective of its legal status.

It is worth outlining that the detailed analysis of the definition of attack enshrined in Article 49(1) of API, especially of the expression "whether in offence or in defence," disclosed sufficient grounds to consider that the definition in question substantially differs from "the normal military usage"[213] of the term "attack" with regard to offensive military operations only. ICRC experts and later Emanuela-Chiara Gillard explained that any hostile act, irrespective of its motives and reasons, may adversely affect civilians, the civilian population, civilian objects and other objectives protected against effects of hostilities.[214] Taking into account an importance of broader understanding of the notion of "attacks," ICRC experts required to invoke the mentioned explanation in the course of armed forces' instruction process because they "should clearly understand that the restrictions imposed by humanitarian law on the use of force should be observed both by troops defending themselves and by those who are engaged in an assault or

[210] API, art. 49(3).

[211] Bothe, Partsch and Solf, *Commentary,* para. 2.4, at 330.

[212] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1898, at 606.

[213] Bothe, Partsch and Solf, *Commentary,* para. 2.8.2, at 408.

[214] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 1880, at 603; Emanuela-Chiara Gillard, "Protection of Civilians in the Conduct of Hostilities," in *Routledge Handbook of the Law of Armed Conflict*, ed. Rain Liivoja and Tim McCormac (London, GB: Routledge Taylor & Francis Group, 2016), 160, doi:10.4324/9780203798362.

taking the offensive."[215] Therefore, the obligations set forth in Article 57(2) and 57(3) of API shall be fulfilled not only before offensive attacks but also in the course of defensive attacks including counter attacks[216] and self-defense military operations.[217]

ICRC experts also clarified in Draft API that "[c]are should [. . .] be taken not to confuse the author of an attack, within the meaning of the present Protocol [Draft API], with an aggressor, that is to say, the party that starts the armed conflict itself. The author of an attack is he who, *whatever his position may be at the outbreak of hostilities*, starts a military operation involving the use of arms (emphasis added)."[218] In the ICRC Commentary to API it was further emphasized that "an attack is unrelated to the concept of aggression or the first use of armed force; it refers simply to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict."[219] Thus, the capacities of attacking and defending sides have relevance neither to the application of *jus ad bellum* rules nor to the reasons of an armed conflict's commencement. What is more, each party to an armed conflict may be treated as defending or attacking one depending on the circumstances of a particular attack.

It should also be clarified that precautions in attack prescribed in Article 57(2) and 57(3) of API are required to be applied by persons having discretion to plan or decide upon the way the attack is launched or persons launching the attack on the battlefield directly before the commencement of an attack concerned. Because due to changeable circumstances of modern warfare, objects which met all requirements for military objective at the moment of attack planning may no longer be considered as such during the launching of attack on the battlefield, and *vice versa*.[220] Therefore, if a particular attack is launched in a considerable period of time after the application of all required precautions in attack, responsible persons shall verify the nature of objectives to be attacked[221] and carry out proportionality assessment afresh. Moreover, in contrast to the canceling of an attack in accordance with Article 57(2)(b) of API, the obligation to suspend an attack if it becomes apparent that the objective is not a military one or is subject to special protection or that an attack may not be proportional shall be fulfilled by responsible persons at any time in the course of the launched attack.

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[215] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1880, at 603.

[216] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1880, at 603; Gillard, "Protection of Civilians," 160.

[217] Husby, "A Balancing Act," 6, 11.

[218] Draft API, 54.

[219] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1882, at 603.

[220] Bothe, Partsch and Solf, *Commentary,* para. 2.4.6, at 367.

[221] Julio Jorge Urbina, *Derecho Internacional Humanitario. Conflictos Armados y Conducción de las Operaciones Militares* (La Coruña, ES: Santiago de Compostela, 2000), 241, quoted in Quéguiner, "Precautions," 797n12.

Summarizing all of the analyzed in this subchapter, it should be underlined that the obligation to take constant care to spare the civilian population, civilians and civilian objects and under Article 57(1) of API shall be fulfilled during any movements, manœuvre and other activities of armed forces for any combat or campaign throughout the duration of an armed conflict. The same *ratione temporis* is applicable to taking all reasonable precautions to avoid losses of civilian lives and damage to civilian objects in the course of military operations at sea and in the air in conformity with Article 57(4) of API. Precautionary measures prescribed in Article 57(2) and 57(3) of API are required to be applied only with respect of attacks as one of the forms of military operations which is inherently associated with the coordinated use of physical force against military objectives and armed forces of the adversary, provided that the latter are situated on land territory, irrespective of its legal status. The coordinated use of physical force against the adversary by a single member of armed forces will constitute an "attack" if this attack was initially planned to be launched by a single member of armed forces. Moreover, the obligations set forth in Article 57(2) and 57(3) of API shall be fulfilled directly before the commencement of both offensive and defensive attacks including counter attacks and self-defense military operations. And if a particular attack is launched in a considerable period of time after the application of all required precautions in attack, responsible persons shall verify the nature of objectives to be attacked and carry out proportionality assessment afresh. In contrast to the canceling of an attack in accordance with Article 57(2)(b) of API, the obligation to suspend an attack shall be fulfilled at any time in the course of the launched attack.

3. FEASIBILITY OF PRECAUTIONS IN ATTACK AND ITS ASSESSMENT

Too burdensome character of the precautionary obligations imposed on persons assuming a responsibility for their proper fulfilment on behalf of belligerents as well as the necessity to reach an acceptable compromise between representatives of 124 States having participated in the work of the Diplomatic Conference of 1974–1977 facilitated the inclusion of feasibility caveats into the provisions of Article 57(2)(a)(i) and 57(2)(a)(ii) of API. By virtue of the fact that feasibility issues substantially modify the *ratione materiae* of the obligations of verifying of the nature of objectives to be attacked and taking precautions in the choice of means and methods of attack in order to avoid incidental civilian losses, the detailed analysis of feasibility caveats defined with the expressions "do everything feasible" and "take all feasible precautions," is the main objective of this Chapter.

Jean-François Quéguiner, Théo Boutruche, Isabel Robinson and Ellen Nohle characterized the latter as "relative standard of measurement."[222] Because, as Eritrea–Ethiopia Claims Commission clarified, "[t]he law requires all "feasible" precautions, not precautions that are *practically impossible* (emphasis added)."[223] Jean-François Quéguiner additionally pointed out that "[t]he expressions "everything feasible" or "all feasible" are used in Article 57 [of API] as a clear reminder of the obvious fact that, when taking precautions in attack, armed forces cannot be required to do the objectively impossible, *nor can they be content with merely doing what is possible* (emphasis added)."[224] Knut Dörmann reiterated during the second session of the ICRC Expert Meeting (Chavannes-de-Bogis, 2015) that "[w]hile the rules prohibiting indiscriminate attacks and requiring attacks to respect proportionality are absolute, the requirement to take precautions is *relative, based on what is feasible* (emphasis added)."[225] Nevertheless, Théo Boutruche emphasized that "the relative character of what precautionary measures are required shall not be interpreted as a reason for Parties to the conflict to evade their obligations."[226] Consequently, it is permissible to dispense with the application of precautionary

[222] Quéguiner, "Precautions," 802 (see chap. 2, n. 75); Boutruche, "Expert Opinion," 18 (see introduction, n. 8); Isabel Robinson and Ellen Nohle, "Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas," *International Review of the Red Cross* 98, 901 (April 2016): 134, doi:10.1017/S1816383116000552.

[223] Ethiopia v. Eritrea, Vol. 26, Partial Award: Central Front – Ethiopia's Claim 2, para. 110, at 190 (Eritrea–Ethiopia Claims Commission, April 28, 2004), http://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf.

[224] Quéguiner, "Precautions," 809–10.

[225] International Committee of the Red Cross, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects* (Geneva: International Committee of the Red Cross, 2015), 18.

[226] Boutruche, "Expert Opinion," 16.

rules or to diminish the standard of their proper application in exceptional circumstances as the feasibility caveat inherently "provides the basis for a possible rebuttal."[227] But feasibility shall not be used as additional loophole for non-application of IHL rules.

It is worth to underline that the majority of obligations to take precautions in attack in accordance with Article 57 of API are phrased via contextual evaluative qualifiers, namely "everything feasible," "all feasible precautions," "may be expected," "becomes apparent" and "unless circumstances do not permit." A. P. V. Rogers substantiated the mentioned tendency as follows: "The term **"**feasible" has rightly ben [*sic*] criticised for its vagueness, but [. . .] a text shorn of ambiguities either provides insufficient protection or does not provide sufficient flexibility to cover the many situations that can arise in armed conflict."[228]

According to *travaux préparatoires* of API, two alternative proposals were initially included in Article 50(1)(a) of Draft API with regard to the verification of the nature of objectives to be attacked in order to recognize this obligation either as absolute by choosing of the term "ensure" or as qualified one by using the expression "take all reasonable steps to ensure." Moreover, the Working Group in its Report to the Committee III of the Diplomatic Conference 1974–1977 stated that "[c]ertain words created problems, particularly the choice between "feasible" and "reasonable" in 2(a)(i) and 2(a)(ii). [. . .] "Reasonable" struck many representatives as too subjective term."[229] Consequently, the absolute character of the obligation concerned was rejected, and "[r]eferring to the use of the word "feasible" [. . .], it was preferred by most representatives to the word "reasonable."[230] Alexandre Cabral Campelo Hierro Lopes confirmed that "this expression [of feasibility] was chosen precisely for its abstract characteristics, for its numerous interpretation possibilities depending on each situation and players in it."[231]

Despite the fact that the term "feasible" is enshrined only in Article 57(2)(a)(i) and 57(2)(a)(ii) of API, Michael N. Schmitt and Eric W. Widmar deemed that "[t]he condition of feasibility is generally understood to apply to all of the precautionary requirements set forth in

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[227] *ILASG Report*, 373 (see introduction, n. 6).

[228] A. P. V. Rogers, "General Report – Conduct of Combat and Risks Run by the Civilian Population," *Military Law and Law of War Review* 21 (1982): 309.

[229] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 15, at 353, CDDH/III/264/Rev.I (February 3–April 18, 1975).

[230] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 15, para. 98, at 285, CDDH/215/Rev.I (February 3–April 18, 1975).

[231] Lopes, "Conduct of Hostilities: Precautions in Attack," 12 (see chap. 2, n. 76).

Article 57 [of API]."[232] However, Article 57(4) of API which requires taking "all reasonable precautions" in the conduct of military operations at sea or in the air refutes the mentioned conclusion of Michael N. Schmitt and Eric W. Widmar. Because the intentions of the drafters of API having deliberately used different terms in Article 57(2)(a)(ii) and 57(4) of API shall not be disregarded, taking into consideration the rule of interpretation set forth in Article 33(3) of VCLT, according to which "[t]he terms of the treaty are presumed to have the same meaning in each authentic text."[233] ICRC experts stated that "all reasonable precautions" must be taken [in the conduct of military operations at sea or in the air], which is undoubtedly slightly different from and a little less far-reaching than the expression "take all feasible precautions," used in paragraph 2 [of Article 57 of API]. As the nuance is tenuous, the purpose of the provision appears to be to reaffirm the rules that exist to protect civilians in such situations."[234] Marco Sassòli, Antoine A. Bouvier and Anne Quintin confirmed that

> "the provision [of Article 57(4) of API] is explicitly qualified by a reference to the existing rules ("in conformity with its rights and duties under rules of international law applicable to armed conflict"). This must probably be understood as a simple saving clause in respect of those rules applicable to air warfare. It nevertheless indicates an authoritative understanding of the States drafting Protocol I that "reasonable precautions" have to be taken according to those other rules which are not yet codified in a treaty."[235]

Therefore, the terms "feasible precautions" enshrined in Article 57(2)(a)(ii) of API and "reasonable precautions" set forth in Article 57(4) of API were chosen to serve different purposes. Feasibility caveat is aimed at providing sufficient discretion to responsible persons concerning the scope of precautions in attack to be applied in specific circumstances of a particular attack, whereas "reasonable precautions" refers to the necessity to apply the existing precautions in attack applicable in air and naval warfare, even in case of their non-codification in API.

Article 3(10) of the amended Mines Protocol defines feasible precautions as "those precautions which are practicable or practically possible taking into account all circumstances

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[232] Michael N. Schmitt and Eric W. Widmar, "On target": Precision and Balance in the Contemporary Law of Targeting," *Journal of National Security Law & Policy* 7, 3 (2014): 400n144.

[233] VCLT, art. 33(3) (see chap. 1, n. 15).

[234] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2230, at 688 (see chap. 1, n. 20).

[235] Marco Sassòli, Antoine A. Bouvier and Anne Quintin, eds., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* 3rd ed., vol. 1 (Geneva: International Committee of the Red Cross, 2006), chap. 11, 4.

ruling at the time, including humanitarian and military considerations."[236] Committee III of the Diplomatic Conference 1974–1977 also underlined in its Report that "it [the term "feasible"] was intended to mean that which is practicable or practically possible."[237] In the French text of API which is "equally authentic" with English one in compliance with Article 102 of API the similar expression "*pratiquement possible*" is enshrined instead of the term "feasible." Moreover, a significant number of scholars having dedicated their researches wholly or partially to the analysis of feasibility caveat also denoted this notion by the above-mentioned definition, e.g., Robin Geiss and Michael Siegrist,[238] Christopher J. Markham and Michael N. Schmitt,[239] Vaios Koutroulis,[240] Théo Boutruche,[241] Emanuela-Chiara Gillard,[242] Isabel Robinson and Ellen Nohle.[243] It is also worth noting that from a considerable number of States having incorporated the definition from Article 3(10) of the amended Mines Protocol into their military manuals, Canada,[244] Germany,[245] Ireland,[246] Italy,[247] the Netherlands,[248] Spain[249] and the UK[250] additionally set forth the definition in question in their declarations formulated during the process of ratification or accession to API. Accordingly, the definition of feasible precautions in attack as those which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations, will be used for the purposes of further research, in light of its generally recognized character.

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[236] Amended Mines Protocol, art. 3(10) (see chap. 1, n. 70).

[237] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 15, para. 98, at 285, CDDH/215/Rev.I (February 3–April 18, 1975).

[238] Robin Geiss and Michael Siegrist, "Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?" *International Review of the Red Cross* 93, 881 (March 2011): 36–37, doi:10.1017/S1816383111000191.

[239] Christopher J. Markham and Michael N. Schmitt, "Precision Air Warfare and the Law of Armed Conflict," *International Law Studies* 89 (2013): 685.

[240] Koutroulis, "All Feasible Precautions," 47 (see chap. 2, n. 96).

[241] Boutruche, "Expert Opinion," 14–15.

[242] Gillard, "Protection of Civilians," 173 (see chap. 2, n. 214).

[243] Robinson and Nohle, "Proportionality and Precautions in Attack," 134.

[244] 1591 U.N.T.S. 464, November, 20 1990.

[245] 1607 U.N.T.S. 529, February 14, 1991.

[246] 2073 U.N.T.S. 29, May 19, 1999.

[247] 1425 U.N.T.S. 438, February 27, 1986.

[248] 1477 U.N.T.S. 300, June 26, 1987.

[249] 1537 U.N.T.S. 392, April 21, 1989.

[250] 2020 U.N.T.S 76, January 28, 1998, 78.

The preliminary analysis of the wordings used in the mentioned definition affords sufficient grounds to assert that the latter contains no definite standards applicable to every particular judgment on a feasibility of precautions in attack.[251] That is why Vaios Koutroulis described the element of feasibility as "context-dependent,"[252] whereas the ILASG explained this feature by stating that "what is feasible will not only be contingent on the environment in which the attack is to be carried out but will also depend on a range of factors."[253] The Committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia in its Final Report to the Prosecutor of the ICTY emphasized the following regarding the issue concerned:

> "[A] determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus *exclusively on a specific incident.* If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate (emphasis added)."[254]

Hence, as Vaios Koutroulis concluded, "there can be no pre-established list of means and methods to be applied in every situation. Means and methods that may be feasible in one context may prove not to be feasible in another."[255] Article 3(10) of the amended Mines Protocol stipulates that the circumstances to be taken into account "include, but are not limited to: (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield; (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring); (c) the availability and feasibility of using alternatives; and (d) the short- and long-term military requirements for a minefield."[256] What is more, an illustrative non-exhaustive list of factors to be considered as "circumstances, including humanitarian and military considerations" in the course of feasibility assessment process is enshrined in almost every research dedicated to the issues of feasible precautions. But the most extensive and detailed one was included in the UK Military Manual, having stated the following:

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[251] Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge: Cambridge University Press, 2013), para. 6, at 28, doi:10.1017/CBO9781139525275 (hereafter cited as *PHPCR Manual*).

[252] Koutroulis, "All Feasible Precautions," 47.

[253] *ILASG Report*, 374.

[254] ICTY, *Review the NATO Bombing Campaign*, para. 29 (see chap. 2, n. 176).

[255] Koutroulis, "All Feasible Precautions," 47.

[256] Amended Mines Protocol, art. 3(10).

> "In considering the means or methods of attack to be used, a commander should have regard to the following factors:
>
> a. the importance of the target and the urgency of the situation;
>
> b. intelligence about the proposed target – what it is being, or will be, used for and when;
>
> c. the characteristics of the target itself, for example, whether it houses dangerous forces;
>
> d. what weapons are available, their range, accuracy, and radius of effect;
>
> e. conditions affecting the accuracy of targeting, such as terrain, weather, and time of day;
>
> f. factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zones and whether they are inhabited, or the possible release of hazardous substances as a result of the attack;
>
> g. the risks to his own troops of the various options open to him."[257]

During the forty-second plenary meeting of the Diplomatic Conference of 1974–1977 representatives of Canada, Germany, Turkey, the UK and the USA explained their votes with regard to Article 57 of API as follows: "[T]he word "feasible" when used in draft Protocol I, [. . .], refers to that which is practicable or practically possible, taking into account all circumstances at the time, *including those relevant to the success of military operations* (emphasis added)."[258] ICRC experts expressed the following apprehension regarding the mentioned supplement: "The last-mentioned criterion [the success of military operations] seems to be too broad, [. . .]. There might be reason to fear that by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations."[259] Jean-François Quéguiner expressed the same position, having pointed out that "this interpretation seemed to grant licence to belligerents to give their military interests precedence over humanitarian imperatives."[260] It is worth noting that none of the States which expressed such understanding of the term "feasible" during the Diplomatic Conference of 1974–1977 included this addition into their military manuals.

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[257] *UK JSP 383*, para. 5.32.4, at 83–84 (see chap. 2, n. 98).

[258] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 6, para. 41, 59, at 211, 214, 224, 226, 241, CDDH/SR.42 (May 27, 1977).

[259] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2198, at 682.

[260] Quéguiner, "Precautions," 810.

Théo Boutruche proposed to include "the necessity to keep certain weapons available for future attacks on targets which are militarily more important or more risky for the civilian population"[261] into the list of elements to be identified as relevant ones for an evaluation of precautions' feasibility. The USA Law of War Manual explicitly referred to "the cost of taking the precaution, in terms of time, money, or other resources"[262] as one of the "circumstances, including humanitarian and military considerations." However, as Michael N. Schmitt emphasized, "[t]here is no basis in international humanitarian law for factoring expense into feasibility assessments. Once a belligerent purchases equipment and supplies it to its forces in the field, it must be used if it is available, makes good military sense and will minimize civilian impact."[263] The ILASG also concluded that "allowing financial and economic considerations as such to enter the equation is risky given that they may be abstract and remote and could easily be invoked so as to manipulate the obligation to take feasible precautions."[264]

Summarizing all of the above-mentioned, it should be concluded that responsible persons are obliged to take into account both humanitarian and military considerations in the course of a feasibility assessment process with regard to precautions in attack in compliance with Article 57(2)(a)(i) and 57(2)(a)(ii) of API. However, neither a success of a particular military operation, nor estimated financial or material implications which could be caused by the attack concerned shall take precedence over other relevant factors to be assessed. Because, as PHPCR experts emphasized, "whereas a particular course of action may be considered non-feasible due to military considerations, some risks have to be accepted in light of humanitarian considerations."[265]

An existing warfare tends to be characterized with the inequality between armed forces of States with developed and developing economies[266] regarding an access to technologically improved weaponry and military equipment. Consequently, the dependence, if any, between a feasibility of precautions in attack and belligerents' level of technological development should be ascertained. Because, as Michael N. Schmitt correctly elucidated,

> "a low-tech force facing an adversary armed with state of the art C4ISR [Command, Control, Communications, Computers, Intelligence, Surveillance and

[261] Boutruche, "Expert Opinion," 19.

[262] United States, Office of General Council, Department of Defense, *Law of War Manual* (June 2015 as updated December 2016), para. 5.2.3.2, at 193.

[263] Michael N. Schmitt, "Precision Attack and International Humanitarian Law," *International Review of the Red Cross* 87, 859 (September 2005): 462, doi:10.1017/S1816383100184334.

[264] *ILASG Report*, 378.

[265] *PHPCR Manual*, para. 5, at 28.

[266] U.N., *The World Economic Situation and Prospects 2018*, at 3 (January 17, 2018), doi:10.18356/02486bd4-en.

> Reconnaissance] and weaponry has difficulty simply surviving, let alone confronting its opponent. Its troops and equipment can be readily located, reliably identified, and accurately targeted on a conventional battlefield far more easily than the other side. Asymmetry in precision compels the disadvantaged side to respond asymmetrically."[267]

Michael N. Schmitt concluded that "[t]echnologically advanced militaries can achieve a far higher level of precautions than their opponents can. [. . .], the legal standard that applies to belligerents is a constant. However, because they have greater ability to exercise precautions in attack, advanced militaries are held to *a higher standard* – as a matter of law – *because more precautions are feasible* (emphasis added)."[268] Robin Geiss and Michael Siegrist strongly advocated the same point of view, having stated that "what is feasible also hinges on the reconnaissance resources available to the attacker. It is therefore generally accepted that, in practice, technologically advanced parties may be bound to a higher standard than those parties who lack similarly advanced reconnaissance means."[269] However, a permissible difference in the feasibility standards depending on the availability of resources and technology shall not be considered insofar as an approval of the non-application of IHL rules by less advanced armed forces. As ICRC experts correctly pointed out, "it is the duty of Parties to the conflict to have the means available to respect the rules of the Protocol [API]."[270] Therefore, the higher standard of feasible precautions is expected to be applied by technologically advanced armed forces, whereas less advanced belligerents are not required to fulfil precautionary obligations at the same level with advanced ones but at least up to the practically possible for them extent without violations of IHL rules.

The next issue of crucial importance for the reasonableness of further conclusions is the scope of information on the basis of which a feasibility of precautions in attack should be evaluated. Almost every State Party to API unambiguously determined this scope in its declaration formulated during the process of ratification or accession to API. Isabel Robinson and Ellen Nohle, having analyzed States' practice on this matter, identified that "[r]egarding the quality and quantity of information that is required [. . .], a number of States have explicitly declared that military commanders must make their decisions on the basis of the information that

[267] Schmitt, "Precision Attack," 463.

[268] Michael N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law," *Air Force Law Review* 62, 1 (2008): 36.

[269] Geiss and Siegrist, "Armed Conflict in Afghanistan," 37n116.

[270] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 1871, at 600.

is *available* to them at the time of the attack,[271] whilst others have referred to information that is "*reasonably available*"[272] (emphasis added)."[273] Hence, there is no unanimously accepted approach to the issue concerned. Ian Henderson, having expressed a prevalent viewpoint among scholars with regard to the necessary scope of information, concluded the following:

> "[A] commander must not only reach his or her decision based on the information available to them at the time, but "must *make a reasonable effort to discover pertinent information*" before making that decision. [. . .] Where information was reasonably available *but not collected or assessed*, the reasonableness of the decision of the commander, planner or staff officer can be judged based on not only what information the person did have but also what information was reasonably available to that person (emphasis added)."[274]

Therefore, responsible persons shall assess precautions' feasibility not only on the basis of the currently available information but also of "reasonably available" one by exerting all reasonable endeavors to obtain it. Moreover, this requirement shall not be neglected even in case of urgent circumstances requiring prompt decisions to be made with regard to attacks because the obligation under Article 57(2)(a)(i) of API involves "a continuing obligation to assign a high priority to the collection, collation, evaluation and dissemination of timely target intelligence."[275]

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[271] For instance, Algeria ("the information *available* at the time the decision was made"), Australia ("on the basis of their assessment of the information from all sources, which is *available* to them at the relevant time"), Austria ("the information *actually available* at the time of the decision"), Belgium ("such relevant information as is *then available*"), Egypt ("on the basis of their assessment of all kinds of information *available* to them at the time"), Germany ("on the basis of all information *available* to him at the relevant time"), Italy ("on the basis of their assessment of the information from all sources which is *available* to them at the relevant time"), the Netherlands ("on the basis of their assessment of the information from all sources which is *available* to them at the relevant time"), Spain ("shall not necessarily be based on anything more than the relevant information *available* at the relevant time") and the United Kingdom ("on the basis of their assessment of the information from all sources which is *available* to them at the relevant time"), quoted in "Customary IHL: Practice Relating to Rule 15," ICRC, accessed December 15, 2018, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15.

[272] For instance, Canada ("on the basis of their assessment of the information *reasonably available* to them"); Ireland ("on the basis of their assessment of the information from all sources which is *reasonably available* to them at the relevant time"), New Zealand ("on the basis of their assessment of the information from all sources which is *reasonably available* to them at the relevant time") and the United States ("on the basis of their assessment of the information *reasonably available* to them at the time"), quoted in "Customary IHL: Practice Relating to Rule 15," ICRC, accessed December 15, 2018.

[273] Robinson and Nohle, "Proportionality and Precautions in Attack," 135.

[274] Henderson, *Contemporary Law of Targeting,* 163 (see introduction, n. 4).

[275] Bothe, Partsch and Solf, *Commentary,* para. 2.5, at 405 (see chap. 2, n. 78).

Théo Boutruche also pointed out that "there is a requirement on the part of the attacker to take steps to collect the relevant and reliable information from all sources to be able to make an assessment in good faith."[276]

It should also be mentioned that any assessment process is considered to be finished after the processing of all relevant information. But in case of a feasibility caveat, taking into account the necessity to obtain all reasonably available information existing in endless scope, it is important to define a sufficient level of certainty to be reached by responsible persons in order to properly complete a feasibility evaluation process. Michael N. Schmitt and Eric W. Widmar concluded that an attainment of a particular standard of certainty would be impractical[277] because, as Michael Bothe, Karl Josef Partsch and Waldemar A. Solf emphasized, "the adverse Party will do its utmost to frustrate target intelligence activity and may be expected to employ ruses to conceal, deceive and confuse reconnaissance means."[278] Ian Henderson reached the same conclusions, having stated that "[w]hereas there will be occasions when the intelligence available to a commander leaves the commander with no doubt, by the very nature of armed conflict intelligence will often be less than 100 per cent."[279] Consequently, instead of a criterion of certainty, Ian Henderson, having based on the judgement of the Trial Chamber I of the ICTY in *Prosecutor v. Galić*,[280] suggested using another contextual evaluative qualifier of a responsible person's "reasonable belief"[281] which shall be reached by making "a reasonable effort to discover pertinent information."[282]

Moreover, ICRC experts emphasized that "in case of doubt [as to the nature of the objective to be attacked], even if there is only slight doubt, they [those who plan or decide upon an attack] must *call for additional information* (emphasis added)."[283] Noam Neuman also underlined that "[t]he more doubt there is, the more reason there will be to require further

[276] Boutruche, "Expert Opinion," 21.

[277] Schmitt and Widmar, "On target," 401–2.

[278] Bothe, Partsch and Solf, *Commentary,* para. 2.5, at 405.

[279] Henderson, *Contemporary Law of Targeting,* 164.

[280] "The Trial Chamber understands that such an object shall not be attacked when it is not *reasonable to believe*, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action [emphasis added]." Prosecutor v. Galić, Case No. IT-98-29-T, Judgement, para. 51 (Int'l Crim. Trib. for the Former Yugoslavia December 05, 2003), http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf.

[281] Henderson, *Contemporary Law of Targeting,* 165.

[282] Ibid., 163.

[283] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2195, at 680.

verification."[284] Robin Geiss and Michael Siegrist, having analyzed the issue concerned, concluded the following:

> "This standard, which requires the elimination of doubt about an object's status, has been criticized as too high. However, allowing attacks in spite of remaining doubt about an object's status would significantly undermine the principle of distinction. For as long as doubt remains, IHL stipulates certain presumptions in favour of a protected status (Article 50 paragraph 1 and Article 52 paragraph 3 of Additional Protocol I). These presumptions would be rendered meaningless if attacks were to be allowed in cases of doubt. [. . .] Thus, while the 'fog of battle' may not always allow 'clinical accuracy' in decision-making, it may well be argued that it is precisely for the fog of battle, [. . .], that IHL requires target verification and *disallows attacks in case of doubt* (emphasis added)."[285]

The same conclusion was made by the ILASG, having stated that "[i]f lack of resources or capacity does not allow ascertaining that the proposed target is actually a military objective, the attack must not take place."[286] Théo Boutruche, having devoted a considerable part of his research to a proper qualification of mistakes made in the course of a feasibility assessment process, summarized his conclusions as follows:

> "[A] precautionary measure that proves to be unsuccessful does not mean that the corresponding obligation has been violated. It must be assessed whether the attacker respected its duty to take feasible measures and collected sufficient information. [. . .] A genuine mistake, such as a malfunction in the guiding system of a missile, can still be committed even if all feasible precautions have been taken. [. . .] On the other hand this does not allow for unreasonable assumptions to be the basis for an attack. Mistakes must therefore be distinguished from negligent acts. [. . .] [I]f the attacker failed to take all feasible precautions or even to collect information as part of the implementation of those obligations [to verify the lawfulness of the objective being attacked], the effects on civilians or civilian objects would qualify as a negligent act, objectively determined by such failure."[287]

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[284] Noam Neuman, "A Precautionary Tale: The Theory and Practice of Precautions in Attack," *Israel Yearbook on Human Rights* 48 (2018): 34, doi:10.1163/9789004382183_003.

[285] Geiss and Siegrist, "Armed Conflict in Afghanistan," 37–38.

[286] *ILASG Report*, 377.

[287] Boutruche, "Expert Opinion," 22–23.

Consequently, summarizing all of the analyzed in this Chapter, it should be outlined that feasible precautions in attack are those ones which are practicable or practically possible taking into account all circumstances ruling at the time. The higher standard of feasible precautions is expected to be applied by technologically advanced armed forces, whereas less advanced belligerents are not required to fulfil precautionary obligations at the same level with advanced ones but at least up to the practically possible for them extent without violations of IHL rules. Responsible persons are obliged to take into account both humanitarian and military considerations in the course of a feasibility assessment process with regard to each particular attack. However, neither a success of a particular military operation, nor estimated financial or material implications which could be caused by the attack concerned shall take precedence over other relevant factors to be assessed. Moreover, they shall assess a precautions' feasibility not only on the basis of the currently available information but also of "reasonably available" one by exerting all reasonable endeavors to obtain it, even in case of urgent circumstances requiring prompt decisions to be made. And if an assessment of all currently available and "reasonably available" information previously collected still leaves some doubts as to the military nature of an objective to be attacked and all practically possible means to verify its nature have already been exhausted, a person having discretion to plan or decide upon the way the attack is launched or a person launching the attack on the battlefield shall fulfil their obligation of cancelling or suspension of the attack concerned in accordance with Article 57(2)(b) of API. But if an assessment of the "reasonably available" information obtained through the use of all practically possible means provides no grounds to question the military nature of an objective, the attack concerned could be launched provided that the assessment in question has been performed in good faith and the respective attack does not violate other IHL rules. And in case of a mistaken conclusion as to the nature of an attacked objective, there will be no violation of the obligation enshrined in Article 57(2)(a)(i) of API if a person having discretion to plan or decide upon the way the attack is launched has genuinely fulfilled this obligation in good faith.

4. EFFECTIVE ADVANCE WARNING AS A PRECAUTION IN ATTACK

The rule of prior attack warning, being the first codified precaution in attack among those currently enshrined in Article 57 of API, is of significant importance for the civilian population. And in comparison with other precautions in attack serving the same common purpose of avoiding or at least minimizing the effects of an armed conflict on the civilian population and civilian objects, civilians by means of a given effective warning receive a real opportunity to successfully protect themselves, instead of waiting for decisions regarding their fate being taken by belligerents. Because the mentioned statistical figures concerning civilian casualties in the course of armed conflicts reiterate the fact that effectiveness of such decisions for the achievement of the mentioned purpose is highly questionable. Consequently, this Chapter is aimed at ascertaining of the main factors for a proper assessment of a warning's effectiveness, analyzing of a caveat defined with the expression "unless circumstances do not permit" and evaluating of legal consequences of the rule's application.

From the historical perspective the first reference to the rule of prior warning in case of attack could be found in Article 19 of the 'Lieber Code,' according to which "[c]ommanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity."[288] As to the codification of the obligation concerned in international treaties, Article 26 of Regulations annexed to HCIV stipulates that "[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities."[289] The same rule of advance warning is enshrined in Article 6 of HCIX with a different wording of the exception phrased by more ambiguous expression "if the military situation permits, [. . .]."[290] Pursuant to Article 57(2)(c) of API, "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[291] It should also be mentioned that the United Nations Fact Finding Mission on the Gaza Conflict[292] (the UNFFM on the Gaza

[288] Lieber, *Instructions for the Government*, 8–9 (see chap. 1, n. 13).

[289] HCIV, art. 26 (see chap. 1, n. 16).

[290] HCIX, art. 6 (see chap. 1, n. 17).

[291] API, art. 57(2)(c) (see chap. 1, n. 48).

[292] "On 3 April 2009, the President of the United Nations Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether

Conflict) in its Report "Human Rights in Palestine and Other Occupied Arab Territories" referred to as the Goldstone Report explicitly recognized, *inter alia*, the provision of Article 57(2)(c) of API "to be norms of customary international law."[293] Hence, even those States which have not expressed their consent to be bound by API and other above-mentioned international treaties are obliged to apply a customary rule of effective advance warning as it is worded in Article 57(2)(c) of API.

Therefore, taking into consideration a recognized customary character of the provision of Article 57(2)(c) of API, the following advance warning rule will be analyzed in this Chapter for the purposes of further research: "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[294]

It is worth noting that attacking parties did not pay due attention to the proper application of advance warning rules in accordance with Article 26 of Regulations annexed to HCIV and Article 6 of HCIX by virtue of the fact that Hague Conventions' provisions initially drafted with a decisive predominance of the principle of military necessity did not specify any criteria regarding an assessment of the warning concerned. Thus, in response to humanitarian challenges posed by the mentioned controversial practice, the drafters of API supplemented the advance warning rule with an additional requirement of a warning's effectiveness currently enshrined in Article 57(2)(c) of API.

However, the enhancement of standards of the proper fulfilment of the advance warning obligation inevitably led to the complication of the assessment process regarding the adherence to the standards concerned because, as Pnina Sharvit Baruch and Noam Neuman reasonably emphasized, "there is no precise formula of what is considered an "effective warning."[295] The UNFFM on the Gaza Conflict pointed out that "[w]hether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage."[296] The ILASG also concluded that the qualification of a particular warning as an effective one "depends on the circumstances of each given case."[297] Nevertheless,

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before, during or after." U.N. Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, para. 1, A/HRC/12/48 (September 25, 2009), https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (hereafter cited as *UNFFM Report*).

[293] *UNFFM Report*, para. 528.

[294] API, art. 57(2)(c).

[295] Baruch and Neuman, "Warning Civilians Prior to Attack," 377 (see chap. 1, n. 14).

[296] *UNFFM Report*, para. 510.

[297] *ILASG Report*, 385 (see introduction, n. 6).

a considerable number of researches, international organizations' reports and States' military manuals, having confirmed the necessity to evaluate an effectiveness of a warning on a case-by-case basis, specified certain criteria which shall be uniformly applicable in the course of any effectiveness assessment process with a view to ensuring the succession of the practice concerned and the unified application of IHL rules. But the most comprehensive summarized list of such criteria was compiled by Pnina Sharvit Baruch and Noam Neuman having dedicated their research to the profound analysis of advance warning rules. They enumerated the following factors to be thoroughly examined for a proper assessment of a warning's effectiveness, namely "the temporal aspect – when should the warning be given, the recipient of the warning – to whom is it addressed, the content of the warning and the method by which the warning is issued."[298]

Pursuant to Article 57(2)(c) of API, the temporal scope of the obligation to give an effective warning is shortly delineated with an adjective "advance," and the obligation concerned is required to be fulfilled restrictedly only with respect of "attacks which may affect the civilian population."[299] The definition of attack in compliance with Article 49(1) of API is limited to the coordinated use of physical force against military objectives and armed forces of the adversary, provided that the latter are situated on land territory, irrespective of its legal status. However, Article 57(2)(c) of API restrains *ratione temporis* of a warning obligation to cover only those attacks which may affect the civilian population. With regard to the limitation in question, Robin Geiss and Michael Siegrist pointed out that "the word 'may' in Article 57 paragraph 2(c) of the Protocol [API] *does not require any degree of certainty* as to whether an attack will indeed affect civilians; *the mere possibility suffices.* Thus, the criterion of 'attacks which may affect the civilian population' should be interpreted broadly. Unless it can be ruled out that an attack will affect the civilian population, the obligation to warn is triggered (emphasis added)."[300] As to the meaning of the term "affect," Ian Henderson expressed the following viewpoint on this matter which was cited by a number of scholars, including Luke A. Whittemore,[301] Pnina Sharvit Baruch and Noam Neuman:[302] "mere loss of a job could not warrant advance warning. Affect should be interpreted narrowly to mean *directly affected* in the sense of *injured or killed*

[298] Baruch and Neuman, "Warning Civilians Prior to Attack," 378.

[299] API, art. 57(2)(c).

[300] Geiss and Siegrist, "Armed Conflict in Afghanistan," 39 (see chap. 3, n. 238).

[301] Luke A. Whittemore, "Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law," *Harvard National Security Journal* 7, 2 (2016): 597n81.

[302] Baruch and Neuman, "Warning Civilians Prior to Attack," 405n108.

(emphasis added)."[303] Moreover, a passive personal scope of the obligation to give an effective warning is unambiguously defined by the term "civilian population" because, as ICRC experts reasonably emphasized, "the proper function of warnings [. . .] is to give civilians the chance to protect themselves."[304] Based on the mentioned objective, Pnina Sharvit Baruch and Noam Neuman concluded that "there is no legal obligation to issue warnings in an area where there are no civilians or when there are no civilians likely to be affected by the attack,"[305] having explicitly excluded civilians directly participating in hostilities from the beneficiaries of the analyzed precaution.[306]

The next issue of a crucial importance for the analysis of temporal aspects of the warning obligation is an assessment of the necessity, if any, to give an effective warning before every single attack which may affect the civilian population. Robin Geiss and Michael Siegrist defined a frequency of attack warnings in the following way: "[E]ven on the basis of a broadened understanding of when an attack 'may affect the civilian population,' this Article [57(2)(c) of API] would not categorically require a warning prior to each and every attack."[307] Jean-François Quéguiner also denied an existence of a requirement to give a warning before each attack as follows: "[T]he attacking commander does not have to issue multiple warnings of the danger incurred by a civilian population that is located near a clearly defined military objective that has been declared as such. A warning made in general terms at the start of the hostilities, and then repeated during the conflict, will satisfy both the letter and spirit of the obligation."[308]

Therefore, if a planned attack is likely to affect the civilian population, a person having discretion to plan or decide upon the way the attack is launched should either take a decision as to the acceptable timing for an effective warning to be given or take a decision to dispense with a warning, applying the caveat "unless circumstances do not permit."

The UK Military Manual specified that "[t]o be effective the warning must be *in time* (emphasis added)."[309] Pnina Sharvit Baruch and Noam Neuman, having underlined the necessity of a sufficient flexibility regarding timing determination for ensuring the possibility of any warning to be recognized as effective one in any possible circumstances of an armed conflict, concluded the following: "In order to be effective, warnings that a specific target is about to be

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[303] Henderson, *Contemporary Law of Targeting*, 188 (see introduction, n. 4).

[304] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols*, para. 2225, at 687 (see chap. 1, n. 20).

[305] Baruch and Neuman, "Warning Civilians Prior to Attack," 374.

[306] Ibid., 404n101.

[307] Geiss and Siegrist, "Armed Conflict in Afghanistan," 39.

[308] Quéguiner, "Precautions," 808 (see chap. 2, n. 75).

[309] *UK JSP 383*, para. 5.32.8, at 84 (see chap. 2, n. 98).

attacked must be issued *within a reasonable time* before the attack is actually launched. If a warning is issued too close to the time of the attack, it might not *allow sufficient time for the civilian population to evacuate* (emphasis added)."[310] The UNFFM on the Gaza Conflict also outlined that "[t]he effectiveness will depend on [. . .] *the possibility* of those receiving the warning *taking action to escape the threat* (emphasis added)."[311] Based on the mentioned conclusion, the UNFFM on the Gaza Conflict acknowledged a personal telephone call made by the Israeli armed forces to Mr. Abu Askar seven minutes before the launching of an aerial attack on his house as an effective advance warning because Mr. Abu Askar and approximately forty members of his family managed to evacuate.[312] The Commission of Inquiry on Lebanon[313] emphasized with regard to the timing of an effective warning the following: "Having given a warning, the actual physical possibility to react to it must be considered. [. . .] To be truly "effective", the message should also give civilians *clear time slots for the evacuation* linked to guaranteed safe humanitarian exit corridors that they should use. Military staff should ensure that civilians obeying evacuation orders are not targeted on their evacuation routes (emphasis added)."[314] Human Rights Watch in its report documenting serious violations of IHL by Israel Defense Forces (IDF) in Lebanon in July 2006 concluded that warnings given through loudspeakers by Israeli representatives across the border to inhabitants of the Lebanese border

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[310] Baruch and Neuman, "Warning Civilians Prior to Attack," 378.

[311] *UNFFM Report*, para. 513.

[312] "At around 1.45 a.m. on 6 January 2009, Mr. Abu Askar received a personal telephone call from the Israeli armed forces advising him that he should evacuate the house and everyone in it because it was going to be destroyed by an air strike. The building housed not only his immediate family but a large number of his extended family, about 40 in all. Mr. Abu Askar responded quickly, evacuating not only his own extended family but also advising neighbours of the imminent strike. The survivors of the al-Deeb family confirm they were advised at this time by Mr. Abu Askar of the call he had received. The house was struck by a missile from an F-16 according to Mr. Abu Askar about seven minutes after the call was received. […] As a result of the warning, Mr. Abu Askar was able to save himself and his family." *UNFFM Report*, para. 658–59, 687.

[313] "On 11 August 2006, […], convened to address the ongoing conflict in Lebanon, the Human Rights Council adopted resolution S-2/1, entitled "The grave situation of human rights in Lebanon caused by Israeli military operations," in which it decided to "establish urgently and immediately dispatch a high-level commission of inquiry". The Commission, according to paragraph 7 of resolution S-2/1, was mandated: "(a) to investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) to examine the types of weapons used by Israel and their conformity with international law; and (c) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment." Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* para. 1, A/HRC/3/2 (November 23, 2006), https://digitallibrary.un.org/record/587605/files/A_HRC_3_2-EN.pdf (hereafter cited as *CIL Report*).

[314] *CIL Report*, para. 153, 157.

village of Marwahin were not effective ones despite the fact that civilians concerned were provided two hours to evacuate.[315] Because, as Human Rights Watch reported,

> "the Israeli military did not follow its orders to evacuate with the creation of safe passage routes, and on a daily basis Israeli warplanes and helicopters struck civilians in cars who were trying to flee, many with white flags out the windows. [. . .] On July 15 [2006], an Israeli strike on a convoy of civilians fleeing from the Lebanese border village of Marwahin killed twenty-one people, including fourteen children. Many villagers fled after the IDF warned them to evacuate ahead of a threatened attack."[316]

Pnina Sharvit Baruch and Noam Neuman reiterated the above-mentioned conclusion of the Commission of Inquiry on Lebanon and delineated that it might be preferable to warn civilians to stay indoors and take shelter than to evacuate when circumstances do not permit enough time to do it safely.[317]

However, Pnina Sharvit Baruch and Noam Neuman also underlined that "a warning must not be issued too early either, as this might *lead people to believe that the threat is no longer valid* (emphasis added)."[318] For instance, Amnesty International reported that the statement of Air Commodore Wilby with regard to the *Radio Televisija Srbije* made on April 8, 1999, shall not be considered as an effective warning of the attack launched on April 23, 1999, by the NATO which bombed the central studio of *Radio Televisija Srbije* in Belgrade.[319] Because, as Inter Press Service estimated, there were at least 120 civilians in the building at the time of the attack[320] who "had returned to the building believing the threat had passed,"[321] and at least sixteen civilians were killed in the course of the respective attack.

Summarizing all of the above-mentioned assertions regarding temporal aspects of an effective warning, it should be concluded that the obligation to give an effective warning shall be fulfilled before the coordinated use of physical force against military objectives of the adversary

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[315] Human Rights Watch [HRW], *Fatal Strikes: Israel's Indiscriminate Attacks Against Civilians in Lebanon*, vol. 18, no. 3 (E) (August 2006), 35–38, https://www.hrw.org/reports/2006/lebanon0806/lebanon0806webwcover.pdf.

[316] Ibid., 35, 38.

[317] Baruch and Neuman, "Warning Civilians Prior to Attack," 379.

[318] Ibid., 378.

[319] Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force*, at 52, EUR 70/018/2000 (June 5, 2000), https://www.amnesty.org/en/documents/eur70/018/2000/en/.

[320] Inter Press Service [IPS], *NATO and Serbian TV Accused of Rights Crimes*, October 1999, quoted in Amnesty International, *NATO during Operation Allied Force*, 44.

[321] Baruch and Neuman, "Warning Civilians Prior to Attack," 378.

even if there is a small possibility that at least one civilian may be injured or killed in the course of the attack concerned. An acceptable frequency of attack warnings shall depend on the intensity of the repetition of attacks targeted against the same military objective and on the effectiveness of the warning previously given to the same recipient. A person having discretion to plan or decide upon the way the attack is launched shall determine an acceptable timing for an effective warning to be given, taking into consideration the necessity to provide sufficient time for the civilian population to evacuate safely but not too much time for civilians' false delusion as to the attack cancellation.

The second element of a warning's effectiveness is the recipient of the warning. Article 26 of Regulations annexed to HCIV and Article 6 of HCIX explicitly designate "the authorities" of a defending party as a proper recipient of an attack warning, whereas Article 57(2)(c) of API specifies nothing in this regard. Pnina Sharvit Baruch and Noam Neuman stated that "[t]he determination as to whether warning the authorities would suffice [to be considered as effective] relies on *their ability [of authorities] to reach the relevant civilian population in an effective manner* (emphasis added)."[322] As Human Rights Watch reported, a warning given by the local political leader of the Liberation Tigers of Tamil Eelam to a Muslim community leader in Mutur before an attack on August 2, 2006, was not effective one because on August 1, 2006, the Liberation Tigers of Tamil Eelam cut off the electricity in Mutur. Consequently, a community leader was objectively unable "to inform the public of the impending fighting through the mosque loudspeaker."[323] Having analyzed the practice of giving warnings directly to the civilian population, experts of the PHPCR defined an acceptable number of recipients as follows: "[I]t [a warning] must be "effective" by reaching the *civilians likely to suffer death or injury from the attack* (emphasis added)."[324] This principle was rather successfully[325] used by IDF in the course of Operation Cast Lead in Gaza (December 27, 2008–January 18, 2009) for notifying of civilians of impending military operations in the following way: "First, general warnings were used,

[322] Baruch and Neuman, "Warning Civilians Prior to Attack," 380.

[323] Human Rights Watch [HRW], *Improving Civilian Protection in Sri Lanka: Recommendations for the Government and the LTTE*, at 11, No. 1 (September 19, 2006), https://www.hrw.org/legacy/backgrounder/asia/srilanka0906/srilanka0906web.pdf.

[324] *PHPCR Commentary*, para. 37.8, at 133 (see chap. 2, n. 153).

[325] "While the warning systems implemented by the IDF [Israel Defense Forces] did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces [Israel Defense Forces] confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings." Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects*, July 2009, para. 265, at 100, http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf.

calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed *in certain areas*, calling on civilians to leave those areas before IDF forces operated in them. [. . .] Finally, specific warnings were issued to *residents of particular buildings before attack* (emphasis added)."[326] Consequently, proper recipients of an attack warning shall be determined based on the circumstances of a particular attack, including the extent of the anticipated harm likely to be caused to the civilian population, the type of weaponry planned to be used in the course of the attack concerned and its hitting area.

The next factor to be examined for an assessment of a warning's effectiveness is the content of the warning which shall be evaluated upon three main criteria, namely clarity, specificity and credibility of the warning in question.

The UNFFM on the Gaza Conflict specifically emphasized that a warning had to be clear "so that the civilians are not in doubt that it is indeed addressed to them."[327] Experts of the PHPCR also acknowledged the necessity of warning's clarity, having stated that "[w]arnings have to be made *in a language that is understood by the local population* (emphasis added),"[328] because only in this way a warning could be considered as sufficiently comprehensible one to enable civilians to follow it.[329] Jean-François Quéguiner confirmed the same viewpoint and, as a result, challenged the effectiveness of the warning given to western journalists who were advised "to stay away from the television station"[330] before the above-mentioned bombing attack on April 23, 1999, launched by the NATO against *Radio Televisija Srbije*.[331]

As to the specificity of a warning, PHPCR experts identified that "[w]arnings ought *not be vague* but *be as specific as circumstances permit* to allow the civilian population to take relevant protective measures, like seeking shelter or staying away from particular locations (emphasis added)."[332] The UNFFM on the Gaza Conflict in the Goldstone Report underlined that for a warning to be effective time and place of a particular attack had to be indicated as clearly as possible[333] because, as Clive Baldwin concluded, "vague warnings have little impact when time and location of potential attacks are not clearly set."[334] Moreover, the Commission of Inquiry on

[326] Israel Ministry of Foreign Affairs, *The Operation in Gaza*, para. 263, at 99.

[327] *UNFFM Report*, para. 530.

[328] *PHPCR Commentary*, para. 37.12, at 133.

[329] *UK JSP 383*, para. 5.32.8, at 84.

[330] ICTY, *Review the NATO Bombing Campaign*, para. 77 (see chap. 2, n. 176).

[331] Quéguiner, "Precautions," 808.

[332] *PHPCR Commentary*, para. 37.10, at 133.

[333] *UNFFM Report*, para. 530.

[334] Clive Baldwin, "Effective Advance Warning," in *Collegium*, no. 46 (Autumn 2016): 54.

Lebanon delineated that "[i]f a military force is really serious in its attempts to warn civilians to evacuate because of impending danger, it should take into account *how they expect the civilian population to carry out the instruction* and not just drop paper messages from an aircraft (emphasis added)."[335]

However, ICRC experts explicitly recognized a warning containing only a list of military objectives to be attacked by the adversary as an acceptable warning.[336] The USA Department of the Army even pointed out that a warning "may be *a blanket warning*, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives (emphasis added)."[337] However, it is worth noting that the mentioned standards are applicable only to general warnings which are usually given at the outset of an armed conflict. But for the proper fulfilment of a warning obligation in full compliance with Article 57(2)(c) of API an attacking party is obliged to additionally give more specific warnings identifying time and place of particular attacks, evacuation measures and safe locations as of that time in order to give civilians a real opportunity to evacuate safely and successfully.

In addition to the mentioned qualities of an effective warning's content, warning messages are also required to be credible.[338] The UNFFM on the Gaza Conflict explained the essence of this criterion as follows: "A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk."[339] ICRC experts, having defined false warnings as ruses of war, concluded that "[e]ven though ruses of war are not prohibited in this field, they would be *unacceptable* if they were to deceive the population and nullify the proper function of warnings, which is to give civilians the chance to protect themselves (emphasis added)."[340] Moreover, as Pnina Sharvit Baruch and Noam Neuman pointed out, "[t]he limitation on ruses of war with regard to warnings does not mean, of course, that every warning must be followed by an attack,

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[335] *CIL Report*, para. 156.

[336] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2225, at 687.

[337] United States, *Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf*, 11 January 1991, § 8(I), Report on U.S. Practice, 1997, Chapter 1.6, quoted in Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 2: Practice – Part 1 (Cambridge: Cambridge University Press, 2005), para. 483, at 409.

[338] Nathalie Durhin "Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law," *International Review of the Red Cross* 98, 901 (April 2016): 192 doi:10.1017/S1816383117000029.

[339] *UNFFM Report*, para. 530.

[340] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2225, at 687.

since there are cases where decisions change for different reasons, including operational, policy and humanitarian considerations. The focus is *on the intention at the time the warning was issued* (emphasis added)."[341]

The last aspect to be examined with regard to an effectiveness of an attack warning is a method by which the warning is given. PHPCR experts emphasized that warnings could be issued "either verbally or in writing, or through any other means that can reasonably be expected to be effective under the circumstances."[342] Taking into consideration the analysis of belligerents' practice, it should be concluded that telephone calls and dropping or distributing leaflets are the most widespread methods by which warnings are given. For instance, only for twenty-three days IDF have made 165,000 telephone calls, including both direct calls and pre-recorded messages, and dropped 2.5 million leaflets to warn the civilian population of their attacks launched in Gaza Strip.[343] Steven Collins reported that forty million leaflets had been dropped over Iraq by Coalition aircrafts since October 3, 2002, before the commencement of an armed conflict on March 20, 2003, whereas another forty million leaflets were dropped in the course of the armed conflict.[344] Warnings given through radio broadcasting were also widely used in Gaza.[345] Furthermore, as PHPCR experts defined broadcasting as "not only radio broadcasts but also telecasting and other means such as internet announcements,"[346] the latter method was successfully applied by IDF which gave attack warnings "to the residents of the Gaza Strip" on their official Twitter page on November 15, 2012.[347] The UK Military Manual specified that a warning could also be given "by word of mouth,"[348] for instance, warnings given through loudspeakers by representatives of IDF across the border to inhabitants of Marwahin in July 2006.[349] In the course of the Second World War there were cases of attack warnings having been given by aircrafts flying very low over military objectives in order to give civilians

[341] Baruch and Neuman, "Warning Civilians Prior to Attack," 377.

[342] *PHPCR Commentary*, para. 37.15, at 134.

[343] *UNFFM Report*, para. 500.

[344] Herbert A. Friedman, "No Fly Zone Warning Leaflets to Iraq," 2003, http://www.psywarrior.com/IraqNoFlyZone.html; Steven Collins, "Mind Games," NATO Review, 2003, https://www.nato.int/docu/review/2003/issue2/english/art4.html.

[345] *UNFFM Report*, para. 500.

[346] *PHPCR Commentary*, para. 37.13, at 134.

[347] Israel Defense Forces' Twitter page, accessed December 15, 2018, https://twitter.com/IDF/status/269058128027451392.

[348] *UK JSP 383*, para. 5.32.8, at 84.

[349] HRW, *Israel's Indiscriminate Attacks*, 35–38.

sufficient time to leave the adjacent areas.[350] However, the International Commission of Inquiry on Darfur in its Report to the United Nations Secretary–General refuted the use of this method by rebel forces having conducted attacks in Buram, South Darfur, having concluded the following: "No eyewitnesses reported [. . .] that aircraft had flown low over villages to warn civilians of an imminent attack. Moreover, the mode and pattern of aerial flights preceding attacks can in no way be construed as warning signals, as these were clearly part of the attack."[351]

The most controversial method of warning referred to as "roof-knocking"[352] which was initially used in Operation Cast Lead in Gaza was subsequently being applied by IDF in Operation Pillar of Defense (November 14, 2012) and Operation Protective Edge (July 8, 2014–August 26, 2014) and by the armed forces of the USA in Iraq in 2016.[353] IDF defined the mentioned warning technique as "firing warning shots from light weapons that hit the roofs of the designated targets"[354] and asserted that a "roof-knocking" tactic was being employed only when civilians had remained in their houses despite having been already given other attack warnings, including telephone calls, broadcasts and leaflets.[355] However, as the UNFFM on the Gaza Conflict concluded,

> "this technique is not effective as a warning and *constitutes a form of attack against the civilians inhabiting the building*. [. . .] In the context of a large-scale military operation including aerial attacks, *civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack*. [. . .] [I]t is not clear why another call could not be made if it had already been possible to call the inhabitants of a house. [. . .] If the choice is between making another call or firing a light missile that carries with it a significant risk of killing those civilians, the Mission [the UNFFM on the Gaza Conflict] is not convinced that it would not have been feasible to make another call to confirm that a strike was about to be made (emphasis added)."[356]

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[350] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2224, at 686.

[351] International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, para. 265, at 72 (January 25, 2005), http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

[352] *UNFFM Report*, para. 501.

[353] Roger-Claude Liwanga, "Roof-Knocking Tactic: A Lawful and Effective Warning Technique under the Laws of War," *North Carolina Journal of International Law* 43, 2 (Spring 2018): 44.

[354] Israel Ministry of Foreign Affairs, *The Operation in Gaza*, para. 264, at 100.

[355] *UNFFM Report*, para. 506, 534.

[356] *UNFFM Report*, para. 532, 534.

Moreover, the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict,[357] having examined the application of "roof-knocking" by IDF in Operation Protective Edge, reported the following:

> "In a number of incidents examined, the concerned persons either did not understand that their house had been the subject of a "roof-knock," or the time given for evacuation between the warning and the actual strike was insufficient. In one case examined by the commission, a 22-member family, including nine children, were given just a few minutes to evacuate their home after a "roof knock" in the early hours of the morning, while they were asleep; 19 of the 22 people present in the house died."[358]

Consequently, it should be emphasized that "roof-knocking" as a method of attack warnings to be given has not proven its effectiveness insomuch that it would be reasonable to advocate its highly questionable application. And, as Michael N. Schmitt underlined, civilians' failure "to heed the warning cannot possibly be understood to create a continuing duty to warn. *Once warned effectively, the requirement has been met* (emphasis added)."[359] Therefore, in order to properly fulfil a warning obligation there is no necessity for "roof-knocking" or any other warning to be given, provided that the attack in question has already been preceded with an effective warning in compliance with all of the above-mentioned requirements regarding its content, recipients and temporal aspects of its giving.

The advance warning rule as the majority of obligations to take precautions in attack is phrased via a contextual evaluative caveat "unless circumstances do not permit," thereby emphasizing that "the duty to warn remains the rule unless the belligerent can invoke special circumstances that would justify its non-compliance."[360] Whereas Articles 57(2)(a)(i) and 57(2)(a)(ii) of API require not to give precedence to a success of a particular military operation over other relevant factors in the course of feasibility assessment process, ICRC experts explicitly recognized "the element of surprise" which is determinative for the success of a

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[357] "On 23 July 2014, the Human Rights Council, by resolution S-21/1, decided to urgently dispatch an independent, international commission of inquiry to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after." U.N. Independent Commission of Inquiry on the 2014 Gaza Conflict, *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, para. 1, A/HRC/29/CRP.4 (June 22, 2015), https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_CRP_4.pdf.

[358] U.N. Independent Commission of Inquiry on the 2014 Gaza Conflict, *Report*, para. 42.

[359] Michael N. Schmitt "Military Necessity and Humanity," *Virginia Journal of International Law* 50, 4 (2010): 829.

[360] Quéguiner, "Precautions," 807.

particular attack as a circumstance triggering the possibility of derogation from the advance warning rule's application.[361] But it is worth outlining that this possibility could be invoked only if the success of a particular military operation is essentially contingent on the element of surprise, e.g. when a military objective is transportable and could be easily relocated after a warning.[362] The UK Military Manual enumerated the situations "where troops have to respond to an attack upon them or unexpectedly come across a target, [. . .] or where the safety of attacking forces would be compromised"[363] as circumstances not permitting to give an attack warning. Additionally, Pnina Sharvit Baruch and Noam Neuman defined mission accomplishment, speed of response and practical impossibility as the situations covered by the analyzed exception enshrined in Article 57(2)(c) of API.[364] Taking into account the absence of a predetermined exhaustive list of circumstances for a justified non-application of the warning rule, the UNFFM on the Gaza Conflict suggested the following assessment standard to be applicable:

> "The key limitation on the application of the rule is if the military advantage of surprise would be undermined by giving a warning. The same *calculation of proportionality* has to be made here as in other circumstances. The question is whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation (emphasis added)."[365]

However, it should be underlined that the above-mentioned evaluative standard shall be applied only in the context of a good-faith attempt to properly fulfil the underlying obligation to avoid, and in any event to minimize, incidental loss of civilian life and injury to civilians.[366] Because, as the ILASG emphasized, "allowing any loss of tactical initiative to justify dispensing with the warning requirement would therefore result in an exception that swallows the rule."[367] Furthermore, Théo Boutruche, having analyzed the consequences of a dispensing with a fulfilment of the warning obligation, concluded that "once it is established that circumstances do permit the issuance of a warning, [. . .], those [circumstances] cannot be invoked at a later stage to justify giving a warning under a certain form, such as one which would be so general to render it ineffective. The exception "unless circumstances do not permit" [. . .] determine whether or not

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[361] Sandoz, Swinarski and Zimmermann, *Commentary on Additional Protocols,* para. 2223, at 686.

[362] Baruch and Neuman, "Warning Civilians Prior to Attack," 389.

[363] *UK JSP 383*, para. 5.32.8, at 84–85.

[364] Baruch and Neuman, "Warning Civilians Prior to Attack," 388.

[365] *UNFFM Report*, para. 529.

[366] *UNFFM Report*, para. 529.

[367] *ILASG Report*, 387.

a warning is required."[368] Consequently, an attacking party is entitled to invoke any reasonable circumstance for non-application of the warning rule, provided that the importance of the circumstance concerned for an attack to be successfully launched is high enough to justify the extent of the anticipated harm likely to be caused to the civilian population. But if an attacking party makes a decision to give an attack warning, the exception "unless circumstances do not permit" shall not be invoked to justify non-effective warnings or to otherwise lower the above-mentioned warning standards.

It should be emphasized that a proper fulfilment of the obligation to give an effective attack warning does not exempt a respective attacking party from the necessity to apply other feasible precautions in attack in compliance with Article 57 of API. Ian Henderson,[369] Théo Boutruche,[370] Pnina Sharvit Baruch and Noam Neuman[371] having devoted their researches to a greater or lesser extent to the analysis of warning obligations also reached the mentioned conclusion. And despite the fact that Jean-François Quéguiner specified that an attacking party which has given an effective warning might be entitled to a greater freedom of action because of "transforming a populated zone into a veritable fortress predominated by military personnel,"[372] Pnina Sharvit Baruch and Noam Neuman construed the mentioned assertion restrictively and concluded that "successful warnings that lead to most civilians leaving a combat area do allow military forces *more freedom of action in the knowledge that less civilian collateral damage is expected* (emphasis added)."[373]

Nevertheless, even if a warning meets all the analyzed standards of effectiveness being evaluated in light of particular circumstances, this does not necessarily imply its success manifested in civilians' anticipated reaction on it. Hence, a determination of the status of civilians remaining in the vicinity of military objectives to be attacked is of crucial significance for the assessment of an attacking party's subsequent actions. Having condemned the IDF's asserted intention to treat every civilian remained in southern Lebanon after being given sufficient time to leave the area concerned as a "Hezbollah supporter," a terrorist and, consequently, as a legitimate target, the Commission of Inquiry on Lebanon outlined the following:

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[368] Boutruche, "Expert Opinion," 29 (see introduction, n. 8).

[369] Henderson, *Contemporary Law of Targeting*, 188.

[370] Boutruche, "Expert Opinion," 29.

[371] Baruch and Neuman, "Warning Civilians Prior to Attack," 392–93.

[372] Quéguiner, "Precautions," 809.

[373] Baruch and Neuman, "Warning Civilians Prior to Attack," 395.

> "A warning to evacuate does not relieve the military of their ongoing obligation to "take all feasible precautions" *to protect civilians who remain behind*, [. . .]. By remaining in place, the people and their property do not suddenly become military objectives which can be attacked. The law requires the cancelling of an attack when it becomes apparent that the target is civilian or that the civilian loss would be disproportionate to the expected military gain (emphasis added)."[374]

Pnina Sharvit Baruch and Noam Neuman reiterated this viewpoint, having stated that "military forces might consider anyone who did not evacuate as forfeiting civilian status and becoming a lawful attack objective. This, of course, is not the case and *civilians who have not left the area must be taken into account in the proportionality analysis* (emphasis added)."[375] It is also worth to mention that pursuant to Article 51(7) of API, "[t]he Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."[376] However, as Marco Sassòli, Antoine A. Bouvier and Anne Quintin emphasized, "[i]f the defender violates the prohibition to use human shields, the "shielded" military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects."[377] Michael N. Schmitt also specified that "mere presence of human *shields does not prevent an attack unless it would otherwise violate the proportionality principle* by causing incidental injury or collateral damage excessive in relation to the concrete and direct military advantage accruing to the attacker (emphasis added)."[378] Eduard Hovsepyan, having devoted a considerable part of his research to a legality of attack against human shield, summarized his conclusions as follows: "[I]nvoluntary human shields *retain their civilian protection under any circumstances*. On certain rare occasions, voluntary human shields can be considered as DPH [direct participation in hostilities] thereby losing their civilian protection, but only if their actions cause *direct danger* to the attacking party (emphasis added)."[379] ICRC experts having dedicated six years of expert discussions and research to the issues of civilians' direct participation in hostilities reached the same conclusion, having stated that "although the presence of voluntary human shields may eventually lead to the cancellation or suspension of an operation by the attacker, *the causal*

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[374] *CIL Report*, para. 158.

[375] Baruch and Neuman, "Warning Civilians Prior to Attack," 395.

[376] API, art. 51(7).

[377] Sassòli, Bouvier and Quintin, *How Does Law Protect in War*, chap. 9, 17 (see chap. 3, n. 235).

[378] Schmitt, "Asymmetrical Warfare," 18 (see chap. 3, n. 268).

[379] Eduard Hovsepyan, "Legality of Attacks against Human Shields in Armed Conflict," *UCL Journal of Law and Jurisprudence* 6, 1 (Spring 2017): 193, doi:10.14324/111.2052-1871.083.

relation between their conduct and the resulting harm *remains indirect* (emphasis added)."[380] Consequently, civilians who have not followed the instructions to evacuate shall retain their civilian status and shall be taken into account in the course of an assessment of an attack's proportionality and a calculation of anticipated collateral damage, irrespective of genuine motives and intentions of staying.

Summarizing all of the analyzed in this Chapter, it should be emphasized that the obligation to give an effective warning shall be fulfilled before the coordinated use of physical force against military objectives of the adversary even if there is a small possibility that at least one civilian may be injured or killed in the course of the attack concerned. An acceptable frequency of attack warnings shall depend on the intensity of the repetition of attacks targeted against the same military objective and on the effectiveness of the warning previously given to the same recipient. A person having discretion to plan or decide upon the way the attack is launched shall determine an acceptable timing for an effective warning to be given, taking into consideration the necessity to provide sufficient time for the civilian population to evacuate safely but not too much time for civilians' false delusion as to the attack cancellation. Proper recipients of an attack warning shall be determined based on the circumstances of a particular attack, including the extent of the anticipated harm likely to be caused to the civilian population, the type of weaponry planned to be used in the course of the attack concerned and its hitting area. The content of the warning shall be evaluated upon three main criteria, namely clarity, specificity and credibility of the warning in question. And for the proper fulfilment of a warning obligation an attacking party is obliged to give specific warnings in a local language identifying time and place of particular attacks, evacuation measures and safe locations as of that time in order to give civilians a real opportunity to evacuate safely and successfully. Moreover, an attacking party is entitled to invoke any reasonable circumstance for non-application of the warning rule, provided that the importance of the circumstance concerned for an attack to be successfully launched is high enough to justify the extent of the anticipated harm likely to be caused to the civilian population. But if an attacking party makes a decision to give an attack warning, the exception "unless circumstances do not permit" shall not be invoked to justify non-effective warnings or to otherwise lower the above-mentioned warning standards. A proper fulfilment of the obligation to give an effective attack warning does not exempt a respective attacking party from the necessity to apply other feasible precautions in attack. And civilians who have not followed the instructions to evacuate shall retain their civilian status and shall be taken into account in the course of an assessment of an attack's proportionality and a calculation of anticipated collateral damage, irrespective of genuine motives and intentions of staying.

[380] Melzer, *Direct Participation in Hostilities,* 57 (see chap. 2, n. 125).

CONCLUSIONS

1. The obligations to take constant care to spare the civilian population, civilians and civilian objects as well as to take all reasonable precautions in the conduct of military operations at sea and in the air are equally imposed on each party to an armed conflict. But the majority of obligations under Article 57(2) and 57(3) of API are imposed exclusively on an attacking party.

2. Any person having discretion to plan or decide upon the way the attack is launched is responsible for taking of precautions in attack in accordance with Article 57(2)(a) of API, irrespective of such person's military rank and official position in armed forces or other organized armed groups. The obligations set forth in Article 57(1), 57(2)(b), 57(2)(c), 57(3) and 57(4) of API are imposed on persons having discretion to plan or decide upon the way the attack is launched as well as on those ones launching the attack on the battlefield. However, the necessity to fulfil the obligation to cancel or suspend an attack if it becomes apparent that the latter will not be proportional by persons launching the attack should be evaluated on a case-by-case basis, taking into account the apparentness of the attack's disproportional character.

3. The scope of objects and persons entitled to the protection by the precautionary rules covers civilians, civilian population, civilian objects and objectives under special protection including both objects and persons.

4. The category of civilians consists of all persons physically present in a territory, apart from members of armed forces. Neither persons being *'hors de combat'* nor wounded, sick and shipwrecked nor prisoners of war, officially remaining to be members of armed forces, shall be considered as civilians.

5. A dual use of a military object for military and civilian purposes as well as the presence of civilians within it do not change its status of a lawful target provided that the estimated collateral damage is not expected to be excessive.

6. Military medical personnel and objects as well as wounded, sick and shipwrecked military persons shall be taken into account in the course of a proportionality assessment as anticipated collateral damage along with civilians and civilian objects.

7. The obligations enshrined in Article 57(1) and 57(4) of API shall be fulfilled during any movements, manœuvre and other activities of armed forces for any combat or campaign throughout the duration of an armed conflict. Precautionary measures prescribed in Article 57(2)(a), 57(2)(b) and 57(3) of API are required to be applied only with respect of attacks which are inherently associated with the coordinated use of physical force against military objectives and armed forces of the adversary, provided that the latter are situated on land territory. The obligation to suspend an attack shall be fulfilled at any time in the course of the launched attack.

8. The obligation to give an effective warning shall be even if there is a small possibility that at least one civilian may be injured or killed in the course of the attack concerned. An acceptable frequency of attack warnings shall depend on the intensity of the repetition of attacks targeted against the same military objective and on the effectiveness of the warning previously given to the same recipient.

9. The coordinated use of physical force against the adversary by a single member of armed forces will constitute an "attack" for the purposes of application of precautionary rules if this attack was initially planned to be launched by a single member of armed forces.

10. Feasible precautions in attack are those ones which are practicable or practically possible taking into account all circumstances ruling at the time. Responsible persons are obliged to take into account both humanitarian and military considerations in the course of a feasibility assessment process with regard to each particular attack. However, neither a success of a particular military operation, nor estimated financial or material implications which could be caused by the attack concerned shall take precedence over other relevant factors to be assessed.

11. The higher standard of feasible precautions is expected to be applied by technologically advanced armed forces, whereas less advanced belligerents are not required to fulfil precautionary obligations at the same level with advanced ones but at least up to the practically possible for them extent without violations of IHL rules.

12. Responsible persons, assessing a precautions' feasibility on the basis of reasonably available information, shall fulfil their obligation of cancelling or suspension of the attack if an assessment concerned still leaves some doubts as to the military nature of an objective to be attacked and all practically possible means to verify its nature have already been exhausted.

13. For the proper fulfilment of a warning obligation an attacking party is obliged to give specific warnings in a local language identifying time and place of particular attacks, evacuation measures and safe locations as of that time in order to give civilians a real opportunity and sufficient time to evacuate safely and successfully.

14. An attacking party is entitled to invoke any reasonable circumstance for non-application of the warning rule, provided that the importance of the circumstance concerned for an attack to be successfully launched is high enough to justify the extent of the anticipated harm likely to be caused to the civilian population. But if an attacking party makes a decision to give an attack warning, the exception "unless circumstances do not permit" shall not be invoked to justify non-effective warnings or to otherwise lower the warning standards.

15. Civilians who have not followed the instructions to evacuate shall not be treated as voluntary human shields and shall be taken into account in the course of an assessment of an attack's proportionality and a calculation of anticipated collateral damage.

RECOMMENDATIONS

1. The expression “those who plan or decide upon an attack shall” enshrined in Article 57(2)(a) of API should be replaced by the phrase “those who have a discretion to plan or decide upon the way the attack is launched shall” by means of an amendment proposed by any State Party to API in compliance with the procedural requirements stipulated in Article 97 of API. Because the valid expression supports a confusing conclusion that a military rank and an official position in armed forces shall be considered as decisive factors in the determination process of persons being responsible for taking of precautions in attack in conformity with Article 57(2)(a) of API.

2. The expression “an attack shall be cancelled or suspended if” set forth in Article 57(2)(b) of API should be replaced by means of an amendment by the expression “an attack shall be cancelled or suspended by those who have a discretion to plan or decide upon the way the attack is launched and by those launching the attack on the battlefield if.” This amendment is aimed at eliminating existing ambiguities with regard to the personal scope of application of the provision concerned in order not to relieve ordinary members of armed forces from the obligation to independently assess any their action carried out directly on the battlefield for its compliance with fundamental IHL rules and principles.

3. The expression “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” enshrined in Articles 51(5)(b), 57(2)(a)(ii), 57(2)(a)(iii) and 57(2)(b) of API should be replaced by means of an amendment by the phrase “incidental loss of civilian life, injury to civilians, damage to civilian objects or objectives which are subject to special protection, or a combination thereof.” The amendment in question is necessary to ensure consistency and integrity of the protection being granted to the objectives concerned by means of, *inter alia*, the precautionary measure requiring to do everything feasible to verify the nature of objectives to be attacked, pursuant to Article 57(2)(a)(i) of API.

4. The title of Article 57 of API “Precautions in attack” should be replaced by the title “Precautions in military operations” because currently the temporal scope of application of two out of eight precautionary measures set forth in Article 57 of API is not limited to attacks. And the obligations to take constant care to spare the civilian population, civilians and civilian objects as well as to take all reasonable precautions in the conduct of military operations at sea and in the air shall be fulfilled during any movements, manœuvre and other activities of armed forces for any combat or campaign throughout the duration of an armed conflict. And in spite of a title having no independent legal existence and as such having no legal force, it misinforms about the content of Article.

5. More attention should be paid by belligerents to the fulfillment of a continuing obligation to collect and process timely and reliable information on a daily basis throughout the duration of an armed conflict by exerting all reasonable endeavors to obtain it. Reliable intelligence collected and assessed in good faith is a decisive precondition for a proper application of the precautionary rule with regard to a verification of the nature of objectives to be attacked, for carrying out a proportionality assessment of a planned attack and for the evaluation of precautions' feasibility on the basis of "reasonably available" information in full compliance with IHL requirements.

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ABSTRACT

Interpretative ambiguities in the scope of precautions in attack could not be underestimated, having regard to statistical figures concerning civilian casualties in the course of contemporary armed conflicts, especially those happened in urban and densely populated areas. Such immutably increasing tendency is influenced by a proliferation of urbanized asymmetrical armed conflicts characterized by a distorted inequality of belligerents' technological capabilities. This research is aimed at defining material, personal and temporal scopes of precautions in attack, in order to facilitate the enhancement of the level of civilian protection by improving existing legal framework through the elimination of all possible inconsistencies. The determination of the scope of persons assuming a responsibility for a proper fulfilment of each precautionary obligation on behalf of warring parties is followed by a detailed analysis of the scope of persons and objects entitled to a protection granted by the precautionary rules, the nature of "feasibility" caveat and applicable standards for an assessment of an attack warning's effectiveness. The present research emphasizes the necessity to amend existing provisions with regard to precautions in attack for ensuring consistency and integrity of the protection being granted to civilians, civilian objects and other exhaustively enumerated objectives.

Keywords: international humanitarian law, conduct of hostilities, precautions in attack, feasibility, attack warning.

SUMMARY

Interpretative ambiguities in the scope of precautions in attack could not be underestimated, having regard to statistical figures concerning civilian casualties in the course of contemporary armed conflicts, especially those happened in urban and densely populated areas. In order to facilitate the enhancement of the level of civilian protection by improving existing legal framework, the present research titled "Precautions in Attack under International Humanitarian Law" is aimed at defining material, personal and temporal scopes of precautions in attack with particular attention being paid to the elimination of all possible inconsistencies on this regard. Taking into account existing international agreements and customary IHL rules as well as the number of States having expressed their consent to be bound by those agreements analyzed in Chapter 1, precautions in attack could be defined as universal rules applicable in any armed conflict, irrespective of belligerents' consent. Upon the allocation of responsibility for the application of precautions in attack between belligerents in subchapter 2.1, it is concluded that any person having discretion to plan or decide upon the way the attack is launched is responsible for taking of precautions in attack in accordance with Article 57(2)(a) of API, irrespective of such person's military rank and official position in armed forces or other organized armed groups. The scope of objects and persons entitled to the protection by the precautionary rules is delineated as covering civilians, civilian population, civilian objects and objectives under special protection including both objects and persons extensively enumerated in subchapter 2.2. And despite existing contradictory viewpoints, it is defined with respective proposed amendments to API that military medical personnel and objects as well as wounded, sick and shipwrecked military persons shall be taken into account in the course of a proportionality assessment as anticipated collateral damage along with civilians and civilian objects. An ascertainment of *ratione temporis* of an application of precautions in attack in subchapter 2.3 results in the conclusions that the obligation to give an effective warning shall be fulfilled even if there is a small possibility that at least one civilian may be injured or killed in the course of the attack concerned. An acceptable frequency of attack warnings shall depend on the intensity of the repetition of attacks targeted against the same military objective and on the effectiveness of the warning previously given to the same recipient. Chapter 3 is dedicated to the analysis of feasibility caveats defined with the expressions "do everything feasible" and "take all feasible precautions" which provides sufficient grounds to conclude that the higher standard of feasible precautions is expected to be applied by technologically advanced armed forces, whereas less advanced belligerents are not required to fulfil precautionary obligations at the same level with advanced ones but at least up to the practically possible for them extent without violations of IHL rules. For the proper fulfilment of a warning obligation comprehensively analyzed in

Chapter 4 an attacking party is obliged to give specific warnings in a local language identifying time and place of particular attacks, evacuation measures and safe locations as of that time in order to give civilians a real opportunity and sufficient time to evacuate safely and successfully. Civilians who have not followed the instructions to evacuate shall not be treated as voluntary human shields and shall be taken into account in the course of an assessment of an attack's proportionality and a calculation of anticipated collateral damage.

HONESTY DECLARATION

15/12/2018

Vilnius

I, Kateryna Yashyna, student of Mykolas Romeris University (hereinafter referred to University), Mykolas Romeris Law School, International Law Master`s Degree Programme confirm that the Master thesis titled "Precautions in Attack under International Humanitarian Law":

1. Is carried out independently and honestly;

2. Was not presented and defended in another educational institution in Lithuania or abroad;

3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

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