

Sieges, the Law and Protecting Civilians

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Summary

- Although sieges may conjure up images of medieval warfare, they are still used by armed forces today, in international and non-international armed conflicts.
- International law does not define sieges, but their essence is the isolation of enemy forces from reinforcements and supplies. Sieges typically combine two elements: 'encirclement' of an area for the purpose of isolating it, and bombardment.
- Questions of the compatibility of sieges with modern rules of international humanitarian law (IHL) arise when besieged areas contain civilians as well as enemy forces.
- Sieges are not prohibited as such by either IHL or other areas of public international law.
- Three sets of rules of IHL are relevant to sieges. The first comprises the rules regulating the conduct of hostilities. The second is the prohibition of starvation of civilians as a method of warfare, along with the rules regulating humanitarian relief operations. The third comprises the rules on evacuation of civilians.
- The application of IHL to sieges is unsettled in some respects. This briefing does not purport to resolve all the difficulties or address all the issues in detail.
- While it may go too far to say that it is now impossible to conduct a siege that complies with IHL, the significant vulnerability of civilians caught up in sieges puts particular emphasis on the need for both besieging and besieged forces to comply scrupulously with the legal provisions for the protection of civilians and to conclude agreements for their evacuation.



I. Introduction

The developments in the LOAC [law of armed conflict] have now made it very difficult for a commander to conduct a siege that is both successful and lawful.¹

Siege warfare has been employed throughout the ages and remains dramatically relevant today. Reports of civilians forced to eat grass to survive in Homs,² living underground to escape bombardments in Eastern Ghouta³ and targeted by Islamic State of Iraq and Syria as they seek to flee eastern Mosul⁴ join similarly harrowing stories from Grozny and Sarajevo.

Armed forces resort to sieges for a variety of purposes. Often sieges are used to compel enemy forces to surrender, and to gain control of an area while avoiding fighting in urban areas. But they can also be a way of containing enemy forces in a particular location, so that such forces do not impede military operations elsewhere.

Questions of the compatibility of this practice with modern rules of international humanitarian law (IHL) arise when besieged areas contain civilians as well as enemy forces. This briefing addresses those rules of IHL that are particularly relevant to sieges. The paper does not, however, purport to settle all of the difficulties that arise in the application of the law to sieges or to deal in detail with all of the relevant legal issues. In addition to IHL, international human rights law continues to apply in armed conflict; states have obligations regarding persons over whose enjoyment of rights they exercise power or effective control.⁵

II. What is a ‘siege’ and is it prohibited?

IHL treaties refer to ‘besieged’ or ‘encircled’ areas but do not define them.⁶ Nor are sieges defined in other areas of public international law. Unlike occupation or naval blockades, there are no specific conditions that must be met for a siege to be established and for specific rules to become applicable.

¹ Riordan, K. (2010), ‘Shelling, Sniping and Starvation: the Law of Armed Conflict and the Lessons of the Siege of Sarajevo’, *Victoria University of Wellington Law Review*, 41(2): p. 149, at p. 150. Brigadier Kevin Riordan is former director general of the Defence Legal Services for the New Zealand Defence Force.

² BBC News (2014), “Eating grass to survive” in besieged Homs, 27 January 2014, <https://www.bbc.com/news/world-middle-east-25916804>.

³ Médecins Sans Frontières (2018), ‘Syria: An outrageous, relentless mass casualty disaster in East Ghouta’, MSF statement, 8 March 2018, <http://www.msf.org/en/article/syria-outrageous-relentless-mass-casualty-disaster-east-ghouta>.

⁴ Hassan, H. (2017), ‘Civilians killed while fleeing Islamic State in Mosul’, Reuters, 3 June 2017, <https://www.reuters.com/article/us-mideast-crisis-iraq-mosul/civilians-killed-while-fleeing-islamic-state-in-mosul-idUSKBN18U0Q1>.

⁵ Human Rights Committee (2018), *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36, 30 October 2018, paras 63 and 64. The Human Rights Committee specifically noted that ‘this includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner’.

⁶ Article 27 Regulations concerning the Laws and Customs of War on Land annexed to 1907 Convention (IV) respecting the Laws and Customs of War on Land (1907 Hague Regulations); Article 15 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Article 18 1949 Geneva Convention For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); and Article 17 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).

Questions of the compatibility of sieges with modern rules of international humanitarian law (IHL) arise when besieged areas contain civilians as well as enemy forces

The essence of siege operations is the *isolation* of besieged enemy forces in terms of their separation from reinforcements and logistical supplies.⁷ There is no need for total encirclement. What matters is the *effect* of the positioning of the besieging forces. They must be in a position to control entry and egress from a particular area, and thus movement in and out of weapons and ammunition, supplies and people.⁸

Sieges typically combine two key constituent elements: ‘encirclement’ of an area for the purpose of isolating it, and bombardment. Encirclement is the defining characteristic of sieges. It is usually accompanied by bombardment – the frequency and intensity of which will vary. If the purpose of the siege is to contain enemy forces, there may be no need for bombardment, unless the forces attempt to flee. The situation is different if the objective of the siege is either to force the enemy to surrender or to assume control of the besieged area.

Concerns about the compatibility of sieges with modern rules of IHL arise because attacks into besieged areas and the isolation of the besieged forces will also adversely impact any civilians in the besieged areas; civilians are likely to be affected sooner and to a greater extent than the fighters against whom the isolation is directed.

Sieges are not prohibited as such under either IHL or other areas of public international law. Under IHL, the besieging party is entitled to attack forces and other military objectives in besieged areas, and to limit supplies that reach them. However, in doing so it must comply with all relevant rules of IHL: the few that specifically refer to sieges, as well as the generally applicable rules that regulate the conduct of hostilities and afford civilians protections and safeguards.

III. Rules of international humanitarian law particularly relevant to sieges⁹

Three sets of rules of IHL are of particular relevance to sieges. The first comprises the rules regulating the conduct of hostilities; these are primarily of relevance to the bombardment dimension of sieges. The second set is the prohibition of starvation of civilians as a method of warfare, as well as the rules regulating humanitarian relief operations; these are of relevance to the encirclement dimension. The third comprises the rules on evacuations, which can provide a way of alleviating the adverse effects of sieges on civilians. This briefing proceeds on the assumption that all these rules are the same in both international and non-international armed conflicts.

It is not just the besieging party that has obligations. The besieged party must also comply with a number of rules that play an important role in protecting civilians in besieged areas and in reducing the adverse impact of sieges on civilians.

⁷ See, for example, United States Department of the Army (2006), *Field Manual 3-06, Urban Operations*, III-19: ‘[p]hysical isolation involves interdicting the movement of units, persons, weapons, supplies, funds, contraband and other shipments into the urban area.’

⁸ For example, *ibid.*, III-18: ‘[i]solation involves identifying and controlling the most important ingress points into the urban area (and adapting as the adversary finds different routes). The level of granularity required in isolating an urban area will depend on the nature of the threat.’ See also Hampson, F. (2015), ‘Can Siege Warfare Still be Legal?’, in College of Europe (2015), ‘Proceedings of the Bruges Colloquium, Urban Warfare’, 16th Bruges Colloquium, p. 89 at p. 91.

⁹ Some consider that other rules of IHL are also particularly relevant to sieges. For example, the Syria Commission of Inquiry established by the Human Rights Council was of the view that some sieges in Syria violated the prohibition of collective punishment. See Independent International Commission of Inquiry on the Syrian Arab Republic (2018), *The Siege and Recapture of Eastern Ghouta*, conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, 20 June 2018, UN Doc A/HRC/38/CRP.3.

For the purpose of applying these key rules of IHL, the bombardment and encirclement elements of sieges must be considered separately. A question that remains unsettled is whether, in addition, a siege *as a whole* must also comply with these rules.

A. Sieges and the rules of IHL on the conduct of hostilities

1. Bombardments

The rules regulating the conduct of hostilities are primarily of relevance to the bombardment dimension of sieges. The discussion below focuses on bombardments, but *any* act that amounts to an ‘attack’ conducted in the context of a siege, such as sniping or other small arms fire, must also comply with these rules. The encirclement dimension of sieges is relevant to the application of these rules as they take into account the *context* in which the bombardment occurs.

To the extent that bombardment is used during a siege, it must comply with the relevant rules of IHL regulating the conduct of hostilities. Bombardments constitute an ‘attack’ as this term is defined in Additional Protocol I of 1977 to the Geneva Conventions of 1949 (AP I): ‘acts of violence against the adversary, whether in offence or in defence’.¹⁰ This means that bombardments must comply with a number of key rules: they must be directed exclusively against military objectives;¹¹ they must not be indiscriminate;¹² and they must comply with the rule of proportionality.¹³ Moreover, in the conduct of all military operations, belligerents must take constant care to spare the civilian population and civilian objects, and besieging and besieged forces must take a number of precautionary measures.¹⁴

The confined environment of a siege, where fighters and civilians find themselves in extremely close proximity, raises practical challenges for the application of the rules set out above. Many of these challenges also arise in other situations of urban warfare.

a. The principle of *distinction*

Besieging forces are entitled to direct attacks against enemy forces and other military objectives in besieged areas, provided of course that these attacks comply with other relevant rules. Article 27 of the 1907 Hague Regulations – the first of the four IHL treaty provisions that specifically refers to sieges – sets out a limited obligation to ‘spare’ certain civilian objects when conducting attacks.¹⁵ But it is uncontroversial that, following the extensive codification of the rules regulating the conduct of hostilities that has taken place since 1907, attacks directed against *all* civilian objects are now prohibited, including in sieges.

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¹⁰ Article 49(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (AP I).

¹¹ Articles 51(2) and 52(1) AP I; and Henckaerts, J.-M. and Doswald-Beck, L. (2005), *Customary International Humanitarian Law Vol 1: Rules*, 1st edn, Cambridge University Press, Rules 1 and 7 (ICRC CLS).

¹² Article 51(4) AP I; and Rule 11 ICRC CLS.

¹³ Article 51(5)(b) AP I; and Rule 14 ICRC CLS.

¹⁴ Articles 57 and 58 AP I; and Rules 15–24 ICRC CLS.

¹⁵ Article 27 1907 Hague Regulations sets out only a limited list of civilian objects very similar to those afforded special protection today. It does not prohibit the targeting of these civilian objects, but merely requires attacking forces to take necessary steps to ‘spare’ them unless they become military objectives.

The challenges of applying the principle of distinction in sieges are principally of a practical rather than legal nature. For example, can besieging forces identify military objectives with the requisite degree of certainty? This issue is addressed in the discussion of precautions in Section III.A.1.d.

b. The prohibition on *indiscriminate* attacks

Besieging forces must identify each military objective within the besieged area and direct attacks exclusively against such objectives. The besieged area must not be considered a single military objective even though it may contain a number of such objectives. To regard the whole area as a single military objective would violate the prohibition in Article 51(5)(a) AP I, which includes among the list of indiscriminate, and therefore prohibited, attacks:

an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects ...

c. The rule of *proportionality*

The rule of proportionality prohibits attacks ‘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’.¹⁶

Any bombardment conducted in the context of a siege must comply with the rule. The rule applies to an ‘attack as a whole’ rather than isolated parts thereof.¹⁷ What amounts to an ‘attack as a whole’ depends on the context. If the military advantage anticipated from a single attack is not dependent on or affected by other acts, then that act is the ‘attack as a whole’ for the proportionality assessment. If, however, a particular act is an element in a larger operation where other acts contribute to the anticipated military advantage, then the operation in its entirety constitutes the ‘attack as a whole’. Setting aside for now the question of whether the rule of proportionality also applies to the entirety of a siege *per se*,¹⁸ examples of ‘attacks as a whole’ in siege settings include operations to prevent weapons or ammunition from entering besieged areas, or to respond to attacks from the besieged forces. The rule of proportionality requires balancing the military advantage anticipated from that operation against the incidental harm – i.e. the death of or injury to civilians and damage to civilian objects – expected from the operation, and determining whether the expected harm would be excessive in relation to the anticipated advantage.

The particularities of sieges must be taken into account when applying the rule of proportionality. The *context* in which an attack is conducted plays a significant role in proportionality assessments. Of particular relevance in siege situations are the limitations on movement and the isolation of the area. This is one way in which the encirclement dimension of sieges affects the application of the rule of proportionality. It affects the *weight* to be given in proportionality assessments to injuries to civilians and damage to civilian property. For example, injuries are likely to be harder to treat

¹⁶ Article 51(5)(b) AP I.

¹⁷ See, for example, Gillard, E.-C. (2018), *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Research Paper, Royal Institute of International Affairs, pp. 9–10, <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>.

¹⁸ See discussion at Section III.A.2.

in sieges, as medical facilities may be limited and supplies stretched. Damage to civilian residences may have a more severe impact on civilians if alternative shelter is limited. If previous attacks have already damaged water treatment facilities, any further damage will be more significant than if they had been intact.

d. Precautions in attack

When planning or launching attacks, belligerents must take a range of precautions to spare the civilian population. These play an extremely important role in sieges. As discussed below, with regard to some of these measures belligerents are required to do what is 'feasible'. Feasibility is understood as referring to steps that are 'practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations'.¹⁹

What is considered feasible depends on the context in which an attack is planned or launched. As sieges are by nature relatively 'static', more significant precautions may be considered feasible for besieging forces than during more dynamic operations.

i. Target verification

Belligerents must do everything feasible to verify that objectives against which they are directing attacks are neither civilians nor civilian objects and are not subject to special protection.²⁰ This obligation plays an extremely important role in sieges, as civilians are likely to be in close proximity to military objectives.

IHL provides that, in case of doubt as to whether a person is a civilian, that person must be considered a civilian. Similarly, in case of doubt as to whether an object normally dedicated to civilian purposes has become a military objective, it must be assumed that it has not. This presumption of protected status is the starting point, but the required degree of certainty that an intended target of attack is indeed a military objective is unclear.²¹ It seems generally accepted that certainty requirements in IHL must be understood contextually. Among other things, this means that a higher degree of certainty should be demanded when an attack may have adverse consequences on civilians,²² including with regard to the verification of possible military objectives in densely populated areas, such as most besieged locations. Moreover, in view of the risk to civilians, belligerents should consider setting for themselves, as a matter of policy, higher certainty standards than those required as a matter of law.²³

¹⁹ Essentially identical declarations upon ratification of AP I made by Algeria, Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the UK.

²⁰ Article 57(2)(a)(i) AP I.

²¹ See, for example, Schmitt, M. and Schauss, M. (2019), 'Uncertainty in the Law of Targeting: Towards a Cognitive Framework', *Harvard National Security Journal*, 10(1): p. 148.

²² Ibid., pp. 158 *et seq.* See also Van den Boogaard, J. and Vermeer, A. (2017), 'Precautions in Attack and Urban and Siege Warfare', *Yearbook of International Humanitarian Law*, 20: p. 163, at p. 180; and ICRC (2009), *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, p. 76.

²³ For example, in 2013 the US standard for attacking a target during a counterterrorism strike outside the US and beyond the active battlefield was 'near certainty', both as to the target and 'that non-combatants will not be injured or killed'. White House (2013), 'Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and in Areas of Active Hostilities', 23 May 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

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ii. Measures to avoid or minimize incidental harm

Belligerents must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental harm.²⁴ Key measures for doing so are the choice of weapons and the timing, location and angles of attack.²⁵

With regard to the choice of weapons, explosive weapons with wide-area effects should be avoided in view of the significant likelihood of indiscriminate effects, and in view of the short- and long-term humanitarian effects of their use in populated areas.²⁶

iii. Warnings

A further precaution that attackers are required to take is giving 'effective advance warning' of attacks that may affect the civilian population, unless circumstances do not permit.²⁷ In view of the close proximity of civilians to military objectives in most besieged areas, it seems unlikely that attacks into such areas would not affect civilians. Depending on the size of the besieged area, effective warnings could allow civilians to move to safer locations, or to not leave their places of shelter if they are in relative safety.

The context in which an attack is conducted affects the application of this precautionary measure. For example, the exception allowing attackers not to issue warnings 'when circumstances do not permit' should be interpreted narrowly in sieges. Frequently, the tempo of operations is likely to be slow, so the likelihood of attacking forces being unable to issue warnings on account of being under attack is low. However, the exception may be relevant when, for example, retaining the element of surprise could allow targeting when enemy forces are not in close proximity to civilians.

e. Precautions in defence

It is not just besieging forces that have obligations. Besieged forces must also take precautions to spare civilians from the effects of attacks. In particular, to the maximum extent feasible they must:

- endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; and
- avoid locating military objectives within or near densely populated areas.²⁸

As is the case for precautions in attack, what is feasible depends on the context. Depending on the size of the besieged area and how densely populated it is, the possibilities for removing civilians from the proximity of military objectives may be limited. The second obligation may be simpler to comply with – always bearing in mind the size of the besieged area – and besieged forces can avoid locating military objects close to especially protected civilian objects such as hospitals.

²⁴ Article 57(2)(a)(ii) AP I.

²⁵ On precautions see, for example, Van den Boogaard and Vermeer (2017), 'Precautions in Attack and Urban and Siege Warfare'; and Quéguiner, J.-F. (2006), 'Precautions under the Law Governing the Conduct of Hostilities', *International Review of the Red Cross*, 88(864): p. 793.

²⁶ ICRC (2016), 'ICRC Q&A on the issue of explosive weapons in populated areas', *International Review of the Red Cross*, 98(1): p. 97. The UN secretary-general has repeatedly called on states to develop a political declaration acknowledging the problem and operational policies based on a presumption against the use of explosive weapons in populated areas. See, for example, *Report of the Secretary-General on the Protection of Civilians*, UN Doc S/2018/462, paras 41–45 and 58.

²⁷ Article 57(2)(c) AP I.

²⁸ Article 58(a) and (b) AP I.

While it may be challenging in practice to remove civilians from the proximity of military objectives, it is clear that besieged forces must not *deliberately* place civilians in proximity to military objectives to render the latter immune from attack, or to favour or impede military operations.²⁹ It is equally clear that the fact that besieged forces may have violated this prohibition and resorted to the use of ‘human shields’ in no way absolves an attacker of its own obligations.

2. Encirclement and ‘sieges as a whole’

There is no doubt that the rules above apply to bombardments carried out during sieges. The question arises as to whether they apply also to the encirclement aspect of sieges and to sieges ‘as a whole’ – i.e. the *combined* effect of bombardment and encirclement.

As a matter of IHL treaty law, different rules apply to different measures taken by belligerents in the conduct of hostilities. At the most general level, during ‘military operations’ (a term that is not defined), belligerents must take constant care to spare the civilian population, civilians and civilian objects.³⁰ The rules outlined above on targeting, including the rule of proportionality, apply to ‘attacks’, defined in Article 49 AP I as ‘acts of violence against the adversary, whether in offence or in defence’.³¹ Finally, some specific ‘methods of warfare’ are expressly prohibited or regulated.

It is clear that as a minimum the obligation to take constant care applies to the encirclement dimension of sieges. Whether or not the other rules also apply depends on whether encirclement and ‘sieges as a whole’ constitute ‘attacks’ for this purpose – something on which at present there is a divergence of views among writers and practitioners. Some do not consider that mere encirclement can amount to an attack, since it is not an act of violence in itself as required by Article 49 AP I. Others are of the view that, since it can be reasonably expected that the *effects* of encirclement will include injury or death, it should be considered an attack.³²

While the rules requiring attacks to be directed at military objectives and the prohibition of indiscriminate attacks might in practice be applied to the encirclement aspect of sieges, it is difficult to see how this could be done with regard to the rule of proportionality. What would be ‘the attack as a whole’ that constitutes the frame of reference for the proportionality assessment? And while it might be feasible to identify the anticipated military advantage when planning the siege, identifying the expected incidental harm is much more difficult, as it will depend on the duration of the encirclement.

Further discussion as to whether the encirclement dimension of a siege and the siege as a whole are ‘methods of warfare’ (again a term that is undefined in the treaties) has arisen in the context of a comment of the International Court of Justice (ICJ) in the *Nuclear Weapons* Advisory Opinion that ‘... methods and means of warfare, which would preclude any distinction between civilian and military targets, or which

²⁹ Article 51(7) AP I.

³⁰ Article 57(2) AP I.

³¹ Article 58 AP I.

³² This approach draws on the definition of attacks in cyber operations, which focuses on the *effects* of an act. See Schmitt, M. N. (ed.) (2017), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Rule 92, Cambridge University Press.

would result in unnecessary suffering to combatants, are prohibited'.³³ These words are the basis for the assertion that *all* methods of warfare (however defined) must be discriminate and not cause unnecessary suffering. According to this view, while sieges and the starvation of combatants are not prohibited, they must nonetheless comply with the principle of distinction, so must not be applied in an indiscriminate manner that also affects and causes starvation of civilians. IHL treaty law itself, however, does not lead to the conclusion that the labelling of a particular practice as a 'method of warfare' has any legal consequences.³⁴ These are complex questions that go to the heart of the structure of the rules regulating the conduct of hostilities, and in relation to which views differ.

B. Prohibition of starvation of civilians and rules on humanitarian relief operations

The second set of IHL rules of relevance to sieges comprises the prohibition of the starvation of civilians as a method of warfare, and the rules regulating humanitarian relief operations. These are of pertinence to the encirclement aspect of sieges.

1. The prohibition of starvation³⁵

A first question is what amounts to 'starvation' for the purpose of the prohibition. In terms of the commodities in question, it is uncontroversial that the term 'starvation' must be given a broad interpretation, to encompass deprivation not just of food and water but also of other goods essential to survival in a particular context, for example heating oil and blankets.³⁶

Does it also include the deprivation of medicines and medical equipment? Denying these to civilians can have the same severe consequences on their well-being as denial of other essential commodities. However, other rules of IHL afford greater protection by imposing more onerous obligations that require belligerents to provide such items as soon as they are *necessary*, rather than only once they become necessary in order to prevent or alleviate the degree of suffering and deprivation that amounts to starvation. It is a foundational principle of IHL that wounded and sick civilians and fighters are entitled to receive to the fullest extent practicable, and with the least possible delay, the medical care and attention required by their condition. In view of this entitlement, if there are people in need of such care who are not receiving it, besieging and besieged forces must accept offers to provide the necessary assistance in a principled manner, and allow and facilitate rapid and unimpeded passage of medical supplies and equipment.³⁷

³³ International Court of Justice (ICJ) (1996), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para 95.

³⁴ It is also worth noting that none of the International Criminal Tribunal for the former Yugoslavia (ICTY) decisions that addressed the siege of Sarajevo considered the lawfulness of the 'siege as a whole'. Instead, they focused on certain practices conducted during the siege – sniping and shelling campaigns – that unquestionably amount to 'attacks'. See, for example, ICTY (2003), *The Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment (Trial Chamber).

³⁵ Article 54(1) AP I; Article 14 AP II; and Rule 53 ICRC CLS.

³⁶ This is clear in the formulation of the International Criminal Court (ICC) war crime, which describes starvation as depriving civilians of 'objects indispensable for their survival'. On the discussions on this aspect of the war crime during the elaboration of the elements of crime, see Doermann, K. (2003), *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, Cambridge University Press and ICRC, pp. 363–64.

³⁷ Akande, D. and Gillard, E.-C. (2016), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, Section G.2, UN Office for the Coordination of Humanitarian Affairs (OCHA).

The second set of IHL rules of relevance to sieges comprises the prohibition of the starvation of civilians as a method of warfare

In terms of threshold of need, ‘starvation’ implies a high degree of deprivation, more significant than the ‘not adequately provided’ standard that brings into play the rules of IHL regulating humanitarian relief operations.³⁸ However, it is not necessary for deaths to occur.

A second and more complex question is whether the prohibition is limited to situations where a belligerent *deliberately* starves civilians, or whether it also covers situations where, although not intended, the starvation of civilians is the *foreseeable consequence* of a particular course of action. If a besieged area holds fighters and civilians, would a besieging party that does not allow the entry of commodities because it wants to starve the fighters, knowing that this is also going to starve civilians, be violating the prohibition? Is what matters the *intention* underlying a course of action or its *effects*?

One view, based on the wording of the prohibition in Article 54 AP I and, in particular, on its framing of the practice ‘as a method of warfare’, is that only the *deliberate* starvation of civilians is prohibited.³⁹ A number of military manuals appear to support this interpretation.⁴⁰ Additional support for this narrow interpretation comes from the wording of Article 54(2) AP I, which sets out an example of a violation of the prohibition of starvation, and refers to the destruction of objects indispensable to the survival of the civilian population ‘*for the specific purpose of denying them for their sustenance value to the civilian population*’ (emphasis added).

Some others consider that while the prohibition covers only the deliberate starvation of civilians, measures that may have the ‘incidental’ effect of causing the starvation of civilians – including operations to starve fighters, such as sieges – must not be disproportionate: i.e. the anticipated military advantage of such measures must not be excessive in relation to the civilian deaths or injuries (including from starvation) that they may be expected to cause.⁴¹ This approach has to rely on the claim discussed above⁴² that the mere encirclement of an area constitutes an ‘attack’, bringing the rule of proportionality into play; as indicated above, that is a difficult argument to make.⁴³

³⁸ Article 70(1) AP I. Article 18 AP II uses the expression ‘suffering undue hardship’.

³⁹ See, for example, ICRC Commentary to APs, para 2089:

[t]he term “starvation” is generally understood by everyone. To use it as a method of warfare would be to provoke it *deliberately*, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies. (Emphasis added.)

Sandoz, Y., Swinarski, C. and Zimmermann, B. (eds) (1987), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (‘ICRC Commentary to the APs’), ICRC and Martinus Nijhoff Publishers.

⁴⁰ See, for example, Australia (1994), *Law of Armed Conflict Commanders’ Guide*, ADFP 37, Supplement 1, para 907; New Zealand (1992), *Interim Law of Armed Conflict Manual*, DM 112, para 613(1); and UK (2004), Ministry of Defence, *Military Manual*, 5.27.1. See also Harvard University Program on Humanitarian Policy and Conflict Research (2009), *Manual on International Law Applicable to Air and Missile Warfare*, Commentary to Rule 97, para 2.

⁴¹ See, for example, US Department of Defense (2016), *US Department of Defense Law of War Manual*:

5.20.2 Starvation – Proportionality

Military action intended to starve enemy forces, however, must not be taken where it is expected to result in incidental harm to the civilian population that is excessive in relation to the military advantage anticipated to be gained.

The instruments on naval and aerial blockades also adopt this approach. See Rule 102 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995); and Rule 157 of the *Harvard Manual on Air and Missile Warfare*. It should be noted that according to one of the experts involved in the elaboration of the *San Remo Manual*, reference was made to proportionality because if blockades are enforced by means of naval mines, the *laying* of the mines constitutes an ‘attack’ (discussions with author).

⁴² See Section III.A.2.

⁴³ An alternative argument could be made on the basis of what a few commentators say is a broader *principle* of proportionality applicable to all military operations. See, for example, Kleffner, J. (2018), ‘Military Collaterals and *Ius In Bello* Proportionality’, *Israel Yearbook on Human Rights*, 48: p. 43. See also International Law Association Study Group (2017), *The Conduct of Hostilities and International Humanitarian Law – Challenges of 21st Century Warfare, Final Report*, 25 June 2017, ‘Part II: The Principle of Proportionality’, p. 27, <http://www.ila-hq.org/index.php/study-groups?study-groupsID=58>.

A further view is that all methods of warfare must, as highlighted by the ICJ in the *Nuclear Weapons* Advisory Opinion, comply with the principle of distinction.⁴⁴ While the starvation of fighters as a method of warfare is permissible, it must not be applied in a manner that is indiscriminate. If belligerents resort to the starvation of fighters, they must not do so in a manner that is indiscriminate and also causes the starvation of civilians.

Whatever position is adopted with regard to the scope of the prohibition of starvation, the rules regulating humanitarian relief operations outlined in the next section will become applicable whenever civilians are inadequately provided with goods essential to their survival. If respected, these rules will prevent starvation from occurring.

2. The rules regulating humanitarian relief operations

The rules of IHL regulating humanitarian relief operations play an extremely important role in alleviating the impact on civilians of the encirclement and isolation of sieges. They are of particular significance in view of the current divergence of views as to the scope of the prohibition of starvation of civilians as a method of warfare and also because, as already noted, these rules come into play when civilians are facing a lower level of deprivation than ‘starvation’.

Primary responsibility for meeting the basic needs of civilians lies with the party that has effective control over them – in the case of sieges, the besieged party. If civilians are not adequately provided with food, water, medical supplies, clothing, means of shelter, heating fuel and other supplies essential to their survival, and if humanitarian relief operations are already being conducted in the state where the siege is occurring, besieging and besieged forces must allow and facilitate the rapid and unimpeded passage of humanitarian relief operations. Both sides are entitled to adopt measures of control such as searches of the relief consignments.⁴⁵

Humanitarian relief is intended solely for civilians, and ideally besieged and besieging parties should agree upon arrangements to monitor distributions in besieged areas. As it might be difficult to reach agreement, besieged forces are also likely to benefit from the relief consignments, either directly or indirectly as the entry of relief reduces the number of people dependent on commodities already within the besieged areas – i.e. it ‘frees up’ available supplies in the besieged areas for fighters.

In practice, this obligation to allow civilians to receive relief will limit the extent to which one key dimension of sieges – the isolation of enemy forces – can be imposed. Consequently, it reduces the effectiveness of the siege.

⁴⁴ ICJ (1996), *Nuclear Weapons* Advisory Opinion, para 95:

[c]ertainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.

The words ‘as ... already indicated’ refer to the court’s discussion at para 78 of the judgment which, however, appears to be a discussion of the rules regulating the use of particular weapons and *attacks* rather than methods of warfare.

⁴⁵ Article 70 AP I; Article 18 AP II; and Rule 55 ICRC CLS. More generally, Akande and Gillard (2016), *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*.

C. Evacuations

The third set of rules relevant to sieges consists of those relating to evacuations and their interplay with the prohibition of forced displacement. Evacuations can be a way of striking a balance between the military aims pursued in sieges and belligerents' obligations towards civilians.

Three of the four IHL treaty provisions that specifically refer to besieged areas relate to evacuations

Removing the civilian population from besieged areas ends their exposure to hostilities and to the deprivations associated with sieges. It is therefore not surprising that three of the four IHL treaty provisions that specifically refer to besieged areas relate to evacuations. The virtually identical provisions of the First, Second and Fourth Geneva Conventions foresee the possibility for belligerents to conclude agreements for the evacuation of the wounded and sick on land or at sea, or of particularly vulnerable members of civilian populations from besieged or encircled areas respectively.⁴⁶

Although not specifically mentioned in the provisions on precautions, evacuations of civilians from besieged areas are a way of giving effect to the general obligation in the conduct of military operations to take constant care to spare the civilian population.⁴⁷

As far as the besieging party is concerned, it is clear that the prohibition on directing attacks against civilians precludes firing on civilians who are fleeing from the besieged area.⁴⁸ For the besieged party, evacuating civilians could be a way of discharging the obligation to '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'.⁴⁹ Depending upon the size of the besieged area, failure by the besieged party to allow civilians to leave could amount to a violation of the prohibition on using the presence of civilians to shield military objectives from attacks or impede military operations.⁵⁰

Besieged and besieging parties are entitled to impose conditions on evacuations. These conditions may specify which categories of people are entitled to participate, and may include measures such as searches to ensure weapons or other military materials are not being removed, as well as oversight arrangements for the agreed-upon modalities.

From the point of view of civilians, the departure from the besieged areas must be voluntary, informed, and conducted in safety, during both the actual evacuation and the subsequent arrangements for shelter. Civilians who do not participate in evacuations and who remain in besieged areas do not forfeit their status and protections. Hostilities cannot be conducted on the presumption that anyone who chose not to be evacuated is a fighter, and the rules regulating humanitarian relief operations continue to apply for the benefit of civilians who have remained.

⁴⁶ Article 15 GC I; Article 18 GC II; and Article 17 GC IV. Common Article 3(2) GCs encourages parties to non-international armed conflicts to enter into agreements to give effect to the other provisions of the conventions, including these on evacuations. See also Rule 109 ICRC CLS.

⁴⁷ Article 57(1) AP I.

⁴⁸ The law has advanced since the end of the Second World War when a tribunal found – admittedly with regret – that it was lawful to order fire on Russian civilians attempting to flee through the German lines during the siege of Leningrad. See American Military Tribunal, Nuremberg (1948), *High Command case (US v. von Leeb et al.)*, 11 NMT 462, 563.

⁴⁹ Article 58(c) AP I.

⁵⁰ Article 51(7) AP I.

Evacuations can be life-saving for besieged civilians. Nonetheless, doubts have been raised as to the compatibility of evacuations with the prohibition on forcible displacement of civilian populations. The Syria Commission of Inquiry concluded that the evacuation of eastern Aleppo in December 2016 constituted a war crime.⁵¹ This sweeping conclusion fails to take into account the exception to the prohibition, allowing total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.⁵² While the conclusion was an incorrect interpretation of the law, it does highlight the close relationship that may exist between evacuations and policies of forced displacement and ethnic cleansing. Evacuations must be temporary, and displaced people must be allowed to return as soon as the reasons for their displacement cease to exist.

IV. Concluding remarks

As discussed above, the rules of IHL restrict the conduct of siege warfare in a number of significant ways. It may even be true that compliance with IHL by the besieging forces may delay the achievement of the military objectives of the siege. While it may go too far to say that it is now impossible to conduct a siege that complies with IHL, the significant vulnerability of civilians caught up in sieges puts particular emphasis on the need for both besieging and besieged forces to comply scrupulously with the provisions for their protection. And in view of the key role of evacuations in alleviating the risks and deprivations caused by sieges, belligerents should strive to conclude agreements to evacuate civilians and the wounded and sick.

⁵¹ Independent International Commission of Inquiry on the Syrian Arab Republic (2017), *Special Inquiry into the Events in Aleppo*, February 2017, UN Doc A/HRC/34/64, para 93. For critiques of this conclusion see, for example, Ambos, K. (2017), 'Evacuation of Civilian Populations and Criminal Complicity: A Critical Appraisal of the February 2017 Report of the Syria Commission of Inquiry', EJIL Talk!, 24 May 2017, <https://www.ejiltalk.org/evacuation-of-civilian-populations-and-criminal-complicity-a-critical-appraisal-of-the-february-2017-report-of-the-syria-commission-of-inquiry/>.

⁵² Article 49 GC IV; Article 17 AP II; and Rule 129 ICRC CLS. This evacuation should be contrasted with the relocations of fighters, other 'irreconcilable elements' and their families as part of 'reconciliation' agreements in other parts of Syria, which took place after the surrender of particular locations to government forces, and were frequently and inaccurately referred to as 'evacuations'. See, for example, Amnesty International (2017), *We Leave or We Die – Forced Displacement under Syria's 'Reconciliation' Agreements*, <https://www.amnesty.org/download/Documents/MDE2473092017ENGLISH.pdf>.

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Cover image: A Syrian family gather to eat a plate of corn and cabbage in Saqba, in the besieged rebel-held Eastern Ghouta area near Damascus, 6 November 2017.

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