

“TAKE PITY OF YOUR TOWN AND OF YOUR PEOPLE” Can International Humanitarian Law protect civilians under siege?

- Christopher Hale

*I will not leave the half-achievéd Harfleur
Till in her ashes she lieburied
The gates of mercy shall be all shut up.
...Therefore, you men of Harfleur,
Take pity of your town and of your people,
While yet my soldiers are in my command,
While yet the cool and temperate wind of grace
O'erblows the filthy and contagious clouds
Of heady murder, spoil and villainy.*

- Shakespeare, W., *Henry V* (1600), Act 3, scene 3¹
 - ‘Siege is the oldest form of total war.’²
 - Michael Walzer

Abstract

It has been argued that the practice of siege warfare is at the very limit of legality under the terms of International Humanitarian Law.³ The question addressed in this essay might be rephrased: how do the laws of armed conflict permit sieges to become humanitarian disasters? More precisely, can military doctrine regarding the efficacy of siege warfare operations to induce surrender of besieged forces comply in real world terms with the laws of armed conflict? Since February, 2022 it is alleged that Russian armed forces perpetrated a number of crimes against humanity in Ukraine during sieges of cities such as Mariupol. These crimes include indiscriminate targeting of civilian habitation and

¹ The Oxford Shakespeare, *Henry V*, ed. Gary Taylor, Oxford, 1982, 2008 p. 173

²Walzer, M., *Just and Unjust Wars*, New York, Basic Books, 2006, p.160

³ Riordan, K., ‘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.150; Watts, S., *Under Siege: International Humanitarian Law and Security Council Practice Concerning Urban Siege Operations*, Research and Policy Paper, CHE Project, May 2014.

attacks on evacuation corridors.⁴ In the 1990s, siege warfare in the former Yugoslavia provoked international censure and criminal prosecution of perpetrators. Nevertheless, recent and ongoing siege operations in Syria, Kashmir and Ukraine show no sign of respecting the rights of civilian populations despite international censure. The core legal issue regarding sieges is the principle of distinction between combatants and non-combatant civilians and thus decisions regarding targeting and proportionality. The essay will show that distinction is a recent innovation in International Humanitarian Law and is uncertainly embodied in military doctrine. The first part reviews evolving IHL norms pertinent to modern sieges. In the second, the essay examines modern jurisprudence regarding the conduct of siege warfare derived from the International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecution of Major General Stanislav Galić and Major General Dragomir Milošević.⁵

Keywords: siege, attacks, citizens, civilians, civilian objects, targeting, distinction, proportionality, encirclement, bombardment.

Introduction

Warfare, whether it is national or international, can be broadly divided into mobile and static conflict. The first takes place on the land, sea and in the air; the second refers to sieges and blockades of cities, fortresses, territories and nations.⁶ Sieges or 'encirclement operations' have dominated the practice and culture of war for thousands of years. The siege of Sarajevo was a pivotal and catastrophic event in the Balkan wars of the 1990s; urban sieges of cities such as Homs, Aleppo, Ghouta and Idlib characterize the ongoing non-international armed conflict in Syria. In South Asia, the disputed territory of Kashmir is regarded by some legal scholars as under siege.⁷ Since the late 19th Century, siege warfare has been implicitly moderated by a succession of legal regimes that impose restrictions on targeting certain human groups. This essay will argue that these restrictions offered minimal protection to civilians for much of the 19th and 20th Centuries and suggests reasons why the contemporary practice of siege warfare has led to frequent violations of the legal principles of distinction and, concomitantly, targeting and proportionality.

To begin with, it should be noted that the treaties and customary rules that now embody the Laws of Armed Conflict (LOAC) do not define a siege. For the purposes of this essay, a working definition is therefore essential. The word siege is derived from the Latin '*sedere*', to sit. A useful synopsis is provided by Krasker: 'siege warfare is an operational strategy to facilitate the capture of a fortified place... in such a way as to isolate it from relief in the form of supplies or additional defensive

⁴<https://blogs.icrc.org/law-and-policy/2022/03/17/armed-conflict-in-ukraine-a-recap-of-basic-ihl-rules/CordulaDroege>, (accessed 18 August, 2022)

⁵<https://www.icty.org/case/galic/indictment> (accessed 18 August, 2022)

⁶ Sources consulted: Dowdall, A., Horne, J., eds., *Civilians Under Siege from Sarajevo to Troy*, London, 2018, Forrest, A., Hagemann, K., Randall, J., *Civilians and War in Europe 1618-1815*, 2009; Funck, M., Chickering, R., *Endangered Cities: Military Power and Urban Societies in the Era of the World Wars*, 2004, Grimsley, M., Rogers, C., *Civilians in the Path of War*, 2002

⁷ Malik, A., *Kashmir under Siege: an International law Perspective*, RSIL, 2019, <https://rsilpak.org/2019/kashmir-under-siege-an-international-law-perspective/> (accessed 18 August, 2022)

forces.⁸ A Chatham House briefing encapsulates siege warfare as a means to isolate enemy forces from reinforcements and supplies.⁹ The fortified place may be a village, town, city or area of land: the intent of the besieger is to impose isolation on inhabitants to compel surrender.¹⁰

The key point is that cities that fall under siege throw together in a single domain civilian populations and combatants or defenders in close proximity. The significance of sieges in both law and culture derives from the way siege warfare exposes these civilians, non-combatants in legal terms, to many different kinds of catastrophic violence from the effects of bombardment, starvation, disease, assault, rape, enslavement, and pillage. Furthermore, the conduct of sieges frequently causes the destruction of homes, civic buildings and sites of cultural significance as well as fortified structures.¹¹ Until the advent of aerial warfare and genocide in the 20th Century, sieges exposed civilians to the most egregious harms of war in greater numbers than any other form of conflict. In short, sieges are discrete forms of military engagement that profoundly unsettle the discriminatory legal distinctions between combatant and non-combatant.

The persistence of sieges in the history of warfare and armed conflicts is a consequence of how cities and towns evolved into the loci of economic and political powers – and how urban strongholds can control extensive tracts of state territory. In an era of globalised urbanisation, sieges are thus becoming more significant in armed conflict. Capture of cities was and is frequently the strategic goal of warring states. In the past, this meant that certain cities were heavily defended as fortresses which, in turn, posed a threat to the mobile forces of an enemy state. Combatants can rarely take the risk of circumventing fortresses in embattled territories. However, as a general rule, sieges are the most expensive to conduct for the attacker. The purpose of fortification, after all, is to minimise the need to deploy manpower while the besieger has to commit considerable human and material resources to achieve his ends. The material and human costs of besieging compel besiegers to look for ways to conclude a siege rapidly.

2.1 The conduct of sieges under international humanitarian law

Some scholars acknowledge that the laws of war or armed conflict (LOAC) and, therefore, International Humanitarian Law have imperfectly legislated ‘the cruelties of certain long-standing forms of hostilities, such as siege warfare.’¹² Siege warfare and the starvation of civilians are not illegal under IHL or other areas of public international law. Issues of legal contention arise from the practice of sieges as these impact civilians in the besieged town, city, or territory. Under constrictions imposed by recent additions to the LOAC in the 1977 Geneva Protocol 1, the practice of siege warfare must respect the fundamental legal obligation of discrimination. This is set out by the International Committee of the Red Cross (ICRC) in customary Rule 15,

⁸Krasker, J., *Siege* in Oxford Public International Law, Oxford University Press, Oxford, 2015

⁹ Gillard, E-C., *Sieges, the Law and Protecting Civilians*, International Law Programme Briefing, Chatham House, 2019

¹⁰Mikos-Skuza, E., *Siege Warfare in the 21st Century from the Perspective of International Humanitarian Law*, Wroclaw Review of Law, Administration & Economics, volume 8, issue 2, 2019

¹¹ At the end of Homer’s ‘Iliad’, written in the 8th Century BCE, when the Greek army finally overwhelms Troy, the long besieged city is sacked, pillaged and burned; its people are enslaved.

¹² Roberts, A., Guelff, R., *Documents on the Laws of War*, Clarendon Press, Oxford, 1989, Introduction, p.15. Hereafter, Roberts &Guelff.

‘Principle of Precautions in Attack’: ‘In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.’¹³

It has been asserted that since at least the mid-19th century, protection of the civilian has been embodied in international law. As Alexander has demonstrated, this is not correct: the concept of the protected civilian is novel.¹⁴ The argument here builds on this analysis to suggest that the gap between the International Humanitarian Law and military doctrine regarding successful outcomes of siege warfare has never been adequately bridged. It is suggested that the late development of the legal concept of the protected civilian may explain this discrepancy between International Humanitarian Law and the practice of siege warfare. Notions of distinction were developed before the end of the 19th century, for example, in medieval laws of war that protected clerics, merchants and the poor. Later, Rousseau argued that since wars were matters of state, individuals were only involved if they were soldiers. Citizens of states were by implication protected.¹⁵ Rousseau’s principle had little impact on international law and jurists continued to conceive of unarmed citizens of an enemy state as hostile or ‘passive enemies’. The precept offered limited protection that every action necessary to win a war was permissible, which implied that harming such ‘passive enemies’ was only permitted if it contributed to ending a war. In the theatre of operations, however, it was considered unrealistic to offer civilians protection. With respect to siege warfare, private property could be destroyed, and lethal harm to civilians caused by bombardment and starvation, the definitive tactics of sieges. This fragile level of protection was compounded by the conception of the citizen of a hostile state as a ‘passive enemy’ who might become an active one by taking up arms or engaging in a *levée en masse*. Civilians were required to *demonstrate neutrality* rather than enjoy protection.

The Lieber Code of 1863, to take a notable example,¹⁶ refers to the ‘native of a hostile country’ as ‘one of the constituents of the hostile state or nation’ (Article 22) and sanctioned starvation (Article 17), driving non-combatants into besieged areas to ‘hasten on the surrender’ (Article 18) and bombardment of cities without prior warning (Article 19). The only concession to distinction is Article 23, which asserts that ‘Inoffensive citizens’ ‘are no longer, murdered, enslaved, or carried off to distant parts.’ Above all, the Code insists that ‘To save the country is paramount’ (Article 5) implying broad parameters of derogation.

Like the Lieber Code, the Hague Convention IV of 1907 is regarded by historians as an epochal stage in the evolution of International Humanitarian Law. Yet the Convention offers only ambivalent protection to non-combatants and does not develop the principle of distinction between combatants and civilian non-combatants.

¹³ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15(accessed 18 August, 2022)

¹⁴ See for example, Green,L., *The Contemporary Law of Armed Conflict* (2000),p.229; Jaworski, E., “Military Necessity” and “Civilian Immunity”: Where is the Balance?,(2003) 2 *Chinese Journal of International Law*, both cited in Alexander, A., *The Genesis of the Civilian*, *Leiden Journal of International Law*, 20 (2007), pp.359-376

¹⁵ Oppenheim, L., *International Law : A Treatise / Vol.2, War and Neutrality.*, London: Longmans, Green, 1906

¹⁶ ‘General Orders, No. 100: Instructions for the Government of Armies of the United States in the Field.’ See Labuda, P., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2126> (accessed 18 August, 2022)

Instead, Article 27 of Hague Convention IV (1907) asserts a principle of distinction between non-human targets of 'sieges and bombardments': all 'necessary steps' must be taken to spare buildings dedicated to religion, art, science, charitable purposes and 'places where the sick and wounded are collected'. The same Article also imposes obligations on the defending or besieged forces to identify 'by distinctive and visible signs' any buildings not used for military purposes at the time of the planned attack. As Watts notes, the language of Article 27 blends imperatives, namely 'all necessary steps' with a weaker construction: 'as far as possible'. Distinction, in short, can be superseded by *discretion* on the part of the besieging forces. The consequence is that the judgement of commanders regarding military necessity or the identification of military objectives to justify targeting restricts the legal efficacy of such limited discrimination to prevent harm to civilians.¹⁷

Furthermore, Article 25 *removes* rather than reinforces protection of non-combatants: 'The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings *which are undefended* is prohibited.'¹⁸ Here a distinction made between objects of attack, namely defended and undefended, denied immunity to civilians in fortified towns, such as a fortress city like Przemysł which would be besieged by Russian armies soon after the beginning of the First World War.¹⁹

The Convention offered remarkably vague protection to people under enemy control in Article 46, which asserts respect for various individual rights, and Article 50, which prohibits civilian reprisals – and was, in any event, ignored by all occupying armies in the course of the war. As it transpired, the Hague Conventions had little prohibitive or ameliorative impact on the conduct of sieges in both world wars.²⁰ Sieges proved to be humanitarian disasters and, for civilians in general, the two world wars were catastrophic.²¹ In general, the Hague Conventions as well as customary law regarded non-combatants as *enemy citizens* of antagonistic state who might be drawn into the conflict and thus had no need of protection since they were hostile actors.²²

The legal concept of a civilian began to emerge somewhat tentatively during and just after the First World War. The legal birth of the protected civilian had its roots in the international disapprobation of German atrocities committed against civilians in Belgium and the development of aerial warfare.²³ The peaceful civilian replaced the potential enemy citizen. Similarly, outrage about the killing of civilians during air raids by German Zeppelins and early bombers led first to the recognition that in modern warfare the distinction between civilians and combatants was eroded since civilians

¹⁷ Hague Convention IV Respecting the Laws and Customs of War on Land, Section 11 Hostilities, Articles 25-28, in Roberts & Guelff, pp. 52-53

¹⁸ *Ibid.*, p.53

¹⁹ Watson, A., *The Fortress: The Great Siege of Przemysl*, London, Penguin, 2019.

²⁰ Watts, *op.cit.*, p.6

²¹ See for example, Watson, A., *op.cit.*; Glantz, D., *The Siege of Leningrad, 1941-1944: 900 Days of Terror*, London, 2004.

²² Alexander, A., *op.cit.* p.365

²³ The Report of the Committee on Alleged German Outrages, known as the Bryce Report, referred to '...the peaceful population of an unoffending country which was not at war with its invaders but merely defending its own neutrality, guaranteed by the invading Power...' German actions were 'unnecessary, excessive and illegal.'
<https://babel.hathitrust.org/cgi/pt?id=umn.31951001694236w&view=1up&seq=6> (accessed 18 August, 2022)

could be targets of aerial attack and second to an effort to regulate its practice. The 1923 Hague Draft Rules of Aerial Warfare made, in theory a significant advance by prohibiting in Articles 22-27 terrorizing the civilian population and asserting rules of targeting military objectives. But the draft Rules were never incorporated into a treaty in a legally binding form.²⁴

To sum up, the evolution of legal norms of protection of non-combatants that encompass siege warfare in International Humanitarian Law was a slow and fitful process. By the time the Second World War began in 1939, legal protection offered to civilians was threadbare. The consequences need not be elaborated here. The 900 day 'Siege of Leningrad' grossly violated any moral notion of distinction and protection of civilians. After the war, there were renewed efforts to codify such protection under the rubric of distinction. The Geneva Convention IV (1949) sought to address the failure to protect civilians through treaty based prohibitions. However, the Convention introduces little that is legally original and, as stated in Article 154, 'shall be regarded as supplementary' to the Hague Regulations.²⁵ It is noteworthy that the Convention offers confusing definitions of who and what should be protected from the 'effects of war'. Thus Article 15 refers to 'wounded and sick combatants and non-combatants' as well as 'civilians who take no part in hostilities... and perform no work of a military category' while Article 16 affirms that the wounded, sick, infirm and expectant mothers must be regarded objects of '*particular protection and respect*'. Article 17 obligates the parties to the conflict to 'endeavour' to conclude agreements for the removal i.e. evacuation of the wounded, sick, infirm and elderly, children and 'maternity cases' from besieged or encircled areas, and for the 'passage' of religious officials, medical personnel and medical equipment 'on their way to such areas'. This hierarchy of more or less entitled civilian types would confuse the fulfilment of their protection since it offers the leadership cadre of besieging forces a further level of triage or discretionary judgement.

Be that as it may, after a hiatus of nearly three decades, in 1977, the First Additional Protocol to the 1949 Geneva Conventions, hereafter AP I and the Second Additional Protocol (AP II) sharpened and clarified the discriminatory elements of the LOAC. Additional Protocol 1 does not explicitly refer to sieges but applies to target provisions to attacks in 'whatever territory conducted', which encompasses siege warfare. The Protocols simplify the principle of distinction in Article 48 (Basic Rule) as between 'the civilian population and combatants and between civilian objects and military objectives'; Article 50 (3) defines the civilian population as 'all persons who are civilians'. The hierarchical levels of civilian protection set out in the earlier Geneva Conventions have thus been superseded.²⁶ Articles 51 and 58 develop rules implicit to the *jus in bello* conduct of sieges.²⁷ Civilians must enjoy general protection against dangers 'arising from military operations'; they should not be objects of attacks or threats of violence designed to 'spread terror'; the enforced use of civilians as 'human shields' to render points or areas immune from attack is prohibited.

²⁴ Roberts &Guelff, op.cit. pp.121-135

²⁵ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949 in Roberts &Guelff, p.271-337: Article 154 pp.324-325

²⁶ Roberts &Guelff, p.414-415

²⁷ Ibid., pp. 414ff. https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf (accessed 18 August, 2022)

The purpose of this account of the evolution of key principles in the LOAC is to show that ratified prohibitions applicable to siege operations which dispense with the notion of the hostile citizen and affirm a distinction between civilians and combatants are recent developments in International Humanitarian Law. This is significant because - to borrow Alexander's phrase - the 'slow, disjointed process of development and change'²⁸ has rendered the legal constraints on the practice of sieges weaker than the methodologies espoused in military doctrine. The foundational principles of doctrine in practice derive from 'On War' by Carl von Clausewitz: '...the destruction of the enemy's military force is the foundation-stone of all action in war, the great support of all combinations, which rest upon it like the arch on its abutments.'²⁹ According to modern doctrine of armed conflict, the successful prosecution of a siege requires *total* encirclement and isolation of the town, city or region and the 'maximum concentration of forces and fires'.³⁰

Kinsella argues that 'civilians' and 'combatants' are concepts in IHL that are susceptible to adaptation by parties with vested interests, such as commanders of a besieging or besieged armed force.³¹ This adaptability of a norm is especially significant when it comes to the potential redefinition in combat situations under Article 52 (3) of civilians who 'take a direct part in hostilities' (DPH) and thus forfeit the right to protection. The definition of DPH is a grey area that the ICRC has attempted to address in an Interpretive Guidance.³² It asserts that in cases of doubt, the individual must be regarded as a civilian. Thus, the definition in the practice of a normative concept is influenced by subjective judgement. Paust further argues that the US Department of Defense 'Law of War Manual' expands the idea of who is DPH in error.³³

Regarding the prohibition in Article 51 against inducing terror, since military doctrine insists that commanders 'maintain constant pressure' on besieged forces, it is difficult to conceive of attacks that do *not* generate robust emotional responses among civilians who must live close to besieged combatants.³⁴ The International Committee of the Red Cross (ICRC) acknowledges that 'even lawful attacks' can induce 'immense anxiety and even terror'. It is hair-splitting to distinguish these emotional states; immense anxiety is coterminous with terror. The critical point is that the Protocol only prohibits attacks that are conducted *primarily* to induce terror. It is lawful, in other words, to 'spread terror' if it can be shown to be an incidental

²⁸ Alexander, A., op.cit. p.375

²⁹ Clausewitz, C. v, On War, accessed here: <https://www.clausewitz.com/readings/OnWar1873/BK1ch02.html#a> (accessed 18 August, 2022)

³⁰ Field Manual No. 3-90-2: 6-18: 'Once the commander decides to destroy an encircled enemy force, that enemy force is reduced as rapidly as possible to free resources for use elsewhere. The reduction of an encircled enemy force continues without interruption, using the maximum concentration of forces and fires, until the encircled enemy force's complete destruction or surrender...' Headquarters Department of the Army Washington, DC, 22 March 2013

³¹ Kinsella, H., *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*, Ithaca, Cornell University Press, 2011, pp.190-200

³² International Review of the Red Cross, 26 February 2009, pp.991-1027

³³ Jordan J. Paust, *Errors and Misconceptions in the 2015 Department of Defense Law of War Manual*, 26 Minn. J. Int'l L. 303, 2017

³⁴ United States, Department of the Army, *Field Manual 3-90-2, Reconnaissance, Security, and Tactical Enabling Tasks*, 6-1 (2013); United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, ¶5-34 (2004).

consequence of an attack. The legal task of proving or disproving indiscriminate or collateral terror beyond a reasonable doubt is daunting.

Another problem arises from the Protocol's refinement of targeting or discrimination in attack. The failure to discriminate is defined in Article 51 as 'attack by bombardment... 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...'³⁵ [italics added]. Again, the military doctrine of maximalism may likely test this prohibition. According to the previously cited manuals of war, the successful prosecution of a siege requires *total* encirclement and isolation of the town, city or region and insists that 'The reduction of an encircled enemy force continues without interruption...'³⁶ Maximalism facilitates the contravention in practice of the obligation not to treat a besieged territory as a 'single military entity'.

The Additional Protocols refine the principle of distinction further in other ways. Article 52 prohibits attacks on civilian objects such as houses, dwellings, churches and other places of worship unless their destruction would provide a 'definite military advantage'. During a siege, civilian objects, such as elevated vantage points, may be used as fighting positions and thus become military objectives. However, Article 51 (3) forbids targeting dual-use objects if there is any doubt concerning whether or not such things have ceased to have civilian status.³⁷ Note once again, that prohibition is hedged by the judgement of the attacker. We should note that these rules apply equally to the besieging and besieged parties. Both belligerent parties must protect and reduce harm to civilians in besieged areas.³⁸

To sum up, the characteristic strategies of siege warfare that should comply with these legal prohibitions are principally bombardment and encirclement. Both practices make applying the LOAC rigorously problematic since sieges - and indeed urban warfare of all kinds - force together combatants and non-combatant civilians in frequently hazardous proximity. Military doctrine insists on a maximalist approach to siege warfare. There is a second problem. The LOAC implicitly pertinent to siege warfare are hedged by the application of human judgement. The legal framework assumes a deciding subject making decisions according to legal principles, not exigencies. Taking each principle in turn: first, the requirement of distinction requires accurate identification of military objectives so that the besieged area is not treated as a 'single military objective'; secondly, the rule of proportionality prohibits attacks which, in the words of the Geneva Convention Article 51 (5) (b), API '*may be expected* to cause incidental loss of civilian life...' that would be excessive in relation to the 'direct military advantage *anticipated*.' Expectation and anticipation are innately subjective. To comply with the rules of distinction and proportionality, it is necessary for the besieging and besieged commanders to make accurate and reliable assessments of whether or not a planned attack is proportional to the

³⁵ Roberts & Guelff, op.cit. p.416

³⁶ Field Manual No. 3-90-2: 6-18: 'Once the commander decides to destroy an encircled enemy force, that enemy force is reduced as rapidly as possible to free resources for use elsewhere. The reduction of an encircled enemy force continues without interruption, using the maximum concentration of forces and fires, until the encircled enemy force's complete destruction or surrender...' Headquarters Department of the Army Washington, DC, 22 March 2013.

³⁷ Roberts & Guelff, pp. 414-418

³⁸ At the time of writing, the AP1 has been ratified by 174 states, but excluding the United States, Israel, Iran, Pakistan, India, and Turkey. The United States, Iran, and Pakistan signed AP1 on 12 December 1977, which merely indicates intention to work towards ratification.

‘incidental loss of civilian life.’ Can we reasonably expect lawful decisions to be consistently made in the fast-changing conditions of siege warfare? For example, returning to the matter of encirclement, a situation in which the besieged territory has been compressed may severely impact the safety of civilians. Bombardment in these circumstances will make the loss of civilian life proportionally more likely and compromise access to medical facilities and food and water supplies. Subjectivity is embedded in the language of LOAC since minds are required to ‘take into account’ or ‘anticipate military advantage’. Proportionality rests precariously on a scaffolding of individual mental actions rather than unequivocal rules.³⁹

2.2 Starvation or Relief?

We can substantiate the problem of subjective discretion by turning to other dimensions of IHL pertinent to siege warfare: the starvation of civilians and the conduct of relief operations. We begin with the matter of starvation. Article 54 (1) of the API (1977) asserts that ‘Starvation of civilians as a method of warfare is prohibited.’ Furthermore, the prohibition extends to the destruction of ‘objects indispensable to the survival of the civilian population’ (Article 54 (2)) and is elaborated to preclude ‘such of the objects covered by it as are used by an adverse party’ (Article 54 (3)).⁴⁰ The latter emphasises that the prohibition derives from the principle of distinction: belligerents may starve, but civilians should not. The Additional Protocol represents a significant advance in IHL norms: the Lieber Code of 1863 stated that ‘it is lawful to starve the hostile belligerent, armed *or unarmed*, so that it leads to the speedier subjection of the enemy.’⁴¹ Since then, the prohibition has been codified in both international (IAC) and non-international conflicts (NIAC) and under the Rome Statute of the International Criminal Court, deliberate starvation is a war crime.⁴² According to the ICRC guidelines, the prohibition is incorporated in IHL Customary law as Rule 15.⁴³ Article 54 reiterates distinction in a specific framework: an attacker may not induce starvation and destroy materials essential to sustain life as a means to achieve a military end.

Again, Article 54 is implicit in application to siege warfare. It is also problematic. Throughout a siege, encirclement and isolation progressively reduce food and water supplies to the occupants within a besieged city, town or region. The needs of civilians are unlikely to be prioritised by besieged commanders over combatants who control the means of access and distribution. Starvation, at some level, is a foreseeable consequence of siege warfare since the isolation of the defining strategy of siege warfare. Dinstein insists that under Article 54 ‘a true siege would no longer be feasible.’ He argues that prohibition is ‘unrealistic’ since according to military doctrine siege warfare is indispensable as a tactic according to military doctrine. He argues:

‘The Protocol completely fails to take into account the inherent nature of siege warfare in which starvation of those within the invested location is not an end

³⁹ This applies equally to the obligations of besieged forces.

⁴⁰ Roberts & Guelff, pp. 416-418

⁴¹ Lieber Code, Article 17, https://avalon.law.yale.edu/19th_century/lieber.asp (accessed 18 August, 2022)

⁴² ICC Statute, Art. 8(2)(b)(xxv), <https://legal.un.org/icc/statute/romefra.htm> (accessed 18 August, 2022)

⁴³ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc (accessed 18 August, 2022)

but a means. It is important to bear in mind that a siege does not generate starvation for the purpose of killing civilians with hunger, but *only in order to cause the encircled town to surrender*.⁴⁴

This is sophistry. If starvation of civilians is a means to induce the surrender of a town then the principle of distinction is voided by linking civilian starvation with the military objective, namely surrender. This barely acknowledged difficulty animates much debate about the real world application of IHL. Watson argues that the prohibition against the deliberate starvation of civilians fundamentally limits the enactment of physical isolation through encirclement in legal terms. Hence sieges rest on the very edge of permissibility.⁴⁵ A contrary view elaborated by Rogers, for example, argues that the apparent contradiction in IHL between permitting sieges and prohibiting the arbitrary starvation of civilians can be resolved by invoking distinct purpose.⁴⁶ This is articulated in the CIHL commentary on customary law Rule 15: 'The prohibition of starvation as a method of warfare does not prohibit siege warfare *as long as the purpose is to achieve a military objective* and not to starve a civilian population.'⁴⁷ This means that to make a case about the potential criminal practice of a siege, prosecutors must provide proof of intent, namely, to starve civilians or deprive them of 'life-sustaining objects' distinct from achieving a military objective.

This brings us to the more fundamental problems of the legal regulation of armed conflict. No legal system can be productive if its prohibitions take no account of predictable real-world conditions in which law is applied. Historical precedents of siege warfare and modern jurisprudence derived from the ICTY, for example, provide concrete evidence of the likely conditions of modern siege warfare. As noted, encirclement conducted over weeks, months and years (as in the case of Sarajevo) compresses the close relationships of the combatants and non-combatants. It thus makes discrimination-targeting arduous and hard to achieve. This means that the likelihood that the besieging force treats the increasingly congested besieged city or town as a 'single military objective' increases. Furthermore, the balance of obligations based on discrimination and proportionality is tilted towards the attacker or besieging forces. In real-world circumstances, the besieged combatants have direct control over the civilian population in the besieged area and thus a greater level of humanitarian accountability.

The obligations of defenders under AP I addresses some of these matters. We have already noted the prohibition in Article 51 (5) of using civilians as human shields. Under Articles 51 (5) and Article 58, defenders are obligated to deploy forces to account for the 'presence and movements of the civilian population' and to remove the latter from the vicinity of military objectives. The same problem pertains. Encirclement and the maximal use of force will progressively contract the space of the besieged area, forcing defenders and civilians, as well as military objects and civilian objects, into ever closer proximity. There is, it might be said, a mathematical relationship between the dimensions of the area under siege and the feasibility of

⁴⁴Dinstein, Y., *Siege Warfare and the Starvation of Civilians*, in Delissen, A., Tanja, G., *Humanitarian Law of Armed Conflict: Challenges Ahead*, p.150, Dordrech; London: Nijhoff, 1991

⁴⁵ Watts, S., *op.cit.* p.10

⁴⁶ Rogers, A., *Law on the Battlefield*, Manchester University Press, 2012, 3rd edition: see pp.140-41

⁴⁷https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53 (accessed 18 August, 2022)

both attackers and defenders complying with IHL. Even the obligation placed on defenders to mark out the location of civilian objects might permit the attackers to deduce the location of *military* objectives. Respecting IHL prohibitions may, in some circumstances, confer tactical advantages to one side or the other.

Let us now turn to a case study to explore how these problems impact on applying criminal law to modern siege warfare practice. Can militarily effective sieges be waged legally?

1. Siege warfare in modern jurisprudence

Waxman succinctly argues that contemporary armed conflict can be viewed as a dynamic interaction between cities, strategies and law.⁴⁸ The first two have undergone transformative evolutions. Has IHL kept pace? The practice of siege warfare in the Balkan conflicts of the 1990s that followed the dissolution of Yugoslavia and the jurisprudence generated at the International Criminal Tribunal for the Former Yugoslavia (ICTY) provide us with crucial insights into the legal status; in short, the application of the Additional Protocols, and practice of sieges – that continue to inform the NIAC in Syria and the isolation of Kashmir by the Indian government.⁴⁹ After being initially besieged by the forces of the Yugoslav People's Army, troops of the VRS, the Army of Republika Srpska encircled the city, launching artillery fire from surrounding hills and positioning snipers in apartment blocks in districts it controlled. The siege, the longest in modern warfare, would endure for 1,425 days from 5 April 1992 to 29 February 1996.⁵⁰ Some five and a half thousand civilians were killed. During the siege, the VRS snipers targeted civilians forced out of their homes to find water and other supplies. Artillery bombardment caused significant civilian casualties, for example, in the 'breadline massacre' of May 1992. The VRS turned off supplies of electricity, water and gas at will, causing, in Catherine Baker's words, 'a sense of powerlessness'. VRS forces targeted historical and cultural institutions, such as the Vijećnica Library which was destroyed by incendiary shells in August 1992. Historians have characterised this strategy as 'urbicide' – meaning the deliberate destruction of a city as a symbol of coexistence in diversity.⁵¹ Others have noted that the onslaught on Sarajevo and other towns were energised by hatred of cities: Bogdan Bogdanović described the Bosnia war as 'a battle between city lovers and city haters.' This is significant because it may prove to be the case that IHL prohibitions apropos siege warfare are weakly defended against highly invested concepts of the nature of military objectives and necessity. As Waxman puts it:

'...the political objectives driving the Serb offensive produced the greatest motivation for besieging cities. In particular, the twin goals of expelling

⁴⁸ Waxman, M., *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 Va. J. Int'l L. 353 (1999), p.387

⁴⁹ During the Bosnian war a number of cities as well as Sarajevo were put under siege, including Dubrovnik, Tuzla, Srebrenica, Bihac and Gorazde. This essay focuses on the siege of the Bosnian capital since the VRS tactics there focused the bulk of international disapprobation at the time and in the criminal proceedings that followed the end of the war.

⁵⁰ Baker, C., *The Yugoslav Wars of the 1990s*, 2015, pp. 66-68.

⁵¹ For example, Sells, M., *The Bridge Betrayed: Religion and Genocide in Bosnia*, Berkley, 1999; Denitch, B., *Ethnic Nationalism and the Tragic Death of Yugoslavia*, Minneapolis, 1996.

opposing ethnic groups and shattering symbols and manifestations of multi-ethnicity made cities enticing targets.⁵²

In the aftermath of the war, the ICTY prosecuted several Serb officials for numerous counts of crimes against humanity committed during the sieges: Stanislav Galić and Dragomir Milošević, who commanded the operation of the siege and their superiors, Radovan Karadžić and Ratko Mladić.⁵³ All four were convicted and sentenced to long terms of imprisonment. Notwithstanding the punitive consequences of the Tribunal proceedings against the perpetrators of a modern siege, there is evidence in the court records of a deepening strain between legal norms and the imperatives of conflict strategy. It implies, contrary to GC AP 1 Article 52 (2), that the entire city can be regarded as a military objective since it embodied the identity of the enemy forces as an arena of ethnic diversity. Similarly, any distinction between civilians and combatant defenders of the city is weakened since the city's population is a collective embodiment of the diverse ethnicity that the VRS and its leaders sought to destroy as a conflict strategy.

The judgement in the case of Major-General Stanislav Galić is significant. It was the first made by an international tribunal regarding the charge of terror under IHL and the deliberations of the court examined in depth of IHL principle of proportionality.⁵⁴ It will be recalled that under AP I, Article 51 (5) (b) and Article 57 'excessive' loss of civilian lives and damage to civilian objects proportional to 'concrete and direct' military advantages are prohibited; so too are military actions undertaken with the 'primary purpose' of inducing terror in civilian populations in Article 51 (2) and Article 13 of Additional Protocol II which regulates non-international armed conflicts. The paradox of the Galić case is that the war crimes charges brought against the defendant, in short attacks on civilians and infliction of terror, are derived from the Geneva protocols but are articulated in different terms in the language of the ICTY Statute. When the ICTY judges debated the application of the Protocols concerning the Statute, they made several innovations in the jurisprudence regulating armed conflict.⁵⁵ First, they rejected the application of the *nullum crimen sine lege* principle on the grounds that the relevant prohibitions of AP I had been brought into effect by the 'May Agreement' of 22 May 1992, signed by the parties to the conflict, which prohibited attacks on the civilian population. With respect to this matter, the chamber insisted that AP I Article 51 (2) did not permit derogation on the grounds of military necessity and insisted that 'attacking civilians or the civilian population cannot be justified by invoking military necessity.'⁵⁶ Equally significant is that the chamber of the ICTY firmly established the crime of terror as a war crime under Article 3: 'acts of violence *wilfully* directed against the civilian population... with the primary purpose of

⁵² Waxman, op.cit., p. 404

⁵³ <https://www.icty.org/case/galic>; https://www.icty.org/en/case/dragomir_milosevic; <https://www.icty.org/en/case/karadzic>; <https://www.icty.org/en/case/mladic> (accessed 18 August, 2022)

⁵⁴ Galić case information sheet: http://haguejusticeportal.net/Docs/Fact%20Sheets/Galic_Case%20Info%20Sheet.pdf (accessed 18 August, 2022); Gall, E., "Introductory Note," International Legal Materials 43, no. 4 (July 2004): 789-793; Kravetz, D., The Protection of Civilians in War: The ICTY's Galić Case, Leiden Journal of International Law, 17 (2004), pp. 521–536

⁵⁵ Kravetz, D., op.cit. pp. 523ff.

⁵⁶ ICTY, Galić case Judgement note 2. Para 44.

spreading terror...'⁵⁷ The implication of this articulation of the crime of terror is that the prosecution is not obligated to prove that certain acts of violence actually caused states of terror in a civilian population, but that the perpetrators intended to terrorize by means of 'reckless attack'. Kravetz, writing in 2004, asserted that the recognition of terrorisation as a war crime 'will certainly transcend the sphere of competence of the ICTY and affect the work of other national and international tribunals that in the future will be charged with the task of prosecuting those responsible for acts of terror against civilians.'⁵⁸

In the case of sieges ongoing at the time of writing, there is little evidence that IHL and the jurisprudence of the ICTY have alleviated the impact of conflict on civilians in besieged cities. In the case of the Syrian conflict(s)⁵⁹, protracted siege warfare that began in Dera'a in March 2011 was crucial to the long-term survival of the Assad regime because it offered a means to isolate and, in effect, immunise pockets of rebellion in urban areas and conduct brutal campaigns of collective punishment.⁶⁰ The siege of eastern Ghouta lasted for over five years (2013-2018) and caused a long-term humanitarian catastrophe. Throughout the Syrian conflict, the regime has impeded the provision of relief supplies to besieged cities such as Aleppo – and Gillard has argued that this exploits an ambiguity in customary law that permits denial for 'valid reasons' that are not 'arbitrary or capricious'.⁶¹ At the same time, the besieged forces have sequestered food supplies for the exclusive use of combatants and exploited civilians as human shields.

This eschewing of a crucial obligation of IHL and the customary law of war goes hand in hand with a profound disrespect for the legal distinction between combatants and civilians and concomitantly for proportionality. As a consequence, sieges have become pivotal spaces of egregious IHL and human rights abuses.⁶² The Violations Documentation Center in Syria in its Special Report on the Attacks in Idlib governate 1 September 2019 – 31 December 2019 provides evidence of alleged breaches of IHL, IHRL and customary laws of war, such as deliberate and indiscriminate attacks

⁵⁷ Ibid., paras. 133,138

⁵⁸ Kravetz, D., pp. 535-536

⁵⁹ There is an unresolved debate about what kind of conflict is taking place in Syria. Is it an international armed conflict or a non-international armed conflict? Gal argues that both type of conflict have or are taking place in Syria; Gill argues contra that since international intervention by the Russian Federation, for example, is on the side of the government, the hostilities must be defined as non-international but, regarding the application of IHL 'on balance, the law relating to targeting is quite similar under the two regimes, hence for the purpose of determining whether an attack is indiscriminate or disproportionate classification will make little difference, if any, as to whether a conflict is governed by the rules pertaining to IAC or NIAC.' Gill, T., *Classifying the Conflict in Syria*, 92 INT'L L. STUD. 353 (2016)

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⁶⁰ Todman, W., *Capitalising on Collective Punishment: Siege Tactics in the Syrian Conflict*, A thesis submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University, April, 2016

⁶¹ Gillard, Emanuela-Chiara, *The law regulating cross-border relief operations*, *International Review of the Red Cross*, Vol. 95 (2013),p.360.

⁶² Independent International Commission of Inquiry on the Syrian Arab Republic, *Sieges as a Weapon of War: Encircle, starve, surrender, evacuate*, 29 May 2019.

against civilians, intentional attacks against civilian objects, targeting popular markets and educational facilities, and arbitrary and forced displacement.⁶³

2. Conclusion

The momentum of global urbanisation and the globalised role of cities as foci of the wealth and identity of states is likely to make siege warfare the most significant kind of international and non-international armed conflict in the 21st Century. Traditional mobile wars waged across open landscapes will become rare. This evolutionary process in the location and conduct of war will put IHL under immense pressure to prevent and punish breaches of the implicit rules governing siege warfare. Yet the modern city may be the perfect locus to *illegally* induce terror in civilian populations and force civilians to the edge of survivable starvation. Since international law acknowledges that causing surrender is the object of siege tactics, breaching prohibitions of proportionality and distinction that embody the judgement of commanders is an inevitable consequence of the contradiction between military doctrine and law.

Real-world practice corroborates this argument. Since the 1990s, Century, the violation of IHL prohibitions intended to constrain the deprecations of siege warfare has become the norm. This is further demonstrated by the conflict in Ukraine, which began when Russian forces launched attacks in February 2022 on cities such as the capital Kiev and the port city of Mariupol. Allegations of war crimes have been made in the aftermath of the illegal attack on Ukrainian territory, which is currently under investigation.⁶⁴ The argument presented in this essay is that IHL embodies significant elements of discretion to identify military objectives and apply the principle of necessity to strategic operations that permit commanders to cause severe harm to civilian populations. The discretionary gap in IHL forms a nexus with the contradiction between maximalist strategic doctrine articulated in the manuals of national armed forces and IHL pertinent to sieges. The implications of humanitarian catastrophes in the former Yugoslavia, Syria and Ukraine provide ample evidence that the fundamental weakness of IHL to govern siege warfare in ways that guarantee the safety of non-combatant civilians will shape future armed conflict in the 21st Century and lead to as yet unimaginable harms

⁶³ Report available here: <https://vdc-sy.net/wp-content/plugins/pdfjs-viewer-shortcode/pdfjs/web/viewer.php?file=https://vdc-sy.net%2Fwp-content%2Fuploads%2F2020%2F03%2FIdlib-Governorate-...-The-Ongoing-Massacre.pdf&download=true&print=true&openfile=false>: 'VDC confirms that the Russian and Syrian government forces violate the principles of international humanitarian law. It targets civilians directly and deliberately. These forces also intend to target aid and relief workers, infrastructure and civilian objects. Systematic attacks targeting civilian neighbourhoods were recorded clearly and unambiguously, killing hundreds of civilians and causing heavy losses to the property of the population...' p.30 See also Human Rights Data Analysis Group, <https://hrdag.org/syria/>, collecting data on torture in prison; Syrian Network for Human Rights, <http://sn4hr.org/>, reporting on deaths, detentions, and disappearances; Exposing the Invisible, 'The Syrian Archive – Hadi Al Khatib', <https://exposingtheinvisible.org/films/group/syrian-archive/>; The Syrian Archive, <https://syrianarchive.org/en> (curating visual documentation of international crimes in Syria)

⁶⁴ <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>

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