

PROTRACTED ARMED CONFLICTS, INVISIBLE CIVILIAN SUFFERING AND INTERNATIONAL LAW (II)

BY DR ALBERTO ALVAREZ-JIMENEZ

The United Nations Security Council receives communications from Israel and Palestine almost weekly, telling the story of their civilians' indescribable affliction. Fifty were sent from August 2013 to July 2014 – the 65th and 66th years of the conflict.¹ In one letter after another, both states expressed not a single word of concern for the other's civilians.

Reacting to this appalling reality, this article seeks to find novel ways in which international humanitarian law and international criminal law could be reinterpreted in order to make the civilian ordeal visible to the adversary, be it Israel or Palestine or any other state behaving likewise.

The first way is to establish, on the adversary, the duty to provide an explanation after attacks with apparently excessive civilian casualties or significant risk to civilian populations. Its contents would include, among others, what commanders estimated as being the expected civilian casualties of a particular attack and of the concrete and definite military advantage that was pursued by it. Such duty would be derived from the principle of distinction or the principle of proportionality interpreted in light of the Martens clause. The second way is to interpret the Rome Statute in ways that commanders could place themselves in a better legal position in criminal proceedings if commanders explained post-attack the reasons for the apparently excessive civilian casualties or significant risk to civilians.

In addition, this article makes a more general claim and suggests that the protracted nature of an international conflict could prompt innovative interpretations of international humanitarian law provisions, the principle of distinction and the principle of proportionality among others, aimed at offering higher degrees of protection, under certain circumstances, to those specific civilians who have already been casualties in the prolonged armed struggle and are about to be so again in a forthcoming military operation. The aggregation of civilian misery throughout decades-long conflicts would be at the root of this proposal.

Are these suggestions the solution for the civilians in Israel and Palestine, or in any other countries facing protracted conflicts, whose suffering is being overlooked? Certainly not. Much, much more is required. However, making massive civilian affliction visible for the other party could be the starting point of an incremental process aimed at providing temporary or permanent solutions, and in any case, it is better than the sheer invisibility of civilian suffering for the other party reigning today.

Neither can it be expected that explanations given by parties to armed conflicts be appreciated by all the affected civilians. The suffering of some may be so overwhelming that the explanation may be just too little or plainly irrelevant to them. However, the situation may be different for others, who, thanks to the justification, may be able to grasp at least some understanding of the

¹ See Alberto Alvarez-Jimenez "Letters to the Security Council by Two Prisoners of War, Israel and Palestine" (2018) 26 Wai L Rev 61.

reasons for their particular suffering in relation to specific military operations by the adversary. This possibility is enough for the validity of the proposal in general terms.

A third caveat: acknowledgement of civilian suffering does not necessarily equate to admission of international wrongful acts. Proper wording of the given unilateral statement may avoid this effect. For instance, regrets for civilian casualties can be made by a state claiming that an operation against a military target was proportionate under international humanitarian law.

A final caveat: there is a measure of hope, not naiveté, in the proposals here. Although happily not a victim himself, the present writer has first-hand experience spanning a few decades living in a country with a non-international armed conflict with limited visibility for the victims.

I. HOW TO INTERPRET INTERNATIONAL LAW TO MAKE CIVILIAN ORDEALS VISIBLE TO ADVERSARIES IN ARMED CONFLICTS

The first question is, what can international law do in order to influence politics and introduce changes aimed at making Israel and Palestine more aware of each other's civilians' suffering? The first way is to carry out interpretations of international humanitarian law that help alter the calculations of both parties in a way that achieves this purpose.²

Before starting, it is important to highlight that the purpose of this endeavour is not to make each and every civilian casualty visible to the adversary. Such objective would plainly ignore practical military and political considerations. The suggestions are limited to particular events in which the principle of distinction³ or the principle of proportionality⁴ seems to have been violated by the apparently excessive number of civilian casualties or by the massive alteration of the ordinary lives of millions of civilians. The second clarification is that the topics explored should not be seen as the only ones possible to make civilian suffering visible to the other party. Much more can and, in fact, should be done in the future to this aim.

A. *The Duty to Explain as Part of the Principle of Distinction and the Principle of Proportionality in International Humanitarian Law*

Civilians affected by what appears to be a violation of the principle of distinction deserve a clear explanation for their suffering, when there seems to be no expected military advantage. The principle of distinction is so fundamental to International Humanitarian Law that a party blamed

2 Thomas M Franck "On Proportionality of Countermeasures in International Law" (2008) 102 *American Journal of International Law* 715 at 728.

3 The principle of distinction, as a customary international law, is so defined by the International Committee of the Red Cross (ICRC):

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

The principle applies to both international and non-international armed conflicts.

4 The principle of proportionality in customary international law has the following formulation: "Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, damages to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." See Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (International Committee of the Red Cross, Cambridge, 2005) Volume I: Rules at 46; See Also Jason D Wright "'Excessive' ambiguity: Analysing and refining the proportionality standard" (2012) 94 *International Review of the Red Cross* 819 at 837.

for failing to comply with it should be compelled to explain what went wrong at the end in the given military operation.

The duty to explain in the event of apparent violations of the principle of proportionality is equally important, even though the protection to civilians that this principle affords is lower than that of the principle of distinction. Loss of civilian life and property is lawful under the principle so long as it is not excessive in light of the anticipated military advantage.

However, violations of the principle of proportionality may be much more significant in terms of civilian suffering than those of the principle of distinction in certain events. Targeting a single civilian who is not taking part in hostilities is by itself a violation of the principle of distinction: there will be civilian suffering for the victim and his relatives. But a violation of the principle of proportionality would usually be more substantial, because appearance of the violation will occur when there have been seemingly excessive civilian casualties or damages to civilian property in light of the expected military advantage. For this reason, the duty to explain as part of the latter principle is equally important.

Explanations of this character have occurred. Take, for example, the North Atlantic Treaty Organization (NATO) attack on a hospital run by Doctors Without Borders in Kunduz, Afghanistan, on 3 October 2015. The United States acknowledged a mistake hours later, started an investigation,⁵ apologised to Afghanistan and to the non-governmental organisation (NGO),⁶ and announced compensation for the victims and their families.⁷

A second telling example is the recent military attack carried out by Saudi Arabia in Yemen in October 2016, targeting what was supposed to be a meeting attended by several Houthi military leaders. The attack was based on intelligence requesting an immediate attack on a valid military target. The decision to carry out the operation did not follow standard procedure, and as it turned out, the meeting was a funeral. Close to 150 people were killed and hundreds were injured. The Saudi-led coalition shortly after the operation deemed it regrettable and sad, acknowledged the mistake in the targeting, ordered an internal investigation of the personnel involved, and offered to compensate the victims.⁸

The value of the explanation for the affected civilians was highlighted, an encouraging fact supporting the claim made in this article. According to media reports, “Mohammed Atbukhaiti, a senior Houthi official, welcomed the findings but said they showed how the coalition is “disorganized and reckless” and treats “the lives of the Yemeni people in a careless and disrespectful manner.”⁹

Apologies offered to civilians harmed by military mistakes carried out by a guerrilla group in a non-international armed conflict have also taken place. An example is the acknowledgement made by the National Liberation Army (ELN), a Colombian rebel group, on its website after killing two

5 Missy Ryan and Tim Craig “Top US general in Afghanistan: Hospital was ‘mistakenly struck’” *Washington Post* (online ed, Washington (DC), 6 October 2015).

6 Roberta Rampton and Stephanie Nebehay “Obama apologizes for Kunduz attack, MSF demands independent probe” *Reuters* (online ed, United States, 7 October 2015).

7 Sandra Maler “US to make payments to families of Kunduz air strike victims: Pentagon” *Reuters* (online ed, United States, 10 October 2015).

8 Sudarsan Raghavan “US-backed, Saudi-led coalition found responsible for Yemen funeral attack that killed more than 100” *Washington Post* (online ed, Washington (DC), 15 October 2016).

9 Raghavan, above n 8.

civilian workers in a military operation against a public oil pipeline. The ELN asked for forgiveness from the relatives and friends of the victims.¹⁰

1. *Elements of the duty to explain*

(a) Contents and limitations

In the event of apparently excessive civilian casualties, a duty to explain after the specific attack¹¹ should exist for the party that carried it out and for the benefit of the civilians that survived the attack or were affected by it, whose physical or psychological traumas would likely be severe and long lasting. The content of the duty would be based on information that could be disclosed in relation to the decision-making process, pursuant to the domestic military rules of engagement, that took place before the attack.¹² The duty should start with an explanation of what kind of information commanders had about the concrete and definite military advantage¹³ that was pursued and about the expected civilian casualties of a particular target before the attack, if this was the case. Commanders should also explain why the collected information was the reasonable one to have available in light of the circumstances.¹⁴ They should also provide information about the precautions that were taken pursuant to art 57 of Additional Protocol I, if any, and of the possible causes of the significant civilian casualties that took place.¹⁵ In the event of mistaken targeting that

10 See “Eln reconoce error por el asesinato de dos contratistas de Ecopetrol y pide perdón” *Pulzo* (online ed, Colombia, 20 September 2014).

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), International Committee of the Red Cross (ICRC) 1125 UNTS 3 (adopted 8 June 1977), art 49(1) defines attacks as “acts of violence against the adversary, whether in offence or in defence.”

12 For illustrative purposes, Beer so described the United States decision-making process:

[T]he wartime decision-making model used in the US army consists of six steps, including intelligence preparation and mission analysis, the development of friendly courses of action (COA), the analysis of these COAs, comparison of the relevant alternative courses and decisions, the development of plans-orders and transition. It requires the commander in the field to develop and present several relevant alternatives and choose the best course of action.

Yishai Beer “Humanity Considerations Cannot Reduce War’s Hazards Alone: Revitalizing the Concept of Military Necessity” (2015) 26 *Eur J Int Law* 801 at 805–806 (footnotes omitted). Other elements to be considered, if they were available, could be life patterns of the civilian population, timing of the operation, weather, and the reliability of the intelligence.

13 According to the ICRC, “A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces.” See International Committee of the Red Cross (ICRC) “Comment No 2218 to Article 57 of Additional Protocol I” <www.icrc.org>.

14 As to the standard of the reasonable commander in the application of the principle of proportionality, see Enzo Canizzaro “Proportionality in the Law of Armed Conflict” in Andrew Clapham and Paola Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014) at 332 and 338–339.

15 Attacks with extensive civilian casualties would not be proportionate even if the direct and concrete military advantage were significant. See International Committee of the Red Cross “Comment No 1980 to Article 51 of the Protocol I” <www.icrc.org>. The International Committee of the Red Cross in its Commentary to art 57 of Protocol I mentions some of the elements that can have a bearing on incidental civil losses.

The danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).

puts in question compliance with the principle of distinction, commanders would have to explain what the error was and why it took place. If, on the contrary, there was a valid military target, then the duty to explain should include an explanation of whether the attack was still proportionate under international humanitarian law.¹⁶ There is no contradiction in this analysis: the civilian casualties were ex post significant, and compliance with the principle of proportionality was in doubt.¹⁷ The attacking state or party would have to explain why the civilian casualties were so high and why, in its view, the attack was still lawful in light of the ex ante information.

The duty to explain would exist even if civilians received warnings from the opponent before the attack was launched, pursuant to art 57(2)(c) of Additional Protocol I.¹⁸ In effect, the significant extent of civilian suffering in the wake of the attack puts in question compliance with the principles of distinction and proportionality as well as the effectiveness of the said warnings, a requirement of the said provision. In addition, warnings say nothing about the reasons for the attack. Thus, explanations should also be given.

The letter sent by Palestine to the Council on 21 July 2014 would illustrate these particular points. The note informed of the death of 26 members of the Abu Jami family as a result of an Israeli operation.¹⁹ The extent of the civilian casualties and suffering in this particular event calls for an explanation, since there appears to be a violation of the principle of distinction or proportionality. Israel would need to explain all of the above-mentioned elements and the reasons for the regrettable outcome.²⁰ Likewise, Palestine would need to explain Hamas's launching of

16 There are other important benefits of the duty to explain, such as gaining insight into commanders' decision-making process and creating a data set of indicators to be used for the purpose of proportionality assessments. These benefits deserve to be explored and are left for future research.

17 Although, specifically, compliance with the principle of proportionality regarding an attack cannot be carried out with the benefit of hindsight, debates on such compliance can be made on the basis of the effects of the attack, and "a plain and manifest breach of the rule [the principle] will be recognizable." – Michael Bothe "War Crimes" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 352.

18 International Committee of the Red Cross "Comments 2223–25 to Article 57 of Additional Protocol I" <www.icrc.org>. This provision had its origin in art 26 of the 1907 Hague Regulations and is also a rule of customary international law. See: International Committee of the Red Cross "Rule 20 Advance Warning" Customary IHL <<https://ihl-databases.icrc.org>>.

19 Thirteen victims had been identified at the time of the letter: Jawdat Tawfiq Ahmad Abu Jami, age 24; Tawfiq Ahmad Abu Jami, age five; Haifa Tawfiq Ahmad Abu Jami, age nine; Yasmin Ahmad Salamah Abu Jami, age 25; Suhaila Bassam Abu Jami; Shahinaz Walid Muhammad Abu Jami, age one; Rayan Tayseer Abu Jami, age eight; an elderly woman, Fatima Mahmoud Abu Jami; Rozan Abu Jami, age 14; and Ahmad Salhoub, age 34. See Email from the Permanent Observer of the State of Palestine to the United Nations, the Secretary-General, the President of the General Assembly and the President of the Security Council "Identical letters dated 21 July 2014 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/642–S/2014/513" (21 July 2014).

20 Israel is not party to Protocol I, but the duty to explain would derive from the principle of proportionality under customary international law. See above n 4.

rockets into Israeli civilian areas,²¹ affecting the life of thousands of Israeli civilians of all ages and genders.²² This action puts in doubt compliance with any of the said principles by Palestine. In sum, the Palestinian and Israeli civilians deserve *at least* an account from the adversary to make some sense of the reality they have faced or will face as a result of the attacks.

The duty to explain could face some limitations in the event of ongoing internal investigations against the commanders and military personnel that planned or executed the military operation in question or when there was sensitive information that could not be disclosed for national security reasons. Indeed, while a full explanation is the ideal, ongoing investigation might not make such explanations possible. However, it does not follow from the existence of such investigations or of national security reasons that they should always prevent the acknowledgment of the other's civilian suffering, nor could it be said that these reasons should always preclude the existence of a partial explanation for the benefit of the other's affected civilians or, at a minimum, some acknowledgement and regret for such suffering.²³ In the end, affected civilians need an explanation of the reasons behind their suffering, and it might not be indispensable for them to know whether or not and on which grounds the military personnel involved acted contrary to their domestic law. Nor could it be necessary for the civilians to get all of the relevant facts divulged.

The duty to explain also presupposes that some of the facts on which the claim of violation of the principles of distinction or proportionality have taken place, and their existence has been either admitted by the attacking party, or corroborated or deemed credible by independent actors either public or private, such as NGOs, media outlets, or the International Humanitarian Fact-Finding Commission, established by Additional Protocol I to the Geneva Conventions, or other fact-finding missions created by the UN General Assembly or the Security Council. To be sure, there is no duty to explain until some facts have been verified, and there will be no duty if the claim of violation of the principles of proportionality and distinction is rooted in falsehoods.

There are connections between the duty to explain as part of the principles of distinction and proportionality in international humanitarian law and the so-called right to the truth in human rights law, as defined by several international treaties.²⁴ Both compel states to submit information to victims or their relatives aimed at offering explanations for state actions that have directly or indirectly harmed them. There are, nonetheless, some differences. First, the right to truth usually,

21 The status of Palestine within the United Nations as a non-member state brings up the question of whether or not Hamas's actions can be attributed to Palestine. Although Hamas and Fatah, which is the domestic authority that represents Palestine internationally, have fought each other, Hamas also functions as a political party, has participated in elections in the West Bank and the Gaza Strip, and has been the administrative authority in the latter and employer of Palestinian civilian servants. See AFP "Hamas employees in pay protest at unity govt Gaza HQ" *YAHOO News* (online ed, United States, 14 January 2015). All these elements combined could lead to the initial conclusion that Hamas is a Palestinian public entity and not merely a non-state actor whose actions, to be attributed to Palestine, would need to meet the requirements of art 8 of the International Law Commission's Articles on State Responsibility.

22 According to the ICRC, Palestine acceded to Additional Protocol I on 2 April 2014. See International Committee of the Red Cross "Treaties, States Parties and Commentaries: Palestine" <<https://ihl-databases.icrc.org/>>; Prior to this accession, Palestine was bound by customary international law. See above n 3.

23 Lack of explanations may have a more arcane reason: the need to avoid making military incompetence evident. Obviously, such incompetence could not be justification for further dehumanisation of armed conflicts. On the connection between violations of the principle of proportionality and military ineptitude, see Beer, above n 12, at 805–806.

24 See, for instance, art 32 of Protocol I to the Geneva Conventions and art 3 of the European Convention on Human Rights. On the right to truth, see Yasmin Naqvi "The Right to the Truth in International Law: Fact or Fiction?" (2006) 88 *IRRC* 245; Dermot Groome "The Right to Truth in the Fight against Impunity" (2011) 29 *Berkeley J Int'l L* 175.

although not exclusively, deals with persons who have disappeared while under the custody of a state, while the duty to explain as part of the principles of distinction and proportionality does not obviously presuppose such custody. Second, the right to the truth includes, under certain human rights treaties, the obligation to investigate and prosecute those who committed the forced disappearance and to compensate for the harm done.²⁵ The duty to explain suggested here as part of the principles of distinction and proportionality does not explicitly go that far, although it is not unlikely that the explanation the duty puts forward might lead to domestic or international proceedings in which investigation, prosecution and compensation would take place.²⁶

(b) Timing, medium of explanation, and benefits of the duty to explain

Additional elements of the duty to explain are the following: its timing, who would make the explanation, the medium to be used, and what states gain by offering explanations to the other's affected civilians.

As to the timing, regret for the other's civilian casualties would not need to wait until after a full investigation is carried out. Without prejudice for an investigation, the duty to explain can exist independently. This would be so because compliance with the principles of distinction and the principle of proportionality is assessed on the basis of the information available before the attack, some of which could be disclosed. This was in fact what happened with the above-mentioned NATO attack in Kunduz. The explanation came first and the investigation followed it.²⁷ Nor would regret always have to take place shortly after the given attack, although the sooner the better for the victims.

As to the medium to transmit the explanation, it would be one that makes it possible for the other's affected civilians to be aware of the acknowledgment. The statement could be made easily available to the public, through websites, Facebook, or Twitter accounts, among others; transmitted to a reliable third state or the International Committee of the Red Cross; or forwarded to UN organs, such as the Security Council itself. It would be a unilateral declaration by any authority chosen by the given state, lacking specific formalities, and it would be expected that the recipient of the declaration would, at a minimum, transmit the declaration to the other state or the affected civilians, or both.

An additional question is, what would states gain by acknowledging civilian suffering through the duty to explain? In general, respect for civilians in armed conflicts stands to benefit the parties' own population. This applies also to the acknowledgment of the other's civilian suffering: the

25 *Blake v Guatemala* (United States Inter-American Court of Human Rights 24 January 1998) (ser C) No 36, para 97, referring to art 1(1) of the American Convention on Human Rights; See also Pablo de Greiff *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence* (A/HRC/21/46, 2012) at [23].

26 For a clear example, see events related to the above-mentioned NATO attack on a Doctors Without Borders hospital in Afghanistan and the attack on a funeral in Yemen by a Saudi-led coalition. See Ryan and Craig, above n 5; Raghavan, above n 8.

27 According to media reports, American Defense Secretary Ashton B Carter said he would hold those responsible accountable: see Ryan and Craig, above n 5.

It is worth noting that there is an explicit obligation to investigate grave breaches of the Geneva Conventions. See, for instance, Article 146 of the Fourth Geneva Convention. Article 87 of Additional Protocol I contains a wider obligation regarding any breach of the Convention and the Protocol. See: Amy ML Tan "The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an International Accountability Problem" (2016) 49 *New York University Journal of International Law & Politics* 181 at 200–203.

acknowledgment by one party may create incentives for similar behaviour by the other, when both are ignoring such suffering. Reciprocity, then, may be one of the outcomes of the duty to explain in international armed conflicts, although much less so in non-international conflicts. A second could well be that of commanders' avoiding international criminal responsibility in close cases of violation of the war crimes provided for in art 8(2)(b)(i) and (iv) of the Rome Statute.²⁸ And last but not least, states would be making a contribution to the humanisation of the conflict, certainly not a minor gain in the long run and with a view to ending the given conflict.

2. *Legal grounds of the duty to explain*²⁹

The duty to explain should not be regarded as a free-standing obligation, but as an additional duty to those already incorporated within the principles of distinction and proportionality. In effect, upon looking carefully at these two principles, it is possible to identify that each of them comprises a set of duties.

First, compliance with the principle of distinction by any party to an armed conflict demands as a key duty that before any attack the party carry out actions aimed at identifying the targets as military. The duty to explain would be added if, in the aftermath of operations, the target ended up being exclusively of a civilian nature. Second, compliance with the principle of proportionality includes several duties: the duty to identify the military advantage to be gained, the duty to identify and estimate the expected civilian casualties, and the duty to assess whether or not the latter are excessive in light of the military benefit. The duty to explain would be an additional element of this principle, to be carried out after the operation if the civilian casualties appear to be excessive.

There is no explicit duty to explain within the contents of the principles of distinction and proportionality. However, the duty could emerge as a result of an interpretation of any of these principles in light of elemental considerations of humanity and the Martens Clause, which provides:³⁰

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

In effect, according to the late Antonio Cassese, the Clause has been used to advance innovative interpretations of certain rules of international humanitarian law. For this purpose, the Clause has been interpreted in many ways over the years. In relation to the legal bases of the duty to explain,

28 More on this in part I B below.

29 The duty to explain is, in terms of policy and reality, a good starting point to acknowledge the other's civilian suffering. Its legal bases can certainly be controversial. This article offers some below that follow in the footsteps of a prominent international law judge and commentator. The present author does not claim that these bases are the only ones. Whether or not they are entirely plausible is an issue that should be separated from the pertinence and the need of the duty to explain as a matter of humanity.

30 Article 1.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The customary nature of the Martens clause was emphasised by the International Court of Justice. See International Court of Justice *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, ICJ Rep 226, 1996) at [79].

this part will follow Cassese's methodology, which in turn is based on the approach taken by the Conseil de guerre de Bruxelles in the *KW* case.³¹ According to Cassese:³²

By virtue of the clause, reference should not be made to vague principles of humanity, but rather to those human rights standards that have been laid down in international instruments ... They may, among other things, be used as guidelines for determining the proper interpretation to be placed upon ... insufficiently comprehensive international principles or rules.

What to do when a state keeps ignoring the other's monumental civilian suffering is a new question for international humanitarian law, calling for the use of the Martens Clause to arrive at a new interpretation, since, to use Cassese's words, the existing principles or rules, in particular the principles of distinction or of proportionality as currently understood, are insufficiently comprehensive to address this issue. Those civilians affected by military operations in which the said principles seem not to have been complied with deserve an explanation for their suffering, and it is the use of the clause that allows international humanitarian law to offer a response to this important situation.

The question then is, what principle of humanity in particular can be invoked as a basis for the new interpretation of the customary rule of distinction and proportionality on the basis of the application of the clause? Avoiding unnecessary suffering. In its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressed this view:³³

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

Although related to the choice of weapons and methods of war and therefore relevant to the planning and execution phases of military operations, avoiding unnecessary suffering is a principle that explicitly covers military personnel but also, implicitly, civilians. That avoiding unnecessary civilian suffering is also part of the principle is evident in the sense that this dimension is itself at the core of the principles of distinction and proportionality. In fact, attacking civilian targets or

31 A different approach adopted by the International Criminal Tribunal for the Former Yugoslavia will be followed when assessing another proposal aimed at protecting civilians in protracted armed conflicts. See International Criminal Tribunal for the Former Yugoslavia *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (undated).

32 *KW Case* Conseil de guerre de Bruxelles, Brussels, 8 February 1950, discussed in A Cassese "The Martens Clause: Half a loaf or simply pie in the sky?" (2000) 11 *Eur J Int Law* 187 at 207; For a similar argument, see Jean Simon Pictet *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, Geneva, 1985) at 59–60; See also on the application of the clause Theodor Mero "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 *American Journal of International Law* 78 at 87–88; Emily Crawford "The Modern Relevance of the Martens Clause" (2006) 6 *ISIL YB Int'l Human & Refugee L* 1; "Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause" in *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 years after the Second Hague Peace Conference* (Duncker & Humblot, Berlin, 2009); *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd ed, ICRC) vol 1 at 159–161.

33 International Court of Justice, above n 30, at [78].

population leads to unnecessary suffering – no military advantage is gained – and so do military operations with expected disproportionate civilian casualties: the casualties will go well beyond what is required to gain the expected military advantage. There is no need for these two kinds of suffering.

International humanitarian law, as currently understood, offers protection to civilians before and during military operations, but the protection is limited in their aftermath for the benefit of those wounded or the relatives of the deceased. Ignoring their suffering by not offering an explanation is a way of further increasing it with no military advantage to be gained. To prevent this reality, as has been said, the Martens Clause becomes available to support a novel interpretation in which the principle of prohibiting unnecessary suffering is the vehicle to incorporate the duty to explain as part of both the principle of distinction and the principle of proportionality whenever compliance with any of them is in question.

Finally, recognising the duty to explain would also be consistent with the trend in place since the 19th century to expand the relevance of humanitarian considerations and to delimit military necessity.

3. *Who could establish the duty to explain as part of the principles of distinction and proportionality*

The next issue to address is, who could introduce the duty to explain for the benefit of the other's civilians as an additional duty to those already in place to comply with the principles of distinction and proportionality. Obviously, the primary actors for the introduction of the duty to explain in general would be states either through treaty law or state practice transformed into customary international law. Hard law would then be an option, but not necessarily the first option to be expected. States could also start the process of introducing the duty to explain through soft-law instruments. For instance, in UN General Assembly resolutions dealing with a given conflict, that between Israel and Palestine, for instance; or through regional organisations' decisions or declarations, with the expectation that hard law would emerge in the future.³⁴ The soft-law process can be developed by some states in a learning-by-doing process;³⁵ the intervention of all of them, a significant majority, or the most powerful at the beginning may not even be necessary, although it would certainly be desirable.³⁶

However, the creation of international law has had actors other than states, as Judge Rosalyn Higgins noted,³⁷ and they could play a role in introducing and developing the duty to explain. Paramount among them is the International Committee of the Red Cross, whose mission includes “to work for the understanding and dissemination of knowledge of international humanitarian law

34 When describing the different relationships that can exist between hard law and soft law, Shaffer and Pollack, highlight political science scholarship positing that non-binding law can pave the way for binding law. See S Gregory Shaffer and Mark A Pollack *Hard and Soft Law: What Have We Learned?* (University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No 12-17, 2012) at 11.

35 David G Victor and others “Conclusions” in *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, Cambridge (Mass), 1998); as highlighted by Shaffer and Pollack, above n 34.

36 To be sure, this process would not be lineal. States have different preferences and objectives, which would have an impact on the evolution of soft-law norms, generally, and of creation of the duty to explain, specifically. On the issue of varied preferences, see, for instance, Shaffer and Pollack, above n 34.

37 Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press, Oxford, 1994) at 230.

applicable in armed conflicts and to prepare any development thereof.”³⁸ But other NGOs – Amnesty International, Human Rights Watch, for example – could also address the issue of consistently ignoring monumental civilian ordeal and promote the duty to explain.

A third actor potentially able to introduce the duty to explain as part of the principles of distinction and proportionality is international courts or fact-finding missions and other quasi-judicial bodies charged with the task of assessing particular events within international or non-international armed conflicts.³⁹ Although any finding and conclusion are formally binding or relevant to the given states or state involved, the reality is that the influence of these decisions or pronouncements can go well beyond the parties involved. Decisions of this kind can be used by other states and NGOs to support their own effort to introduce the duty to explain in a virtuous circle.

To be sure, whether or not a soft-law process would crystallise into a hard-law provision linking the duty to explain as part of the principles of distinction or proportionality cannot be anticipated, and it might not be strictly necessary. Indeed, the duty may not require new formal law to be operative, since it can be attached to the principles through interpretation, since, as was mentioned, the duty would not be a free-standing obligation but one attached to both principles.

4. *Consequences of the failure to explain*

The next issue to address is what happens if a state does not explain after attacks in which compliance with the principles of distinction or proportionality is in question. A definite answer would depend on how creation and development of the duty evolved, as a soft-law or hard-law process or both. However, there is a set of hypotheses to explore. If the duty to explain is developed through soft-law, once the military operation becomes known, the given state, first, will not get the benefit of the humanisation of the conflict to the point that the other party will have incentives to do the same. Second, the ignoring state will suffer reputational costs in the short, medium and long terms,⁴⁰ to be imposed by other states or important segments of the international community, since compliance with basic principles of international humanitarian law is in question. But the given government could also incur domestic costs, in the way of internal condemnations for its military operations and increasing political opposition – not minor costs in states with functioning democratic systems. A related point is the relevance that these reputational costs might have on the silent party. It all depends on the specific facts and context of the operations. Sometimes the reputational costs might not be significant enough, and sometimes they might, as some examples provided above evidence.

Third, if a result of an operation’s compliance with the principle of distinction or proportionality is in doubt and the party to the conflict responsible for the attack remains silent and does not explain, the inference is that the operation did not comply with international humanitarian law, and if the party is a state, it could incur international state responsibility; and the issue of reparation would be dealt with at some point in the future as part of any peace negotiations or before and

38 Statutes of the International Committee of the Red Cross (adopted 21 December 2017, entered into force 1 January 2018), art 5(2)(g).

39 Human Rights Council *Human Rights in Palestine and Other Occupied Arab Territories – Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Doc A/HRC/12/48 2009) at [29]–[31].

40 As to reputation costs as a result of lack of compliance with soft law, see Shaffer and Pollack, above n 34, at 4.

under any of the traditional forms highlighted by the International Law Commission in arts 34 to 37 of the Draft Articles on State Responsibility: restitution, compensation or satisfaction.⁴¹

In the event of non-international armed conflict, and depending on the nature of the conflict, the failure of non-state actors to explain would bring about domestic costs in the form of loss of support by segments of the civilian population.

B. Creating Incentives in the Interpretation and Application of International Criminal Law for Military Commanders to Not Ignore Civilian Casualties

In addition to deriving international duties from existing provisions of international humanitarian law in order to make civilian suffering visible, a second path that could be pursued to this end would be to bring about incentives in international criminal proceedings that improve the chances of acquittal of military commanders charged before the International Criminal Court (ICC) with the commission of the war crimes contemplated in art 8(2)(b)(i) and (iv) of the Rome Statute. The provisions set forth:⁴²

For the purpose of this Statute, “war crimes” means: ...

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; ...
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;⁴³

The third element of the war crime of attacking civilians is the mental element:

The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

For its part, the third element of the war crime contemplated in art 8(2)(b)(iv) is defined as follows:

The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects ... and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

41 Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission (adopted 2001).

42 Rome Statute of the International Criminal Court A/CONF183/9 (adopted 16 January 2002, entered into force 1 July 2002).

43 Another applicable provision is art 30. It defines the notion of mental element:

- 2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ...

On art 30 see Mohamed Elewa Badar and Sara Porro “Rethinking the Mental Elements in the Jurisprudence of the ICC” in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015) 649.

Footnote 37 to this third element of art 8(2)(b)(iv) is more explicit on the knowledge requirement and provides:⁴⁴

... this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

As can be seen, the assessment to be made for the purpose of these crimes is at the time of the attack and on the basis of the information available then.⁴⁵ Thus, apparently, subsequent behaviour by military commanders would not play any role in such an assessment. However, a different question also arises: what role can commanders' conduct *after* the attack play in assessing their intentions before the operation took place?

The existence of the *ex post* explanation should be regarded, in principle, as evidence of the accused's concern for the adversary's civilians and of lack of intent. Indeed, a commander arguing that he or she lacked intent might make his or her case stronger before the ICC if he or she showed an explicit concern for civilian casualties after the attack, by offering a well-supported explanation for it. There is a logical track of events: a commander intended to attack a valid military target only with no civilian casualties or made a judgment that excessive civilian casualties would not result. So, if they did occur, the *ex post* explanation should be seen as the continuation of such concern. On the contrary, a commander accused of having intended the outcome in terms of civilian casualties should have a much weaker case if he or she ignored them afterward. Ignoring them in the wake of the attack would be a consideration to take into account when assessing the intentions before it.

Certainly, there being an explanation afterward does not necessarily mean that there was no crime at the time of the attack. The veracity of the explanation still needs to be confirmed with the use of other sources,⁴⁶ and other elements that show lack of knowledge under art 8(2)(b)(i) and (iv) must be assessed. Among them are the extent of information collected before the operation, its reliability, the precautions taken, and other decisions made during the operation, such as its suspension once significant civilian casualties became evident and by virtue of art 57.2(b) of Protocol I.⁴⁷

Finally, it is important to highlight that the explanation that counts for the purpose of this analysis is the one made by the commander shortly after the attack took place, not the one he or

44 The principle of proportionality under the Additional Protocol I and the war crime set forth in art 8(2)(b)(iv) of the Rome Statute have different thresholds. A state might incur international responsibility for an attack without its commanders or soldiers having committed the said crime. Indeed, the Statute speaks of "overall military advantage" and "clearly excessive" incidental damage to civilians, qualifications that do not exist in Protocol I. See in this regard, Bothe, above n 17, at 379 and 398–399; Yutaka Akai-Takasashi "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual Criminal Liability" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) 325 at 325–326.

45 See in this regard, Knut Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press, Cambridge, 2003) at 164.

46 International Criminal Tribunal for the Former Yugoslavia, above n 31, at [90].

47 Article 57.2(b) of Protocol I provides as follows: "With respect to attacks, the following precautions shall be taken: an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

she could give during trial before the ICC. If commanders got incentives for offering explanations at this stage, they would not likely be genuine and would come very late, taking into account the substantive delays in ICC prosecution. Affected civilians should get an explanation sooner.

Past practice supports the approach suggested here to a certain extent, although not in the context of the Rome Statute. Indeed, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (ICTY/NATO Committee) was created by the prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) under art 18 of the ICTY Statute, to assess allegations that senior political and military figures from NATO countries had violated international humanitarian law during the campaign. The mandate of the Committee was to advise the Prosecutor on whether or not there was a sufficient basis to proceed with an investigation into some or all the allegations related to the NATO bombing.⁴⁸

The Committee was faced with a discussion of the existence of an element of recklessness with regard to the NATO attack on a civilian passenger train at the Leskovac railway bridge in Serbia on 12 April 1999. Thus, compliance with the principles of either distinction or proportionality was in doubt after the operation. The bridge was deemed a military target since it was used by Serbian forces to resupply its troops.⁴⁹ NATO regretted the attack, and a day later, on 13 April, a detailed explanation of its circumstances was offered by NATO's Supreme Allied Commander for Europe.⁵⁰ Although it was divided, the majority of the Committee relied on the explanations offered by NATO after the attack and concluded that no investigation was required.⁵¹

A similar approach was taken in relation with the bombing of the Chinese Embassy in Belgrade, in which compliance with the principle of distinction had been in question. The United States offered an apology to China and paid compensation to the Chinese government and to families of the victims.⁵² The collection of information was deeply flawed,⁵³ and the Embassy was thought to have been the Yugoslav Federal Directorate for Supply and Procurement, a valid military target. The ICTY/NATO Committee concluded:⁵⁴

It is the opinion of the committee that the aircrew involved in the attack should not be assigned any responsibility for the fact they were given the wrong target and that it is inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency.

As can be seen, it may not be impossible to make a connection between the swift recognition by the United States and its commanders of their mistakes, the identification of their origin, and the Committee's recommendation that the Office of the Prosecutor should not start an investigation regarding the bombing of the Chinese embassy.

In sum, the ICC should get some inspiration from what the ICTY/NATO Committee did. By considering commanders' subsequent explanations admitting civilian suffering as an element of the assessment of their intention prior to attacks in the context of criminal proceedings under

48 International Criminal Tribunal for the Former Yugoslavia, above n 31, at [3].

49 At [58].

50 At [59].

51 At [62].

52 At [84].

53 At [81]–[84].

54 At [85].

art 8(2)(b)(i) and (iv), the ICC would be creating incentives for this kind of positive action towards affected civilians by the other party's military commanders.

A similar analysis in terms of recognition of explanations by the ICC could also take place in the event of the invocation of grounds for the exclusion of criminal responsibility in connection with alleged commission of the crimes contemplated in art 8(2)(b)(i) and (iv) of the Rome Statute. Article 32 establishes the exclusion of mistakes of fact or law and its limits,⁵⁵ and art 31 consecrates the exclusion of actions taken as a result of self-defence, duress or necessity, among others.⁵⁶ When assessing the existence of a ground for exclusion invoked by the accused, the ICC should pay particular attention at the existence of explanations shortly after the given military operation. One would expect commanders and other military personal to disclose as soon as possible after the event the potential existence of a ground excluding any criminal responsibility.⁵⁷ In other words, giving an explanation shortly after the given military operation in which the facts supporting the exclusion of criminal responsibility have been made public would be an important element at the time the existence of the ground for exclusion was assessed by the ICC. On the contrary, a lack of explanation would constitute evidence against the existence of the ground for exclusion.

The final issue is whether the creation by the ICC of incentives for commanders' ex post explanations to affected civilians in military operations in which significant civilian casualties occurred constitutes a novel interpretation that, if triggering a dispute between two or more parties to the Statute, would require a decision by the Assembly of the State Parties under art 119.2 of the Rome Statute. It seems to the present author that the creation of incentives to explain does not alter the elements of the crime in art 8(2)(b)(i) and (iv) nor the conditions for the application of grounds for exclusion of criminal responsibility. Consequently, creating incentives to explain would not require the Assembly's intervention to be implemented by the ICC.

C. *Aggregation of Civilian Suffering and the Interpretation of International Humanitarian Law in Protracted Conflicts*

Attempts should be made to find ways in which civilians are given, as a matter of law, a higher level of protection in this type of conflict, not only after attacks, as was discussed in the previous part, but before them.

The mere persistence of protracted conflicts reveals that the layers of civilian suffering have been accumulating year after year. Past civilian casualties are quickly ignored by detached observers. However, victims hardly go through a similar process. So, for societies in conflict, the suffering brought about by new civilian casualties might add to that of the old ones: the stories of civilian suffering for the warring parties accumulate.

The notion of aggregation of civilian suffering – which would be at the root of the proposal for new forms of interpretation of international humanitarian law in protracted conflicts – is grounded

55 On the topic of mistakes in fact and law, see Albin Eser "Mental Elements – Mistake of Fact and Mistake of Law" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 934–948; A Caesius "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 *Eur J Int Law* 144 at 155–156.

56 For an analysis of art 31, see Kai Ambos "Other Grounds for Excluding Criminal Responsibility" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, Oxford, 2002) at 1003.

57 To be sure, the accused has to prove all of the requirements of self-defence.

on the Indian approach to history highlighted by the French historian Michel de Certeau. He pointed out:⁵⁸

“new forms never drive the older ones away”. Rather, there exists a “stratified stockpiling” ... A “process of coexistence and reabsorption” is ... the “cardinal fact” of Indian history.

The analogy of the reabsorption of civilian ordeals may create a certain type of factual situation in which the protracted character of a conflict would play a role in the interpretation of some provisions of international humanitarian law, such as the principle of proportionality.

Let’s take the case of the Israeli attack that led to the death of 18 members of the Al-Batsch family, which was the subject of Palestine’s letter to the Council of 14 July 2014. According to the letter, the following Palestinian relatives died as a result of a military operation carried out by Israel: Nahed Nai’im Al-Batsch, age 41; Bahaa Majed Al-Batsch, age 28; Qusai Issam Al-Batsch, age 12; Mohammed Issam Al-Batsch, age 17; Ahmed Nu’man Al-Batsch, age 27; Yehya Ala Al-Batsch, age 18; Jalal Majed Al-Batsch, age 26; Mahmoud Majed Al-Batsch, age 22; Marwa Majed Al-Batsch, age 25; Majed Subhi Al-Batsch; Khaled Majed Al-Batsh, age 20; Ibrahim Majed Al-Batsch, age 18; Manar Majed Al-Batsch, age 13; Amal Hasan Al-Batsch, age 49; Anas Alaa Al-Batsch, age 10; Qusai Alaa Al-Batsch, age 20; Zakariya Alaa Al-Batsch and Aziza Youssef Al-Batsch, age 59.⁵⁹

The communication stated that the attack was aimed at Tayseer Al-Batsch, a police chief in Gaza,⁶⁰ who was moderately injured and survived. Let’s assume that Israel has again identified his location: he is again home with what is left of his family. Can the two operations be totally disconnected? Should the proportionality assessment be made only in light of the factual conditions of the second attack? No, the concept of excessive civilian casualties, at least in this particular event, should take into consideration the protracted nature of the conflict and the fact that the same individual had been previously targeted, with significant civilian casualties of an identical character: his relatives.

The term excessive should have a different connotation: a stricter approach should be required, and the proportionality test would be more difficult to meet for the second operation. In other words, expected excessive civilian casualties could be found more easily in the second phase of the attack, as a result of its links with the first one in terms of the identical target and the identical character of civilian casualties.⁶¹ Given the facts that the target is the same individual and that the civilians affected have the same nature – the surviving relatives of the first attack, whose suffering will be cumulative – it would be possible to treat the two operations as being parts of a single

58 Michel de Certeau *The Writing of History* (Columbia University Press, New York, 1988) at 4.

59 Letter from the Permanent Observer of the State of Palestine to the United Nations the Secretary-General the President of the General Assembly and the President of the Security Council “Identical letters dated 14 July 2014 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/640-S/2014/491” (14 July 2014).

60 At 2.

61 This argument would apply, in principle, only to planned operations. It would not apply to targets of opportunity in which intelligence on civilians may not be widely available.

attack.⁶² Consequently, art 57.2(a)(iii) and (b) of Protocol I on precautions would play a role at the moment of planning or execution of the second operation and prevent it.⁶³

The situation is similar, although not identical, to the approach taken by the Trial Chamber of the ICTY in *Prosecutor v Kupre[ki]*. There, the Trial Chamber opened the door for the possibility of assessing repeated attacks against *different* targets in a cumulative way. It relied on the Martens Clause to arrive at this conclusion, worth quoting at length:⁶⁴

However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

Here the ICTY Trial Chamber interpreted the Martens Clause in a different way from that advocated by Cassese.⁶⁵ The Trial Chamber did not seek a specific principle of humanity, as Cassese advocates, to make use of the Clause but relied on it to guide the Chamber's application of the principle of

62 This situation can take place in any type of conflict, which does not diminish the need to further protect civilians when the situation occurs in those conflicts of a protracted nature.

63 These provisions establish:

With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

...

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that ... the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

See in this regard Canizzaro, above n 14, at 335.

64 *Prosecutor v Zoran Kupre[ki], Mirjan Kupre[ki], Vlatko Kupre[ki], Drago Kupre[ki], Dragan Kupre[ki], and Vladimir [Anti]* [2000] IT-95-16-T (International Criminal Court) at [525]–[526].

65 Cassese, above n 32, at 207; For a similar argument, see Pictet, above n 32, at 59–60; See also on the application of the clause Mero, above n 32, at 87–88; Crawford, above n 32; "Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause", above n 32; *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, above n 32, at 159–161.

proportionality in order to recognise the cumulative effect of the attacks and “expand the protection accorded to civilians.”

The *Kupre[ki]* interpretative approach of the principle of proportionality recognising the cumulative effect of different operations in order to expand the protection of civilians can be sometimes useful in the event of protracted conflicts. This would be so in relation to those civilians who had already been casualties of the conflict as a result of a previous attack and are at risk of being so again as a result of a forthcoming military operation.

The issue, then, is whether the notion of “expected civilian casualties” in the principle of proportionality and in art 51.5(b) of Additional Protocol I can be lawfully understood to include the first casualties when the proportionality assessment of the second operation against the same target is carried out. Apparently not; what is certain is no longer expected. However, if the attack is seen as a single operation against the same target, all of the civilian casualties of an identical nature – the certain ones of the first phase plus the expected ones of the second – do not become certain. In other words, the incorporation of the first civilian casualties does not prevent an assessment of the expected casualties of the second and an evaluation of whether the two combined are proportionate in light of the concrete military advantage to be obtained at the end. Consequently, the proposal suggested here does go against this constitutive element of the principle of proportionality.⁶⁶ Taking the two attacks as separate may be “contrary to the demands of humanity,” to use the words of the ICTY Trial Chamber.

The Martens clause would then guide, as in *Prosecutor v Kupre[ki]*, the interpretation of the principle of proportionality in protracted conflicts to expand the protection accorded to those civilian relatives who could again be casualties in the second phase of the operation against the same target.

When carrying out this kind of analysis of the principle of proportionality in certain circumstances in protracted conflicts, there is also another dimension that it is important to consider. Although the individual may be the same, the military advantage to be obtained may have increased or decreased over the months or years separating the two military operations. Such an increase or decrease would also need to be included within the proportionality analysis at the time of the second phase of the attack.

However, it is worth admitting that the application of this interpretation has its limits. First, the interpretation would be valid only when the planners of the second operation were or should have been aware of the existence of the first one against the same target, of the civilian casualties in it, and when the commanders had reasons to believe that some of the expected civilian casualties of the second operation would again be those of the first one. If any of this information was unknown before the attack but subsequently became public, there would not be a violation per se of the principle of proportionality as formulated here, for, as was illustrated, the assessment was carried out on the basis of the information available prior to the military operation. Second, the suggested approach would not be applicable when the valid target was not in a similar situation and was surrounded by other kinds of civilians. Certainly, the test of proportionality to be applied is the usual one centred on the expected civilian casualties of the new attack.

⁶⁶ Finally, it is important to state that the recognition of a protracted conflict may not always influence the interpretation of international humanitarian law. There are countless examples in which such recognition should not take place. For instance, valid military targets located at the same place can be destroyed time after time, since such attacks will lead to gaining definite military advantages.

Thus, the proposal suggested here does not create an unrealistic limitation on military operations against the targeted individual and affords a very important protection to a particular group of affected civilians who urgently require it. The proposal achieves a balance, a clear objective of the negotiations of Protocol I.⁶⁷

II. CONCLUSION

This article is a response to 50 communications forwarded by Israel and Palestine to the Council from August 2012 to July 2014 – the 64th, 65th and 66th years of the conflict – reporting on its impact on Israeli and Palestinian populations. Regrettably, both parties have ignored each other's indescribable civilian tragedies. Such an appalling reality calls for a reinterpretation of international law in order to alter adversaries' calculations and make their opponents' civilian tragedies visible to them in this armed struggle or in any other in which the parties are behaving likewise. This article puts forward some suggestions.

The first suggested way is to establish, on each adversary and its government, the duty to explain after attacks with apparent excessive civilian casualties or significant risk to civilian populations in which compliance with the principles of distinction and proportionality is in question. When the principle of distinction seems to have been violated, parties to the conflict should explain why the target was deemed military and lawful. On the contrary, when compliance with the principle of proportionality is in doubt, the content of the duty should be an explanation of what commanders believed about the expected civilian casualties of the attack on a particular target before the operation; of the concrete and definite military advantage that was pursued by it; of the possible causes of the significant civilian casualties that occurred; and why, if this was the case, the attack was proportionate under international humanitarian law.

The article has illustrated that such duty, which would not be a free-standing obligation, could be derived from the above-mentioned principles of international humanitarian law interpreted in light of the Martens clause.

The second way to interpret international law in ways that makes an opposing party's civilian suffering visible is by interpreting the Rome Statute in ways in which accused commanders could strengthen their legal positions in criminal proceedings under art 8(2)(b)(i) and (iv) if they explained after attacks the reasons for the excessive civilian casualties or significant risk to civilians. This manuscript has shown that the ICC should follow the approach that the ICTY/NATO Committee adopted when it took into account NATO's explanations after three attacks as evidence supporting the commanders' assessment before or at the time of these operations to conclude that their decision did not merit criminal investigations by the ICTY.

In addition, and on the basis of events described in the narrative of the Israeli and Palestinian letters and on the protracted nature of this conflict, this article has shown that some provisions of international humanitarian law should be interpreted in different ways under certain circumstances in this kind of conflict. This would be so in situations in which those civilians who have already been harmed in a previous military operation face the risk of being so again in a subsequent one. Their suffering will accumulate; therefore, there is a need to accord those civilians a higher level of protection. One way to do so, it has been suggested here, is by incorporating the first casualties in the proportionality assessment of the second operation.

67 Michael Newton and Larry May *Proportionality in International Law* (Oxford University Press, Oxford, 2014) at 23.

Being “blind with pain”, in the words of Primo Levi, is a dominant reality for parties to protracted armed conflicts. Its expression, in ignoring the other’s civilian suffering, enhances the ordeal on both sides. International Humanitarian Law and International Criminal Law should prevent this from happening.