Abstract:

This research paper explores the challenges of applying current legal protection frameworks, including international humanitarian law and international human rights law, to the changing nature and patterns of contemporary armed violence. The research will focus on two case studies: civil unrest, examining the Arab Uprisings and protracted violence in Syria; and urban violence. It will also explore the intersection of international humanitarian law, international human rights law and the emerging international norm ‘responsibility to protect’. Finally, the paper will identify targeted recommendations to strengthen the legal protective environment in these ‘Other Situations of Violence’.

Keywords: Other Situations of Violence, Protection, Protection of Civilians, Arab Uprisings, Syria, Urban Violence, Protection Frameworks, Responsibility to Protect

About the Author: Amra Lee is a humanitarian protection practitioner who has worked for the UN, international NGOs and governments at the global, regional and national levels. This paper is informed by her experience working as a regional analyst during the first year of the crisis in Syria.

I. Introduction

The nature and patterns of contemporary armed violence are very different from those that the four Geneva Conventions of 1949 and their Additional Protocols were developed to address. The significant shift in the conduct of hostilities from between states to within states, the use of new technologies in warfare, the increasing lethality of urban violence, the Arab Uprisings, and the
global ‘war on terror’ have all presented significant challenges to applying International Humanitarian Law (IHL) and promoting protection for affected populations. This research paper will explore the challenges of applying current international legal protection frameworks, including IHL, to the changing nature and patterns of contemporary armed violence. It will further explore the contentious interplay between IHL and international human rights laws (IHRL) in promoting the protection of civilian populations in situations of armed conflict and ‘other situations of violence’. The paper will focus on two case studies in demonstrating these challenges: civil unrest, examining the Arab uprisings and protracted violence in Syria; and urban violence. Next, the paper will explore the intersection of IHL, IHRL and the emerging international norm ‘responsibility to protect’ and finally identify targeted recommendations to strengthen the legal protective environment for these other situations of violence.

II. Definitions

The term ‘protection’ is often a source of contention between humanitarians with different agencies interpreting the term according to their respective mandates. The most commonly accepted definition of protection was agreed during a series of ICRC facilitated workshops from 1996-2001 and was subsequently endorsed by the Inter Agency Standing Committee (IASC) in 2005:

> All activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender). (1999)

While this definition has been criticized for being too broad, and is subject to different interpretations by humanitarian agencies at the programming level, it remains the most commonly used definition to date. Perhaps more contentious than defining protection is the current status of the term ‘protection of civilians’ (PoC). To IHL purists PoC is a term with a specific legal meaning within the realm of IHL, however increasingly this term is being used in a wider range of contexts. There is the misuse of the term by the media and other stakeholders including some NGOs to inaccurately refer to general protection matters as PoC. We have also seen a progressive expansion of the use and scope of the term PoC through the UN Security Council, initiatives such as the Regional Assistance Mission to the Solomon Islands (RAMSI) and self-mandated NGOs such as Oxfam[1]. For the purposes of this paper protection of civilians will be used in its broader rather than strictly IHL legal context to refer to protection challenges[2] in both situations of armed conflict and other situations of violence. At present there is no legal definition of ‘other situations of violence’ with the ICRC preferring to focus on consequences rather than potentially narrow legal definitions.[3] The legal basis for protection in other situations of violence will be addressed in section v) below.

III. Challenges of applying IHL to the nature and patterns of contemporary armed
Common Article 2(1) of the Geneva Conventions defines its application to "all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". At the time of drafting the Conventions, armed conflict was predominantly conducted between States. However since then there has been a significant shift in the conduct of contemporary hostilities from between states to within states. In 2011 there were 27 intra-state armed conflicts, one inter-state armed conflict and nine internationalized intra-state armed conflicts. The overwhelming shift from international to internal armed conflict consequently reduces the treaty-based protection measures for civilians and other vulnerable groups than those provided for in international armed conflict under IHL. For situations of internal armed conflict between a state and an armed group or between armed groups within a State, protection will be limited to those provided by Common Article 3 (of the Geneva Conventions) as a part of customary international law. Further, Additional Protocol II while more restrictive, may result in additional protection measures only in situations where the conflict involves a State and a non-State armed group, where the State is a party and the hostilities are conducted on its territory.

Public concern over the impacts of armed conflict and violence has grown significantly. This concern has been facilitated by the growth in information technology and subsequent social media tools that enable real time access to events on the ground. It has also been fueled by advocacy initiatives and controversial statistics such as those that claim in World War I, 90 per cent of casualties were combatants whereas now 90 per cent are civilians. Furthermore, improved analysis and research methodologies are demonstrating significantly higher conflict-related deaths due to indirect factors such as the break down in the rule of law and impeded access to health care. Taking Iraq as an example, despite the United States stating it would not record civilian casualties following their invasion in 2003, from 2003 to 2010 Iraqi Body Count estimated 100,000 Iraqi civilian deaths taking a more direct approach. The Lancet Institute, focusing on the period from 2003 to 2006 alone, estimated 654,965 Iraqi deaths though it included indirect factors such as degraded infrastructure and impeded access to healthcare in its methodology.

Further challenges have been presented with the dramatic global shift from rural to urban living with 2 per cent of the population deemed urban in the 1800s, to 30 per cent in 1950, over 50 per cent in 2008 and a projected increase to 60 per cent in 2030. Rapid urbanization is also skewed towards developing contexts which are currently experiencing 90 per cent of the rapid urbanization trend. The African continent is experiencing the fastest rate of urbanization, and Latin America and the Caribbean are already over 75 per cent urbanized and also host to some of the world’s most violent cities. Rapid urbanization and the subsequent rise of mega-cities and informal settlements have significantly increased vulnerability to the impacts of armed conflict and violence. Informal settlements are often high density with higher exposure to disaster risks, lacking in basic service provision including security and host to some of the world’s most vulnerable populations. Urbanization presents two challenges to armed conflict and armed violence, the first is the alarming increase in 'civilian' casualties with the conduct of hostilities and the use of explosive weapons,
in densely populated areas, and also through the breakdown in the rule of law and chronic urban violence in several cities within Sub-Saharan Africa and Latin America and the Caribbean. Having outlined several challenges of IHL and contemporary armed conflict and violence it is now necessary to explore the relationship between IHL and IHRL in armed conflict and other situations of violence.

IV. International Humanitarian Law (IHL) and International Human Rights Law (IHRL) nexus: complementary or mutually exclusive?

There are strongly divergent views on the relationship between these two key bodies of international law in promoting the protection of civilian populations in armed conflict and other situations of violence. Before reviewing the diverging theories it is first necessary to define both bodies of law:

<table>
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<th>International Humanitarian Law (IHL) is a set of rules, which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.[18]</th>
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<td>International Human Rights Law (IHRL) is a set of international rules, established by treaty[19] or custom on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments.[20]</td>
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IHRL covers a wide range of civil, political, economic, cultural and social rights that are frequently violated in both situations of armed conflict and other situations of violence. In addition there are special protections for women, children, migrants and specific prohibitions against acts such as torture. While some rights may be derogable when specific conditions have been met, such as those deemed necessary in a state of emergency, others such as the right to life and conduct that would amount to torture, cruel, inhumane or degrading treatment remain non-derogable at all times.

In terms of complementarity, both sources of law comprise of conventions/treaties and protocols to which states voluntarily subscribe; and customary international law, which reflects the practice of states and subsequently become binding on states. Further “both share the aim of protecting all persons and are grounded in the principles of respect for the life, well-being and human dignity of the person”. [21]

Despite these complementarities, IHL and IHRL diverge on key issues such as the use of force and the right to life. IHRL upholds the right to life at all times while IHL regulates the lawful use of force. Further both legal frameworks confer responsibilities on different stakeholders, IHRL confers duties on states and persons within its territory[22] and IHL regulates the conduct of hostilities between states and also non-state armed actors.[23]

Humanitarian actors operating outside the more legalistic IHL sphere tend to perceive IHL as being primarily concerned with the protection of civilian populations and can be confronted with
the approach taken by military IHL advisers to the conduct of operations and to concepts such as collateral damage. Such interpretations of IHL are at odds with the public advocacy positions taken by the UN, NGOs and civil society to promote and call for the highest possible protection standards for civilian populations affected by armed conflict. These fundamentally opposing views on the purpose of IHL reflect the wide range of interpretations taken to apply IHL in practice.

While progress has been made in the general acceptance of the application of both IHL and IHRL in situations of armed conflict, theories remain divergent in respect of their interaction in practice.

There are three main approaches to the application of IHL and IHRL in situations of armed conflict:

1. The 'lex specialis' approach holds that the more specific rule (IHL) should be applied over the more general (IHRL);
2. The complementary and harmonious approach as supported by the Human Rights Committee argues that “both spheres of law are complementary, not mutually exclusive”; and
3. The Sassoli ‘interpretative approach’ takes a different interpretation to the lex specialis principle; it advocates that the context and issue in question should determine whether IHL or IHRL is the more relevant framework.

According to The Office of the United Nations High Commissioner for Human Rights (OHCHR), in practice these academic distinctions do not commonly arise due to similar protections offered by both IHL and IHRL frameworks, although other actors offer different opinions on this. OHCHR is a strong proponent of the concurrent and continuous application of IHRL drawing on decisions of human rights and judicial organs to support its position. For example, the International Court of Justice (ICJ) has clearly stated “the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency” and only then after very clear criteria have been met.

Interestingly, IHL often relies on IHRL accountability mechanisms which practically undermines a mutually exclusive approach. While one’s view on the applicability of IHL versus and/or with IHRL will ultimately depend on one’s technical background and objective – it is clear that while both frameworks apply in situations of armed conflict, the divergence is in respect of how to apply them. It is also important to highlight that both legal frameworks are not static but rather in a state of permanent evolution.

V. Legal basis for protection in ‘other situations of violence’

Increasingly the ICRC and other humanitarian actors including the UN and NGOs are finding themselves responding to the humanitarian and protection needs of civilian populations affected by ‘other situations of violence’. Common examples of this include early phases of the Arab uprisings, electoral-related violence and urban violence. This presents challenges for agencies vis-à-vis their mandates and respective international legal frameworks that were not drafted to address such concerns. IHL purists may perceive this as mandate creep whereas pragmatists accept the need for
humanitarian agencies to adapt to changing contexts and the resulting humanitarian imperative.

As highlighted in Section ii) definitions, while there is no current legal definition[31] for ‘other situations of violence’, Article 1(2) of Additional Protocol II states “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflict.” As a result of this exclusion, the basis for ICRC action in other situations of violence is based on the right of initiative contained within the Statutes of the International Red Cross and Red Crescent Movement and negotiated with host governments.[32] Furthermore ‘In situations that are not covered by these treaties (Geneva Conventions and Additional Protocols), in particular internal disturbances, civilians are protected by other international bodies of law, notably human rights law and its inalienable rights.[33] by national laws compatible with international laws and by the principle of humanity.”[34] In terms of human rights law, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials are an important non-binding instrument to advocate compliance with to protect civilian populations from the excessive use of force by security forces during other situations of violence. [35] Having reviewed the legal basis for protection in other situations of violence it is now important to review the case studies and associated response challenges.

VI. Other Situations of Violence Case study 1 – Civil unrest, the Arab Uprisings and protracted violence in Syria

Protracted civil unrest scenarios present humanitarian agencies, and protection specialists in particular, with mandate and associated challenges related to response. In the absence of a classification of armed conflict, under human rights law the main duty bearer remains the state, which in many situations of civil unrest can often be the source of threats to the protection of at-risk individuals as witnessed during the Arab Uprisings.[36] State of Emergency laws were quickly invoked, or in some cases, such as Egypt and Syria, had been in place for almost 50 years.[37] In these situations and many others involving authoritarian regimes, governments fail to comply with the strict specifications in which such exceptions were intended to be legitimately invoked,[38] that is reasonable restrictions on freedom of movement and association for the public good rather than an attempt to justify otherwise illegitimate violations of basic human rights to the international community. In Syria, the government justification for the state of emergency and military response in 2011 was based on a constructed terrorism narrative.[39] Following such repressive tactics in both Libya and Syria, civil unrest escalated into armed conflict, albeit more quickly in Libya than Syria.

Following some seventeen months of ‘civil unrest’ and an estimated 26,000 casualties[40] the ICRC declared the situation in Syria as meeting the threshold of internal armed conflict under Common Article 3 of the Geneva Conventions.[41] In line with Common Article 3 of the Geneva Conventions, the ICRC’s three criteria for classification of an internal armed conflict requires (i) “protracted armed violence between government authorities and organized armed groups, or between such groups within a State”,[42] (ii) a minimum level of intensity and (iii) a minimum level of organization of the parties. The significant delay for the classification in Syria was due to the Free
Syrian Army not being able to demonstrate the latter criteria.[43]

Prior to this classification the situation in Syria had been considered localized civil conflicts concentrated in Homs, Hama and Idleb. However, from its early days, the uprising demonstrated concerning patterns of armed violence with the deployment of military personnel and assets, disproportionate use of force and widespread and systematic human rights violations. The impacts on the Syrian population were strikingly similar to those of armed conflict – high civilian death rates and injuries, attacks on medical facilities and personnel, attacks on schools, displacement of populations, military operations and sieges, impeded access to basic services and grave human rights violations including sexual violence amongst others.

While it took seventeen months to make such a classification, the Syrian people suffered under an armed conflict-like situation and the resulting consequences, with the Syrian government using the ambiguity (in respect of the classification of armed conflict) to appease the international community with empty promises of reform. Legal classifications and frameworks are important but when they do not match the reality of contemporary humanitarian challenges, or do not provide a stronger platform for promoting protection of civilian populations, clearly some evolution is required. While the Responsibility to Protect doctrine outlined in section viii) goes someway to bridge the gaps in the protection framework for mass atrocity crimes committed in other situations of violence, further research is needed into the IHL-IHRL nexus and protection framework gap in protracted situations of civil unrest. Such research should ideally inform international initiatives to strengthen protection frameworks and ultimately promote higher protection for civilian populations caught in the midst of such violence.

VII. Other Situations of Violence Case study II – Urban violence

Rapid urbanization and urban violence present significant challenges to humanitarian action and to IHL in protecting civilian populations from contemporary armed violence. To help situate the gravity and scale of the issue, urban violence and criminality in particular are estimated to have claimed more than 60,000[44] lives in Mexico since 2006. Further, a 2007 UN Office on Drugs and Crimes (UNODC) report found the levels of violence in El Salvador in 1995 were higher than that of the civil war of the 1980s.[45] In addition to high death tolls, the humanitarian features of urban violence can share striking similarities with that of armed conflict: impeded access to basic services, recruitment of children and youth, deployment of military personnel, medical needs (including mental health and psychosocial support), kidnapping, torture and sexual violence amongst others.[46]

ICRC and Médecins Sans Frontières (MSF) have undertaken pilot projects to respond to the humanitarian consequences of urban violence in the favelas of Rio de Janeiro Brazil. The characteristics of the armed violence in the favelas share several features of internal armed conflict: “organized armed groups controlling well-defined territories, regular open hostilities with military-grade weapons and grave humanitarian consequences for victims.”[47] However the current consensus amongst IHL experts is that such situations do not attract the application and
While some may flag the criminal character of the non-state armed groups this particular aspect actually has no bearing on the mandate of organizations such as the ICRC to respond.

While IHL specialists are caught in debate over legal technicalities, the impacts on the ground are very similar to that of armed conflict for affected populations. With two thirds of the world’s population projected to be urban by 2020,[48] and the majority of that growth taking place in developing countries, the need to clarify and strengthen protection frameworks to address urban violence will only increase in urgency. Having reviewed both case studies and associated challenges it is now necessary to look at ways to redress these protection framework gaps.

VIII. Gaps in international legal protection frameworks – Responsibility to Protect (RtoP), IHL, IHRL and other situations of violence

RtoP is an emerging international norm concerned with protecting populations from mass atrocity crimes. The norm as defined in the 2005 World Summit Outcome document is derived from a positive notion of sovereignty as responsibility, is based in both IHL and IHRL, and covers four mass atrocity crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. RtoP can be summarized into the following three pillars:

1. The State carries the primary responsibility for the protection of its population.
2. The international community has a responsibility to assist States in fulfilling this responsibility.
3. The international community should use appropriate diplomatic, humanitarian and other peaceful means to protect populations from these crimes. If a State fails to protect its populations or is in fact the perpetrator of crimes, the international community must be prepared to take stronger measures, including the collective use of force through the UN Security Council.

RtoP remains a controversial norm and there is considerable resistance to its application by some UN member states, particularly in relation to pillar 3 which several member states perceive as being open to misuse. There are considerable similarities between IHL and RtoP, particularly in relation to the capacity building requirements of IHL and the prevention pillar of RtoP. Many of the measures outlined in the Secretary-General’s report on implementing RtoP (2009) mirror those obligations under Common Article 1 of the Geneva Conventions.[49] While there are also clear differences, ultimately RtoP is complementary to the bedrock of IHL, the doctrine of protection of civilians.

Despite being an emerging international norm, RtoP’s recent application vis-à-vis the Arab Uprisings and in Libya and Syria in particular are witness to both its potential and also its limitations.[50] RtoP has significant potential to assist in other situations of violence that fall short of attracting the application of IHL. Given RtoP’s applicability in both situations of armed conflict (all four crimes) and in ‘peace’ (genocide, ethnic cleansing and crimes against humanity only), it has significant potential to fill protection framework vacuums at the very least, with respect to accountability for mass atrocity crimes committed in other situations of violence.[51] Having briefly
outlined the potential of RtoP with respect to gaps in the international legal protection framework it is now important to identify targeted recommendations to strengthen the legal protective environment in other situations of violence.

IX. Recommendations

The gaps highlighted in the current international legal framework for protection in other situations of violence such as civil unrest and urban violence also present opportunities for reflection. IHL and IHRL both share common aims of “protecting all persons and are grounded in the principles of respect for the life, well-being and human dignity of the person”. When these aims are not being achieved due to real or perceived gaps in legal frameworks, restrictive interpretations, and lack of state accountability, clearly an evolution in this regard is needed. A series of targeted recommendations to strengthen the legal protective environment for other situations of violence has been outlined below.

Recommendations for:

- **States** (including donors) – sponsor further research into strengthening protection frameworks in other situations of violence; provide diplomatic and financial support to strengthen international and national accountability mechanisms; continue to target sanctions against individuals responsible for IHL and IHRL violations; prevent the sales of weapons and arms transfers to states with poor records of IHL and IHRL compliance – in both situations of armed conflict and other situations of violence; and support the ICRC and other humanitarian actors in strengthening their mandates to provide protective humanitarian action to populations affected by other situations of violence;

- **ICRC** – lobby member states to sponsor further research and consensus building to strengthen protection frameworks in other situations of violence; support expansion of IHRL to promote protection of civilian population objectives, particularly where IHL protection measures are weak or inadequate;

- **NGOs** – conduct research to inform lobbying and support the evidence base on the need to strengthen protection frameworks in other situations of violence;

- **UN** – support research and international consensus building initiatives to strengthen protection frameworks in other situations of violence; support Security Council mandates in respect of the protection of civilians based on consequences of armed violence rather than overly restrictive classifications of armed conflict;

- **Academics and/or IHL specialists** – continue to explore the IHL-IHRL nexus and RtoP doctrine to promote the highest possible protection standards for populations affected by armed conflict and other situations of violence in particular.

[1] Example of an international NGO expanded interpretation of protection of civilians can be


[4] Intended to include both armed conflict within the meaning of IHL and armed violence that fails to attract the application of IHL such as urban violence and civil unrest.

[5] According to the Uppsala University Department of Peace and Conflict Research. Noting they may be using their own definitions: http://www.pcr.uu.se/research/ucdp/


[8] Provided additional criteria are met.

[9] An example of an article reporting this statistic: Layton, Robyn QC (2000), *International Law and Armed Conflict: implications for emergency and humanitarian organisations*, *Australian Journal of Emergency Management*. While statistics such as these are not necessarily widely endorsed now due to methodological concerns, it is clear that there has been an overwhelming shift in the nature of civilian casualties due to factors such as changes in the methods and means of warfare, the shift from the conduct of hostilities on ‘battlefields’ to densely populated urban environments and the continued use and development of weapons that are unable to discriminate amongst others. http://www.em.gov.au/Documents/International_law_and_armed_conflict.pdf Accessed on 24 December 2012.

[10] For more on this see: https://www.iraqbodycount.org and the following quote from US General Tommy Franks “We don’t do body counts”.


[12] As a result of the US-led occupation, including both combatants and non-combatants and indirect causes such as increased criminality, degraded infrastructure and impeded access to healthcare.


[15] As has been witnessed several times in heavily urbanised contexts such as Lebanon and occupied Palestinian territories in the Middle East and more recently in Libya and Syria.

[16] "According to the British NGO, Action on Armed Violence, almost 38,000 people were killed and injured by explosive weapons worldwide in 2012. 78 per cent were civilians. When explosive weapons were used in populated areas, 91 per cent of casualties were civilians." Under Secretary General and Emergency Relief Coordinator, Valerie Amos Security Council Briefing on Protection of Civilians 12 February 2014: https://docs.unocha.org/sites/dms/Documents/USG%20Valerie%20Amos%20Security%20Council%20Remarks%20on%20Protection%20of%20Civilians%2012%20February%202014.pdf


[19] Key sources include the Universal Declaration of Human Rights and nine conventions.


[22] Or jurisdiction.


[25] Ibid.


[28] Which is further supported by the Human Rights Committee in General Comment No.31 (2004) para 11.


[30] That is before the degeneration into and classification of armed conflict in Libya and Syria.

[31] With actors such as the ICRC preferring to focus on consequences rather than potentially narrow legal definitions: http://www.icrc.org/eng/resources/documents/misc/america-internal-violence-itw-070708.htm

[32] Articles 5(2)(d) and 5(3); see also Seville Agreement.

[33] Rights that are considered as universal standards and to which no derogation is admitted, even in time of public emergency or other exceptional situations. Those rights comprise: the right to life; the prohibition of torture and other cruel, inhumane and degrading treatment or punishment; the prohibition of slavery and forced labour; the principle of legality and non-retroactivity of punishments.


[36] Failure to act may also be relevant.

[37] Noting they were not complied with.

[38] While Article 4(1) of the International Covenant on Civil and Political Rights provides limited derogations “in time of public emergency that threatens the life of the nation and the existence of which is officially proclaimed” it must be temporary, necessary and proportional, consistent with other obligations under international human rights and humanitarian law and there must be procedural guarantees. See OHCHR (2011) *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, pp47-48.

[39] Which globally is one of the most commonly invoked defences by governments to justify breaches of international and domestic human rights obligations.
[40] Including 18,500 civilians according to the Syrian Observatory for Human Rights as of August 2012.

[41] Additional Protocol II which governs internal armed conflict between states and non-state actors is not directly applicable here due to Syria not being a party.


[43] For more information please see: 


[47] Ibid.


[50] In Libya the controversial use of force and what some member states perceived to be an over-interpretation of the UN Security Council Resolution 1973 (2011) and subsequent NATO mandate. In Syria, the Kofi Annan peace plan was an example of the international community supporting diplomatic and peaceful means of protecting populations from mass atrocity crimes.


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