Expert Opinion on the Meaning and Scope of Feasible Precautions under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the Context of the Operation “Protective Edge”

Dr. Théo BOUTRUCHE
Independent Consultant in International Human Rights and Humanitarian Law

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1 The views expressed in this Expert Opinion are solely those of the author and do not necessarily reflect those of the organizations and institutions the author has worked for in the past or currently works for.
INTRODUCTION

This Expert Opinion was requested by the non-governmental organization (NGO) Diakonia in the context of the 2014 armed conflict between Israel and Palestinian armed groups that mostly took place in the Gaza Strip, with some military activities occurring outside, i.e. in relation to the tunnels and other infiltrations into Israel. It aims at providing a legal opinion on the content, interpretation and scope of precautionary obligations under the current state of international humanitarian law (IHL). Additionally, it will provide a preliminary assessment of the extent to which the Parties to the conflict complied with those obligations with regard to selected cases and practices.

This Expert Opinion is therefore primarily based on IHL norms. It is not intended to reach factual conclusions, nor legal determinations based of the facts for that matter. The references to facts shall not be construed as the result of factual determinations made by the author through an independent verification process. As far as such factual references are made, they are based on information from open and public sources (identified in the footnotes), including the United Nations (UN), international and local NGOs reports that conducted fact-finding work on the ground according to their own methodology as well as media reports. That being said, they are considered credible sources for the purpose of addressing related legal issues covered by this Expert Opinion. Similarly, this Expert Opinion provides a legal analysis of a series of specific incidents and cases based on publically available information that have not been verified independently by the author. Therefore, the legal conclusions on those cases are not definitive. Cases were selected considering the most debated ones in terms of legality and those that raised particular legal issues under the IHL precautionary obligations. It is based on information available as of 27 February 2015.

Israel launched air strikes codenamed “Operation Protective Edge” on 8 July 2014 in the Gaza Strip followed by a ground invasion 10 days later. The main hostilities ended on 26 August. This constitutes the timeframe of events considered in this opinion.

The undersigned wishes to emphasize that while this opinion is a legal analysis, it shall not downplay the human cost of this war. The civilian casualties and the scale of damage and destruction are unprecedented in the rounds of hostilities that have occurred in the Gaza Strip, not least because it is one of the most densely populated areas in the world.2 In this regard, while the extent of the destruction and the loss of

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2 According the United Nations some 2,192 Palestinians were killed during the conflict, of whom at least 1,523 are believed to be civilians, including 519 Palestinian children and 287 women, over 110,000 were displaced within the Gaza Strip by the time of the 26 August ceasefire and 18,000 housing units were destroyed or rendered uninhabitable. OCHA, Protection of Civilians Weekly Report, 30 September – 13 October 2014, 17 October 2014, available at:
civilian life, no matter how revolting they can be, are not per se and on their own evidence of violations of IHL, they can provide some indication that violations may have occurred.

The fact that the conflict mainly took place in the Gaza Strip, a territory characterized as one of the most densely populated areas in the world and under a continued blockade imposed by Israel, unquestionably plays a role in the application of IHL norms in general and with regard to the obligations to take precautionary measures in particular. It is common to state that IHL does not prohibit warfare in densely populated areas. However, such environments place greater obligations on Parties to the conflict to avoid or at least minimize the effects on civilians and civilian objects, which is the primary purpose of precautionary measures under IHL.

In that regard, it is important to note that while “Operation Protective Edge” triggered the same recurring debate over the conduct of warfare in populated areas, it gave rise to an even more elaborated legal narrative focusing on precautions. This is facilitated by the nature of those norms. Unlike most of the norms on the conduct of hostilities that are framed in prohibitive terms and for which allegations must be rebutted by proving that a given prohibition was not breached, precautionary obligations require positive measures to be taken to demonstrate compliance with relevant norms. In that respect, the Israeli authorities engaged in a discourse which, in addition to accusing Palestinian armed groups of endangering the civilians, insisted on how “the IDF [Israeli Defense Forces] goes to extraordinary lengths to avoid civilian casualties”3 by taking more precautionary measures than what they are required to do under IHL.

Against this backdrop, the undersigned stresses the even greater need to conduct a sound, rigorous and objective legal analysis of those norms on precautions under IHL. This Expert Opinion briefly addresses the classification of the most recent armed conflict in the Gaza Strip before analysing the meaning and scope of precautionary obligations under IHL. It then deals more specifically with two particular questions: the notion of feasibility within the precautionary obligations and the significance of the requirement to give an advance warning. Finally, it provides a preliminary overview of some of the means, methods and tactics of warfare used during the conflict under IHL precautionary obligations.


I. Distinction between international and non-international armed conflicts and relevant applicable norms of IHL on precautions in the Operation “Protective Edge”

While this Expert Opinion primarily addresses the legal definition, interpretation and scope of obligations related to precautions under IHL, it also discusses the application of those norms to the specific context of the “Operation Protective Edge”. IHL only applies in situations of armed conflict and distinguishes between international and non-international armed conflicts in that the content of those norms varies depending on the character of the armed conflict. However, while treaty law applicable in non-international armed conflicts does not contain rules on precautionary measures, customary IHL of non-international armed conflict has developed to include such norms as those applicable in international armed conflict. As a result this issue does not radically affect the main relevant applicable norms.

Suffice to say, for the purpose of this Expert Opinion, that a controversy exists over the status of the Gaza Strip – consequently on the classification of the conflict – in particular since 12 September 2005, when Israeli troops completed their withdrawal following Israel’s unilateral disengagement plan. This gave rise to a debate over the classification of the situation in general, and with regard to the qualification of the hostilities taking place on this territory. There is a dispute as to whether the Gaza Strip remains an occupied territory after the withdrawal of Israeli troops. While answering this question goes beyond the scope of this Expert Opinion, it is sufficient here to note that according to a prevalent view in the doctrine, the Gaza Strip is still considered to be an occupied territory given that Israel continues to exercise certain forms of effective control, including over Gaza’s airspace, territorial water, telecommunications, population registry related to entitlement to Palestinian passports, and movements of persons and goods in and out of this territory. The undersigned wishes to stress that regardless of the position taken, the mere fact that Israel was at some point occupying the Gaza Strip engaged in previous military operations on this territory may impact on the standard of conduct required when applying the IHL precautionary obligations given its knowledge, control, availability of information and past experiences in this context as will be illustrated in this Expert Opinion.

Regarding the character of the armed conflict in the Gaza Strip and for the purpose of this Expert Opinion, it is necessary to note that on the basis of the criteria identified in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

(ICTY),\(^5\) the hostilities between Israel on the one hand and Palestinian armed groups on the other hand unquestionably meet the conditions of an armed conflict that could be qualified as a non-international one due to the nature of the Parties involved. However, there are diverging views on whether a conflict within an occupied territory between the Occupying Power and armed groups qualify as international,\(^6\) a position adopted by the Israeli High Court of Justice itself,\(^7\) or non-international.

Nevertheless, with regard to the previous “Operation Cast Lead” in 2008-2009, Israel officially stated that, although the Gaza Strip is not an occupied territory:

as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.\(^8\)

Furthermore, due to the fact that most of the main IHL norms on the conduct of hostilities acquired a customary status applicable in all armed conflicts, those debates have relatively limited impact on the relevant legal framework to be applied in the context of the “Operation Protective Edge”. It is now widely recognized that there is a convergence of norms applicable in both types of conflict, notably with the development of customary IHL norms on the conduct of hostilities applicable in non-international armed conflict. In the Tadić case, the ICTY held that there has been an extension through the emergence of customary law of a number of principles and rules of IHL applicable in international armed conflict to a non-international armed conflict, though it did not mean a full transplant. It pointed out that the general essence of those norms applies and principles and rules such as on the protection of civilians from hostilities, in particular from indiscriminate attacks, as well as prohibition of means of warfare and ban of certain methods of conducting hostilities govern internal armed conflict.\(^9\) In the Kupreškić case, the ICTY recognized in particular the customary nature of the requirement to take precautions in attack and the applicability of this norm in non-international armed conflicts.\(^10\)


\(^7\) HCJ, 769/02, Public Committee against Torture in Israel et al.v. Government of Israel et al, 11 December 2005, paras.16–22


\(^10\) ICTY, Kupreskić case, Judgment, paras. 49 and 132.
Customary Law Study also referred to the main principles and specific rules on precautions in attacks and against the effects of attacks as applicable in internal armed conflicts.\textsuperscript{11} More generally, fundamental rules of IHL on the conduct of hostilities apply to all armed conflicts.\textsuperscript{12}

Those norms, being of a customary law nature in both types of conflicts, are binding on all Parties to the conflict, be they Israel or Palestinian armed groups. This is particularly relevant given the fact that Israel is not a Party to the \textit{Additional Protocol I to the Geneva Conventions} (AP I) that codifies most of the norms on precautions. In that regard, Israeli practice, as well as that of the United States, confirmed the customary nature of those norms.\textsuperscript{13} The Israeli military made numerous official statements, including during “Operation Protective Edge”, explaining what types of measures were being taken to respect their obligations of precautions under IHL, stating even that they were doing more than what was required of them under international law.\textsuperscript{14} This is evidence that Israel considered itself bound by those norms in the context of the hostilities during the “Operation Protective Edge”. This must not be construed as implying that the determination of which IHL rules are applicable and their related definition and interpretation depend on Israel’s own assessment, or on Palestinian armed groups. These issues are a matter of law based on an objective exercise of what is the current meaning and scope of IHL obligations mainly based on State practice, doctrine, jurisprudence and the practice of other relevant organizations.

Finally it is important to clarify that even though the hostilities during “Operation Protective Edge” included land operations and attacks from the air, this has no impact on the applicable IHL norms. Indeed, while there was in the past a distinction made between the law of land warfare and the law of air warfare, there is now a general agreement that the same norms apply including with regard to precautionary measures when addressing attacks from the air against objectives on land and related protection of civilians issues. Article 49(3) of AP I specifies that its norms “apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air”. Although Israel is not a Party to AP I, modern State practice and other sources confirm that there

\textsuperscript{12} For a detailed analysis of this convergence, see Marco Sassòli and Anne Quintin, “Active and Passive Precautions in Air and Missile Warfare”, \textit{Israel Yearbook on Human Rights} 44 (2014), pp. 69-123.
are no distinct norms applicable to attacks not involving aircrafts. The *HPCR Manual on International Law Applicable to Air and Missile Warfare*, as an attempt to reflect the customary law of air warfare, shows that when considering the protection of civilians on land from attacks from the air the customary norms mirror those of API, including on precautionary measures.

Consequently, in light of the above and for the purpose of this Expert Opinion, the sources of the norms on precautions will also refer to IHL applicable in international armed conflicts as reflecting the customary content of the fundamental principles and norms on that matter.

### II. The meaning and general scope of precautionary obligations under IHL

#### 1. Overview of the norms of precautions in the law on the conduct of hostilities and related sources

Norms related to precautions pertain to the set of IHL principles and rules governing the conduct of hostilities through limitations or prohibitions of means and methods of war. A critical consequence is that those specific norms cannot be considered in isolation and must be understood and interpreted as part of the overall legal architecture of IHL on the conduct of hostilities and in conjunction with its relevant fundamental principles in the field of the protection of civilians – notably the principle of distinction, the principle of military objective, the prohibition of indiscriminate attacks and the principle of proportionality.

IHL envisages two types of precautionary measures aimed at avoiding – or at least minimizing – the incidental effects on persons and objects that are not legitimate targets of attack, creating obligations on the part of all Parties to a conflict that can come under attack: active precautions, precautions in attack, requiring the attacker to adopt certain measures; and passive precautions, precautions against the effects of attacks. In addition, and while this is not technically speaking a precautionary measure, the Party subject to an attack is bound by the fundamental prohibition against using civilians and certain other persons and objects to shield military objectives from attacks.

Prior to API, few treaty provisions included obligations on precaution in particular cases. The 1907 *Hague Convention (IX)* contained the first formulation of the principle of precautions in attack in that if for military reasons immediate action against naval or military objectives located within an undefended town or port is necessary, and no delay can be allowed to the enemy, the commander of a naval force “shall take all due measures in order that the town may suffer as little harm as

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15 Sassòli and Quintin, 2014, op. cit.
possible”. The Hague Regulations concerning the Laws and Customs of War on Land annexed to the 1907 Hague Convention (IV) also included norms on precautions in the specific context of bombardments and sieges. Article 26 made an obligation for the officer in command of an attacking force, before commencing a bombardment to do all in his power to warn the authorities. Considering aspects of military necessity, this rule included an exception in case of assault. Article 27, in the context of sieges and bombardments, required that “all necessary steps (…) be taken to spare, as far as possible” certain categories of buildings including hospitals, “provided they are not being used at the time for military purposes”. Precautionary measures designed to ensure the specific protection of civilian hospitals were also envisaged in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949. Stating that the principle of protection applies unless civilian hospitals “are used to commit, outside their humanitarian duties, acts harmful to the enemy”, Article 19(1) of 1949 GC IV provides that the protection can only cease “after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded”. While those rules address particular situations, they reflect the principle of military necessity as a limitative rule, requiring to avoid the loss of civilian lives whenever possible.

The most elaborated set of treaty norms related to precautions, providing a more precise list of precautionary measures based on the general principle stipulated in 1907 and 1949, are to be found in API under the section on “General protection against effects of hostilities”. Chapter IV of API on “precautionary measures” is divided in two provisions addressing different logic and purpose: Article 57 covers precautions in attacks to be adopted by the Party to the conflict in its attacks on the territory under the control of the enemy while Article 58 addresses specific measures which every Party to the conflict must take in its own territory in favour of its nationals, or in territory under its control. Precautions in attacks are based on the general principle that “constant care” must be taken to spare the civilian population, civilians and civilian objects in the conduct of military operations (Article 57(1)). Based on this fundamental obligation, and as a way to materialize it, this article then spells out more specific precautionary measures including the obligations to cancel an attack if it becomes apparent that it is prohibited (Article 57(2)(b)), to give “effective advance warning”, unless circumstances do not permit (Article 57.2 c), and when a choice is possible to select the military objective causing the least danger to the civilian population (Article 57(3)). Moreover, additional obligations exist for those who plan or decide on an attack (Article 57(2)) with regard to verifying that objectives are not unlawful, choosing means and methods to avoid or minimize civilian losses, and refraining from attacks causing disproportionate civilian losses.

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16 Article 2(3) of the 1907 Hague Convention (IX).
As for precautions against the effects of attacks, three main obligations are envisaged in Article 58 for the Parties to a conflict: (a) “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”; (b) “avoid locating military objectives within or near densely populated areas”; and (c) “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. Other IHL norms refer to precautions such as Article 56 of API on the special protection granted to works and installations containing dangerous forces.

Despite the specific and detailed character of those obligations, such as the one on advance warnings, most of those fundamental precautionary measures acquired a customary status in both international and non-international armed conflicts. For example, while Article 57(2)(a)(ii) of API provides that those who plan or decide an attack “shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”, the ICRC Customary IHL Study also refers to this obligation to take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects as part of the general obligation to take constant care to spare civilians.

2. The nature and functions of precautionary obligations in IHL

a) The legal nature and the dual role of precautionary obligations in IHL

From the outset, it is paramount to stress that the norms on precautions in IHL, notably with regard to norms on precautions in attack, are conceived as a prerequisite for Parties to a conflict to respect other principles and rules on the conduct of hostilities. Indeed, they form part of a coherent regime of norms aimed at the protection of civilians and civilian objects. For example, the fundamental principle requiring belligerents to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives and the related definition of a military objective under IHL can only be applied if the Parties to the conflict take steps to verify the nature of the target they are about to attack.

As a result, the precautionary obligations are closely linked to the other norms on the conduct of hostilities. This is also reflected in the reference as part of the

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19 Customary International Humanitarian Law, op. cit., pp. 51-76.
20 Ibid., p. 51.
22 Article 48 of AP I and Rules 1 and 7 of ICRC Study on Customary IHL (Hereinafter Study on CIHL).
precautionary measures to be taken in attack to the principle of military objective and to the principle of proportionality and the related duties to cancel or suspend an attack or refrain from launching an attack if it appears those principles will not be respected. Additionally, the general obligation to take constant care to spare civilians and civilian objects in the precautions in attack is interpreted as “the legal link between the general obligation of distinction and the operational practicalities of taking precautions in attack”.\textsuperscript{23}

Those obligations have therefore a fundamental preventive nature to give effect to other norms of IHL. They require steps in anticipation of an attack, either on the part of those attacking or those defending to avoid or minimize effects on civilians. For example, while \textit{Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 1977} (APII) does not explicitly include norms on precautions, it contains a provision stating that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”,\textsuperscript{24} a requirement that could not be met without taking precautionary measures in attack.\textsuperscript{25} Furthermore, the obligations of precaution are only relevant when attacking a lawful target in the first place.\textsuperscript{26}

The intrinsic link between the requirement of precautionary measures to be taken and other IHL norms does not mean that the former obligations disappear behind the latter. Such obligations on precautions exist as such and autonomously in addition to the other rules on the conduct of hostilities, placing additional legal constraints when launching an attack. This dual nature of the obligations of precaution is essential to understand and interpret how they must be applied in practice. They also operate on a separate basis from other IHL norms. As stressed in the doctrine, even if a military objective is targeted and the principle of proportionality is respected in that the expected incidental loss of civilian life, injury to civilians and damage to civilian objects is not excessive – in relation to the concrete and direct military advantage anticipated from the attack – precautionary measures must be taken.\textsuperscript{27} The triggering element requiring such precautions is when those attacks may affect civilians and civilian objects despite their apparent lawfulness under the other norms of IHL. In that case, all feasible measures should be taken to minimize such effects.\textsuperscript{28} As a result of this autonomous nature of precautionary obligations, it is recognized that they can be violated even though other rules of IHL have been respected.


\textsuperscript{24} Article 13 (1) of AP II.

\textsuperscript{25} \textit{Customary International Humanitarian Law}, op. cit., p. 52.


\textsuperscript{27} SASSOLI, M. BOUVIER, A. and QUINTIN, A., 2011, op. cit., Chapter 9, p. 9.

\textsuperscript{28} Ibid., p. 4 and p. 9.
This dual nature of the precautionary obligations is reflected in the fact that traditionally, precautionary measures in attack are classified in three categories: the first one refers to the general obligation to take precautions; the second category relates to measures, such as the obligations to verify the objective and to cancel unlawful attacks, to be taken to ensure respect for the other material norms of IHL (distinction and proportionality); the third includes measures to be adopted in cases of lawful attacks under the other principles of IHL to avoid or minimize effects on civilians, such as the obligation to issue warnings.\textsuperscript{29}

Conversely, it is also fundamental to stress that complying with those obligations does not mean that the attacking belligerent is relieved from its obligations under other IHL norms. In other words, it would defeat the purpose of the entire set of precautionary measures if once taken they would for example change the legal status of civilians or civilian objects. This is unequivocally confirmed in Article 57(5) as an essential safety clause to the whole legal regime on precautions: “No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects”. As noted in the ICRC authoritative commentary of API, the law on conduct of hostilities is made of prohibitions that already take into account military necessity and, therefore, precautionary measures in the form of positive obligations to take certain steps cannot justify violations of other norms of IHL such as the prohibition to target civilians.\textsuperscript{30} This is particularly relevant when addressing the obligation to give effective advance warning in that the mere fact that civilians do not leave following a warning does not affect per se their status as persons immune from attacks under IHL.\textsuperscript{31}

Finally, it is important to highlight that precautions in attack under IHL primarily amount to obligations of means, requiring the adoption of certain measures for the obligations to be fulfilled, as opposed to obligations of results, whereby the means matter less than the obligation to achieve a particular result. Violations of those norms might be found if no or inadequate precautionary measures have been taken. In that sense, they belong to the former category of obligations. The norms on precautions do not generally carry an obligation of result in that it is not expected that civilians and civilian objects must not be affected at all as a result of attacks. In other words, the occurrence of harmful effects on civilians following an attack does not mean as such that those obligations were violated. While effects on civilians do not mean per se that the obligations of precaution have been violated, attacks resulting in significant loss of lives and destruction could provide indication that such obligations might have been violated. However, certain precautionary measures could contain the reference

\textsuperscript{29} Sassòli and Quintin, 2014, op. cit.
to a certain result. For example, within the obligation to issue a warning, except if the circumstances do not permit it, the result is to give an effective advance warning. This being said, the question whether the warning was effective is not to be assessed on the basis of its actual consequences *ex-post facto* but according to the plans and information of the attacker who must evaluate this effectiveness prior to the issuance.

**b) The duty-bearers of the precautionary obligations**

Unlike criminal provisions addressed to any individual who can violate IHL rules and their commanders, precautionary obligations and other IHL norms prescribing a certain conduct are meant to bind Parties to a conflict, namely states and armed groups.\(^{32}\) They are expected to structure and organize their forces to ensure respect of IHL.\(^{33}\) Given the nature of active precautionary measures, a question arises as to whether only certain persons with a commanding function are expected to abide by that those rules.

The decisive element to identify who has a responsibility to adopt precautionary measures lies in one’s actual role with regard to a particular attack. The UK Military Manual offers guidance in this regard and indicates that a wide range of persons can be concerned:

> **[W]**hether a person will have this responsibility will depend on whether he has any discretion in the way the attack is carried out and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative. Those who do not have this discretion but merely carry out orders for an attack also have a responsibility: to cancel or suspend the attack if it turns out that the object to be attacked is going to be such that the proportionality rule would be breached.\(^{34}\)

The defining factor relates to which person “possesses the practical possibility to take precautions and in particular who has the necessary knowledge of risks”.\(^{35}\) The responsibility is therefore not dependent on a legal assumption that only commanders with a certain rank will be in a position to have a necessary overview of the military operation and situation to assess the legality of an attack.\(^{36}\)

Article 57(2)(a) provides for specific additional obligations addressed to those planning and deciding upon an attack. It is understood that those measures are designed due to their nature to be adopted by those in charge of commanding or

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32 That being said, the use of human shields, not technically related to precautions, may give rise to individual criminal responsibility as per Article 8(2)(b)(xxiii) of the ICC Statute that lists as a war crime: “Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations”.

33 Sassòli and Quintin, 2014, op. cit.


35 Sassòli and Quintin, 2014, op. cit.

planning functions. The drafting negotiations of API shed some light on the scope of this responsibility. It was argued by some State delegations that the terms addressing the planners and decision-makers were placing a heavier burden of responsibility on subordinate officers who are not always capable of taking such decisions. Some States reiterated those concerns at the implications of these terms when joining the API, in particular with regard to decisions on proportionality or on cancelling an attack for which junior officers might not have the authority, the practical possibility or the experience to take.37 It is also reasonable to consider that certain situations (such as in cases of attack from the air compared to land operations) impose to distinguish between those planning an attack and the executers in terms of responsibility vis-à-vis specific precautionary measures, notably the obligation to verify the objective.

However, according to the ICRC Commentary, a very large majority of delegations during the Diplomatic Conference for the drafting of API intended to “cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects”. This logic has an important implication in that “the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged”.38 Furthermore limiting all precautionary measures in attack to be adopted when conducting an attack to those categories of persons with high commanding functions would be too restrictive and would run against the purpose of IHL norms, which are meant to be binding on all persons involved in an attack39 defined broadly as “acts of violence against the adversary, whether in offence or in defence”.40

Consequently the author wishes to emphasise that the only way to give full effect to the norms on precautions in attack is to consider the duty bearers in relation to the role they can play in an attack, whether to execute, minimize impact or avoid it. This being said, the limited or the absence of “discretion” (a term used in the UK Military Manual) of a given person in the way the attack is carried out does not exhaust the responsibility to take precautions. As noted by some experts with regard to the obligation to verify the objective, “the rule should be that the less possible it is for executers to verify, the more verification is necessary by those who plan and decide upon an attack”.41

Finally, it is also important to note that, while violations of some of the other material norms, to which precautions are meant to give effect are criminalized under international law and considered war crimes (such as the principle of

37 ICRC Study on CIHL, p. 54.
40 Article 49 para. 1 of AP I.
41 Sassòli and Quintin, 2014, op. cit.
proportionality), this is not the case for violations of the norms on precautionary measures, except in the particular case of the use of human shields. Such violations could not as such and in principle trigger the international criminal responsibility of the perpetrator but can only give rise to the responsibility of the State under international law, provided that the conduct is attributable to that State.

c) The relative character of precautionary obligations

Precautionary obligations under IHL are crafted in relative terms. This character stems directly from the fundamental logic of this body of norms that strikes a balance between humanitarian considerations and military necessity. The wording of Article 57 of API frames obligations in reference to “do everything feasible”, “take all feasible precautions”, or “take all reasonable precautions”. Although not all precautionary measures in an attack envisaged by this provision contain such terminology, it is a fundamental aspect of those obligations. For example, the ICRC Study on Customary International Humanitarian Law identifies as customary law the general obligation to take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects in Rule 15. Article 58 of API in relation to precautions against the effects of attacks uses a different terminology for all three types of measures that shall be taken “to the maximum extent feasible”. This expression, as well as the different terms used to describe the obligations in this provision, appears to make the defender’s obligations weaker than those of the attacker.

The notion of feasibility is also reflected in other IHL norms such in Article 41 of API on the safeguard of persons hors de combat and the obligation to take all feasible precautions to ensure the safety of prisoners of war in certain circumstances or Article 56 of API on the protection of works and installations containing dangerous forces. This concept does not operate under the exact same requirements depending on the expression used. For example, it is agreed that the terms “all feasible precautions” are more demanding than the expression “all reasonable precautions”. In any case, the reference to the concept of feasibility in the construction of those norms on precautions requires considering certain standards of conduct for the fulfilment of those obligations.

Based on State practice and the declarations made at the time of ratification of API the term “feasible” is defined by the HPCR Manual on International Law Applicable to Air and Missile Warfare as “that which is practicable or practically possible, taking

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42 Article 8.2.b (iv) of the Rome Statute classifies as a war crime the following act: “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 or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

43 SASSOLI, M. BOUVIER, A. and QUINTIN, A., op. cit., Chapter 9, p. 28.

into account all circumstances prevailing at the time, including humanitarian and military considerations”. A similar definition is to be found in Article 3(1) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention on Certain Convention Weapons as amended on 3 May 1996) providing that all feasible precautions shall be taken to protect civilians from the effects of weapons. A debate over the French translation of ‘feasible’ during the Diplomatic Conference on the drafting of API illustrates further the meaning of this term. While it was first translated by “possible” in French, a final agreement was found on the expression “tout ce qui est pratiquement possible” to reflect the intent of the drafters of the English version.

The notion of feasibility reflects a realistic conception of what is required in warfare in terms of precautions. It is not about expecting what is “objectively impossible”, but it is also conceived as a more demanding constraint than just doing what is merely possible. Based on this definition, the various precautionary obligations would only require those precautions that are practically possible given the circumstances ruling at the time.

IHL norms on precautions in attack spell out the general obligation that constant care shall be taken to spare the civilian population and detail the type of measures that must be taken, but only when these are feasible. Both this general obligation and the specific precautionary measures are relative in nature. In other words, IHL acknowledges there are particular situations in which civilians cannot be spared and when precautionary measures cannot be taken. This means that the feasibility test is essential to establish that a violation of those IHL obligations occurred. On the other hand, this assessment must be done and cannot be done lightly without defeating the very purpose of those norms. Indeed IHL dictates to take into account various considerations under the overarching duty to avoid or at least minimize harm to civilians.

Despite the general consensus among States on the definition of the term “feasible”, in practice the application of this standard to determine the content of the precautionary obligations – and most importantly when and which precautionary measures are required – is particularly controversial. Feasibility is primarily a contextual notion, highly dependent on the circumstances and the military and humanitarian considerations. The analysis of what is feasible under IHL has been deemed “a matter of common sense and good faith”. As a result, experts involved in

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47 J-F QUEGUINER, op. cit., pp. 809-810

the drafting of the *HPCR Manual* agreed that “[t]here are currently no absolute standards applicable to any judgment on feasibility”.

However, the relative character of what precautionary measures are required shall not be interpreted as a reason for Parties to the conflict to evade their obligations, especially where IHL norms state that all feasible measures must be adopted. Similarly, the importance of the context in applying those rules cannot be construed as making them only dependent on certain given factors to the point of rendering them irrelevant to limit the conduct of Parties to the conflict. As military considerations are already taken into account in the formulation of the rules on precautions, they cannot be invoked to dismiss precautionary obligations altogether. This reading of military necessity has been rejected. In the same vein, those military considerations cannot be interpreted too broadly, by invoking for example the success of military operations, as to exclude humanitarian considerations underlying those obligations.

Nevertheless, it is necessary to stress that, like for other norms on the conduct of hostilities, the way those precautionary obligations are designed and their application in practice requires considering various perspectives and elements, such as those regarding the attacker, the way weapons were used, the nature of the target, the effects of the attack and the defender. Most importantly, given contingent nature of the determination of the feasibility of precautions, based on information and circumstances prevailing at the time of the attack, establishing facts on allegations of violations of those norms and assessing the legality of certain conducts are two activities done *ex post* although they depend on an *ex ante* evaluation by the attacker.

**III. The relevant criteria and parameters to determine what feasible precautionary measures are required**

The question of the criteria and parameters to determine what precautionary measures are required before carrying out an attack is closely linked to the relative nature of several of the obligations of precautions. As noted earlier, some of those obligations depend on what is “feasible” at the time and therefore are not absolute. In appearance, this exercise of determination may seem vain given the changing nature of what is feasible. However, this notion cannot challenge the very existence of those

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49 *HPCR Manual on International Law Applicable to Air and Missile Warfare*, op. cit, commentary to Section A, Para. 1 (q),

50 The UK Military Manual provides that “military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resource”. See UK, *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, 2004, pp. 21-22, para. 2.2.

obligations. It is merely an integral part of the assessment of whether an attack is lawful under the norms on precautions. In other words, the analysis will require considering the various relevant circumstances and information ruling at the time to determine whether, against this context, all feasible measures have been taken. This also means that there cannot be a pre-established list of measures systematically required whatever the situation is. Conversely, certain measures that may not seem feasible in abstract terms could prove feasible in specific circumstances. For example, allowing civilians to evacuate an area prior to launching an attack could be deemed feasible if, given the nature of the target (for example an object), such measure would not undermine the success of the military operation. The obligation, even for this last instance, lies with conducting the test of feasibility to determine whether the measure is required.

There are several obligations of precautions that are governed by this standard of feasibility. In addition to the customary general obligation to take “all feasible” precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects, the following two precautionary measures operate on the basis of feasibility according to Article 57 of API: to do “everything feasible” to verify the objective to be attacked is licit as per the legal definition of military objective; and take “all feasible” precautions in the choice of means and methods of warfare. However, the ICRC Study on customary international humanitarian law also refers to the term feasibility in the formulation of the other precautionary measures to be taken in attack such as with regard to proportionality and to the cancellation of an attack. Article 58 for precautions against the effects of attacks is based on the standard of “the maximum extent feasible”. For the purpose of this Expert Opinion, the analysis of the feasibility will primarily focus on the obligations of precautions in attack and its implications for the various precautionary measures required under IHL. The meaning of the expression used for precautions against the effects of attack will also be addressed though in more succinct terms.

1. **Feasible precautionary measures in attack**

a) **Standard of care: feasible vs. reasonable**

The commonly agreed definition of the term ‘feasible’ mentioned earlier refers to “that which is practicable or practically possible”. This raises the question of the standard of care expected from the attacker. Due to the relative character of some of the precautionary obligations in attack, certain discretion is recognized for those who plan or decide upon an attack. Regarding the standard of care in targeting, the Canadian Military Manual rejects a standard of perfection in the decision of commanders, planners and staff officers. In describing this standard, it refers to “the honest judgement [sic] of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements [sic] are usually made”. It
further specifies that “the test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?” The term “feasible” therefore implies a standard of appreciation.

However the standard requiring taking all “reasonable” precautions can be understood slightly differently and in a less demanding way than the one calling for all “feasible” measures to be taken. In this regard, as pointed out by Sassòli and Quintin, some States argued that the terminology “all feasible measures” creates too high a standard. On the other hand, the ICRC Commentary of Article 57 para. 4 regarding the conduct of hostilities at sea or in the air and referring to “all reasonable precautions” specifies that while this standard is “undoubtedly slightly different from and a little less far-reaching than the expression ‘take all feasible precautions’, used in paragraph 2”, “the nuance is tenuous”. However, one must consider the implications of the distinction between those two standards in a given situation. It may have a significant impact on what is expected of States capable of taking greater precautions, based for example on their technological capabilities to gather intelligence and information. It seems therefore fair to agree with Sassòli and Quintin on the unclear status of customary law as to which adjective prevails. In this regard, those scholars refer to the fact that the US challenges the existence of a high standard and uses the terms “all practicable precautions” combined with “a reasonableness standard for evaluating command decisions”. This being said, they also pointed out that the majority of States refer to the term “feasible” and that the HPCR Manual also considered this term as reflective of customary international law.

b) The parameters to consider and their function

The term feasible is a legal notion to identify the scope of precautionary obligations and determine what is required from the attacker to conclude that the related norms have been respected. This is not an abstract concept. As highlighted in the definition, this standard implies to consider what is practical or practically possible in a given context. Consequently, various considerations, including military and humanitarian ones, will influence the feasibility of such precautionary measures and will serve as references to determine what was practically possible. Ultimately, as noted by an expert, the feasibility requirement “acknowledges that the lawfulness of an attack will be judged according to relative standards of measurement, which will namely depend on the economic and technological development of each party to the conflict”.

52 Canada, Law of Armed Conflict at the Operational and Tactical Levels, 2001, para 418 1-3, quoted in ICRC Study on CIHL.
53 Sassòli and Quintin, 2014, op. cit.
54 Commentary on the Additional Protocols, at para. 2230.
56 The Judge Advocate General’s Legal Center and School, Law of Armed Conflict Deskbook (Charlottesville: TJAGLCS, 2013), at 152.
57 J-F QUEGUINER, op. cit., p. 802.
As a way of illustration, the following elements have been identified as relevant to assess feasibility: “the importance and the urgency of destroying a target; the range, accuracy and effects radius of available weapons; the conditions affecting the accuracy of targeting; the proximity of civilians and civilian objects; the possible release of hazardous substances; the protection of the party’s own forces (and the proportionality between the additional protection for those forces and the additional risks for civilians and civilian objects when a certain means or method is chosen); the availability and feasibility of alternatives; the necessity to keep certain weapons available for future attacks on targets which are militarily more important or more risky for the civilian population.”

The UK Military Manual provides a more detailed list:

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

Against this backdrop, one anticipates the complexity, and potential controversy, in determining the expected precautionary measures to be taken when so many factors may come into play and must be measured based on circumstances ruling at the time. However, like for the definition of the direct and concrete anticipated military advantage in the application of the principle of proportionality, this complexity cannot serve for a Party to evade its obligations. Similarly, one military consideration cannot result in negating humanitarian aspects, especially when considering the purpose of the protection of civilians underlying those norms. Additionally some factors cannot be considered as relevant in this assessment. For example, with regard to whether there is a choice between different types of weapons, financial considerations cannot be included in the feasibility evaluation as they are neither of a military nor of a humanitarian nature. A related issue is whether on the other hand the attacker would have an obligation as part of its precautionary obligations to acquire smart weapons more capable of avoiding harmful effect on civilians or if they have them the obligation to use them. As noted by some authors, this debate is one of the reasons why States oppose the interpretation as to considering the term feasible as imposing a

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higher standard on technologically advanced States. While there is no obligation under IHL for States to acquire certain types of weapons or modern technology, as noted in the UK Military Manual, the availability of certain types of weapons may play a role under the specific obligation to take all feasible precautions in the choice of means and methods of attacks.

In that regard, the consideration of the safety of the attacker’s armed forces is a topical example. It certainly constitutes an element to be taken into account in the feasibility equation. However it cannot be used to justify not taking any precautionary measures at all, or to expose the civilian population to greater risk. This would run against the very purpose of the norms on precautions. As noted by the ICRC, while under national military regulations, commanders are expected to protect their forces; under IHL, members of the armed forces are considered legitimate military targets. As a result, this military consideration cannot lead to neglecting the humanitarian consideration of the protection of civilians and some level of risk has to be accepted for that purpose.

c) Characteristics of the information required and the implications in case of prolonged occupation or recurrent rounds of hostilities

Obtaining reliable and relevant information is both a prerequisite to decide upon and implement precautions in attack required under IHL and a form of precaution in itself. For example the Australia’s Manual of the Law of Armed Conflict (2006) provides that “all feasible precautions must be taken to gather relevant intelligence”. State practice reflects this important element in that the decision will be based on an assessment of this information and not on the basis of options that may become apparent later on after the attack. In that regard, the feasibility will not be assessed in the abstract. It is to be based on information available and relevant at the time. This is confirmed by State practice. For example when Austria ratified API, it made a declaration stating that Article 57 (2) “will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative”.

This is a decisive element to be taken into account when evaluating the lawfulness of an attack under the norms on precautions. Like for other rules on the conduct of hostilities, the ex-post facto analysis must be based on information known at the time.

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60 Sassòli and Quintin, 2014, op. cit.
63 Ibidem.
64 HPCR Manual on International Law Applicable to Air and Missile Warfare, op. cit, commentary to Section A, Para. 1 (q).
65 Para. 5.1, quoted in ICRC Study on CIHL.
66 ICRC Study on CIHL, pp. 54-55. HPCR Manual on International Law Applicable to Air and Missile Warfare, op. cit, commentary to Section A, Para. 1 (q).
by the person required to take precautionary measures, not “with the benefit of the knowledge of the facts as they actually unfolded”\textsuperscript{67}, or “on the basis of hindsight”.\textsuperscript{68} On the other hand, there is a requirement on the part of the attacker to take steps to collect the relevant and reliable information from all sources to be able to make an assessment in good faith.\textsuperscript{69} This is so for the obligation to verify whether the objective is a military objective but it extends to the general precautionary obligations. This is a fundamental element of precautionary obligations. While it cannot be expected from the attacker to have all the data and information, there is a duty to collect data, which is relevant to make a determination, notably with regard to the verification of the target. Insufficient data or the lack of meaningful data otherwise necessary to reasonably conclude that the target is a legitimate military objective cannot serve to make assumptions. This would also contradict the IHL norm that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian”.\textsuperscript{70}

Therefore, the feasibility of a certain course of action will have a different meaning depending on the context and the relevant information at the time. If the obligation relates to the verification of whether an objective is a military one, a fundamental aspect for the respect of the principle of distinction, what is feasible will vary based on the availability of technical means for observation and detection.\textsuperscript{71} As a result, what may be expected from a Party to the conflict may vary depending on the technical means at its disposal. A belligerent with more advanced technology might have information than another belligerent may not have.\textsuperscript{72}

While the requirement to take into account the information available at the time of the attack raises some challenges in determining the feasibility of precautionary measures and whether IHL obligations have been violated, this does not preclude considering a broader perspective, including post-event analysis to assess the feasibility of future measures. In this regard, Sassòli and Quintin stressed that “feasibility evolves through experience”, noting that while “[p]recautions that prove to be unsuccessful do not render past attacks unlawful (...) they may imply the need to revise the practice to avoid such incidents in the future”.\textsuperscript{73} It is true that in another context the same measure that did not work before might be effective in a different situation. But it is also within the limits of the feasibility standard to include the lessons learned from past experiences as part of the information available at the time when such measures were unsuccessful. The same scholars referred for example to the Eritrea-Ethiopia Claims Commission jurisprudence whereby Eritrea was sanctioned for its “failure to

\textsuperscript{67} DINSTEIN Yoram, \textit{The Conduct of Hostilities under the Law of International Armed Conflict}, 2\textsuperscript{nd} ed., Cambridge, CUP, 2010, p. 139, para. 343.

\textsuperscript{68} Declaration made by Germany at the time of the ratification of API, 14 February 1991.

\textsuperscript{69} I. Henderson, op. cit., p. 9.

\textsuperscript{70} Art. 50(1), API.

\textsuperscript{71} \textit{HPCR Manual on International Law Applicable to Air and Missile Warfare}, op. cit, commentary to Section A, Para. 1 (q).

\textsuperscript{72} Sandoz, Y, Swinarski, C. & Zimmermann, B. (eds), op. cit., Article 57, para. 2299.

\textsuperscript{73} Sassòli and Quintin, 2014, op. cit.
take appropriate actions to prevent future recurrence” following an attack that missed the planned targets. In that respect it is important to note that the repeated rounds of hostilities between Israel and Palestinian armed groups in the same environment, the Gaza Strip and the prolonged occupation by Israel of this territory provides Israel with a wealth of information and relevant experiences that need to be taken into account to review the feasibility and efficiency of certain precautionary measures. Consequently it is within the scope of those obligations to consider that they imply an obligation to learn as part of the application of the precautionary measures.75

d) Feasibility, mistakes, negligence and patterns

If only feasible precautions are required under IHL, the question arises whether the relative character of those obligations may amount to legitimizing errors or mistakes.76 For example, this may be the case when targeting an objective deemed military on the basis of reliable intelligence, but which turns out to be a civilian object, by nature or hitting another target due to a failure in the guiding system of a missile.77

As noted above, a precautionary measure that proves to be unsuccessful does not mean that the corresponding obligation has been violated. It must be assessed whether the attacker respected its duty to take feasible measures and collected sufficient information. It is important here to restate the general standard as described by the ICRC authoritative commentary of the API: “The duty to take precautionary measures is not absolute. It is a duty to act in good faith to take practicable measures, and persons acting in good faith may make mistake”.78

A genuine mistake, such as a malfunction in the guiding system of a missile, can still be committed even if all feasible precautions have been taken. Furthermore, precautions do not mean that the attacker has to be right when it carries out its verification and other precautionary measures. It must simply demonstrate that it acted appropriately on the basis of intelligence gathered and the related knowledge of facts acquired reasonably. As noted by one researcher, IHL “judges conduct, not necessarily results”.79 In that regard, and as pointed out earlier, if on this basis for example a target was genuinely considered lawful and it turns out it was not, this attack is not per se unlawful. On the other hand this does not allow for unreasonable assumptions to be the basis for an attack.

74 Eritrea-Ethiopia Claims Commission, Partial Award, Ethiopia’s Claim No. 2, para. 110.
75 Sassòli and Quintin, 2014, op. cit., pp. 78 and 94.
76 QUEGUINER Jean-François, op. cit., p. 810.
77 Ibidem.
Mistakes must therefore be distinguished from negligent acts. This issue relates to the scope and purpose of precautionary measures within the overall regime of protection of civilians under IHL. The principle of distinction between combatants and civilians includes not only the prohibition of deliberate attacks against civilians, but aims at protecting them against the effects of hostilities. This is the purpose of the obligation to verify the lawfulness of the objective being attacked as a precautionary measure. By nature this obligation is not meant to ensure the respect of the prohibition of deliberate attacks against civilians but to avoid or minimize attacks directed at civilians by negligence and give effect to the principle of distinction. Consequently, if the attacker failed to take all feasible precautions or even to collect information as part of the implementation of those obligations, the effects on civilians or civilian objects would qualify as a negligent act, objectively determined by such failure.

This issue of isolated potential mistakes raises another question about the distinction to be made between single incidents and patterns, defined as a recurrent practice marked by a typical, possibly systematic feature, in determining whether all feasible precautionary measures have been taken as matter of policy. The report by the Office of the ICTY’s Prosecutor on the review the NATO bombing campaign against the Federal Republic of Yugoslavia takes a cautious approach in this regard described as follows:

(...) a determination that inadequate efforts have been made to distinguish between military objectives and civilian objects should not necessarily focus exclusively on one incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact that they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.  

A recurring pattern of adequate precautions taken by the attacker does not exclude a violation in a specific incident. In conjunction with this, the question arises as to the extent to which it is possible to challenge the compliance of a Party to the conflict with its obligations of precautions in attack when it can show it adopted a range of various precautions. Obviously, if the loss of civilian lives, injury to civilians and damage to civilian objects are significant, this can contribute to questioning the adequacy of those measures meant to protect the civilians under IHL. By analogy with the reasoning of the ICTY in the Kupreskic case, one may argue that such repeated attacks carried out with the same precautionary measures of dubious effectiveness might actually, by their cumulative and extensive effects on civilians and civilian objects, mean that they do not comply with the norms on precautions. Furthermore, in the same way that feasibility is influenced by experience; the attacker, especially in cases where measures proved to be unsuccessful or

80 See Report of the Committee appointed by the ICTY Prosecutor to determine whether an inquiry should be made into NATO’s bombing campaign against the FRY from 24 March to 10 May 1999, ILM, Vol. 39 (5) (2000), para. 29.
problematic, must review the effectiveness of those precautionary measures. Although this is not explicitly mentioned as a precautionary measure to be taken under IHL, this underlying obligation to learn from mistakes is the only way to give effect to the duty to spare whenever possible the civilian population.  

2. Feasibility in precautions against the effects of attacks

Each Party to a conflict, as opposed to only the attacker in the previous obligations, has precautionary obligations to protect civilians and civilian objects against the effects of attacks. Those obligations reflected in Article 58 of API also contain a reference to the notion of feasibility. However, it is fundamental from the outset to stress that the customary nature of these obligations is strongly contested for a number of reasons. Additionally those obligations must be read in conjunction with the prohibition contained in Article 51(7) of API to abuse the obligations of the attacker to protect civilians and the civilian objects by trying to shield military objectives and operations, also known as the prohibition on the use of human shields. While it is at times difficult to differentiate between this prohibition and the failure to take passive precautions, the decisive test is commonly seen as “whether the simultaneous presence of civilians and legitimate targets results from the defender’s efforts to obtain “protection” for its military forces and objectives, or simply from a lack of care for the civilian population”.

Under Article 58(c), each Party to a conflict has a duty “to the maximum extent feasible” to “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. While API refers to this obligation as a remedial one, the corresponding customary norm is envisaged as an overarching obligation for all Parties to the conflict to take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. The term ‘necessary’ has been replaced by “all feasible”. In that regard, the obligation contained in Article 51(7) of API is closely linked to those passive precautions, although it is not per se a precautionary measure but rather a specific prohibition.

The mention of the formula “to the maximum extent feasible” in the chapeau of Article 58 is meant to apply to the three main precautionary obligations. However, it shows that obligations related to passive precautions are weaker than those of the

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82 Sassòli and Quintin, 2014, op. cit., pp. 78 and 94.
83 Sassòli and Quintin, 2014, op. cit.
84 Article 51 (7) of API reads as follows: “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”
85 Sassòli and Quintin, 2014, op. cit.
86 ICRC Study on CIHL, Rule 22.
attacker and that the latter has more responsibilities than the defender in this regard. Furthermore, due to the nature of those obligations, such as the requirement of removing the civilian population from the vicinity of military objectives, and of refraining from placing such objectives within or in the vicinity of densely populated areas, they might be more difficult to fulfil in practice. The most fundamental obligation on the part of the defender would reside in the prohibition of human shields.

The drafting history of this prohibition illustrates those constraints – in particular the issue of hostilities taking place in densely populated areas. The expression “to the maximum extent feasible” was meant to accommodate the concerns of small and densely populated countries for which it would be challenge to separate civilians and civilian objects from military objective. This concern was reflected in the declaration made by certain States upon ratification of API.  

This specific issue is linked to a more fundamental question with regard to the interaction between those obligations and the duties of the attacker. First, the failure of the Party to the conflict to take passive precautions does not automatically mean that the civilians are being used as human shields. As stressed by some experts, “the decisive factor (…) is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender’s specific intention to obtain “protection” for its military forces and objectives, or simply of a lack of care for the civilian population”. Furthermore, it is commonly agreed that an attacker is not prevented from attacking a military objective even if the other Party did not take precautions to protect the civilian and the civilian objects from the effect of hostilities or even deliberately violating the absolute prohibition to use human shields. However the attacker will always be bound by all the norms on the conduct of hostilities, including its own obligations on precautions. Under IHL, the violations by a Party of its obligations cannot justify violations by the other Party.

Finally, the feasibility of precautions will depend on available means which would be, in the case of the removal of the civilian population from the vicinity of military objectives, the availability of means of transportation and alternative housing.

IV. The meaning and scope of the requirement for an effective advance warning

The specific requirement to give effective advance warning before an attack raises a series of questions under the IHL norms on precautions. Among those is the exact

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87 ICRC Study on CIHL, p. 71.
88 SASSOLI, M. BOUVIER, A. and QUINTIN, A., op. cit., Chapter 9, p. 17.
89 HPCR Manual on International Law Applicable to Air and Missile Warfare, op. cit., commentary to Section A, Para. 1 (q).
definition of this precautionary measure and the conditions a warning should meet in order for the legal obligation to be fulfilled – in particular, what form and specificity the warning should take and which are the circumstances when this requirement is not expected.\(^9\) Finally, it is crucial to clarify the claim often made that once a warning is given this may impact on the content and application of other IHL norms. Those issues are paramount in order to assess whether the IDF conduct during “Operation Protective Edge” was properly based on legal obligations as defined under IHL and whether this practice was in compliance with those norms.

1. **The definition of the obligation to give an effective advance warning and the forms and types of warning required**

The obligation to give an effective advance warning is among the most specific precautionary measures to be taken by the attacker. It also appears to be the one carrying the greatest weight in terms of contribution to the protection of the civilian population. Article 57(2)(c) restricts the scope of the warning to “attacks, which may affect the civilian population”. *A contrario,* this would mean that this requirement is not necessary when attacks will not impact the civilian population\(^9\) or when civilians are unlikely to be affected by the attacks.\(^9\) However, this apparent limitation is unlikely to have any bearing in cases where hostilities take place in densely populated areas, a setting in which civilians would most certainly be affected by any attack. This is even more so given the fact that the civilian population is comprised of all persons who are civilians.\(^9\) Furthermore, it only applies to attacks and not to military operations, unlike the generic obligation of Article 57(1), which would refer to troop movements, manoeuvres and other deployment or retreat activities carried out by armed forces before actual combat where no warning would be required.

Despite a debate over the evolution of warfare and the increasing number of situations demanding that no warning be given due to military considerations, this requirement is part of international customary law.\(^9\) The norm requires the advance warning to be effective, although the implications of this requirement in terms of types and forms of warning remain unclear. A question arises as to the level of details expected to consider a warning effective. For military considerations, the US for example argued that a warning does not need to be specific and may remain general in order not to put the attacking forces at risk or affect the success of the operation.\(^9\) An abstract or general warning, such as a message broadcasted on the radio providing a list of


\(^9\) UK Military manual quoted in the ICRC Study on CIHL, p. 54.


\(^9\) Article 50 (2) of AP I.


\(^9\) ICRC Study on CIHL, pp. 64-65.
certain military objectives in advance could be sufficient. In that regard, the attacker would not have to issue multiple warnings of the danger incurred by a civilian population that is located near a clearly defined military objective that has been declared as such. However a warning that is too vague to be acted upon by civilians, such as one announcing an attack on a city, would not be effective and could actually create terror among the civilian population, violating the prohibition to spread terror among the civilians.

It is crucial to stress that the underlying purpose of this obligation, protecting the civilian population, cannot be superseded by military considerations dictating for example to give the most general warning as to render it ineffective. As noted by the Commission of Inquiry on the 2006 war in Lebanon, the attacker “should take into account how they [the civilians] expect the civilian population to carry out the instruction”. This is a fundamental aspect of the effectiveness, in that the beneficiaries must be in position to act upon the warning. According to the UK Military Manual:

The object of the warning is to enable civilians to take shelter or leave the area and to enable the civil defence authorities to take appropriate measures. To be effective the warning must be in time and sufficiently specific and comprehensive to enable them to do this.

Similarly, if multiple warning are given but that none is considered effective, the legal requirement of this precautionary measure will not be met.

A range of factors can affect the effectiveness of a warning, some of them related to the form and type of the warning. It would be useless if it cannot be understood, if the civilians do not know how to act upon this warning due to its general nature, if the instructions given in the warning cannot be followed due to the conduct of the attacker or to the context, such as the impossibility for civilians to flee, or if it is not issued within a reasonable time before the attack as to allow civilians to leave, or issued too early or if the related attack did not take place. Of course military or humanitarian considerations could explain such decisions and are also to be taken into account.

The assessment of the effectiveness of a warning therefore requires considering a wide range of elements. As noted above, the timing, types and content of the warning

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97 QUEGUINER Jean-François, op. cit., p. 808.
98 Sassoli and Quintin, 2014, op. cit.
100 Article 5.3.2.8 of the UK Manual of the Law of Armed Conflict (2004).
can play a role. Previous experiences of using specific warnings and their impact, the particular context of the hostilities or the fact that military operations took place successively in a similar territory may also be important in providing information to assess the effectiveness of a warning. In that regard, the attacker has an obligation to take those aspects into account and any other relevant information, such as information provided by neutral actors on the ground as to the fact that civilians did not leave or are trapped into a building identified in the warning as the object of the attack.

In that respect, if the attacker has been involved in previous armed conflicts regarding a particular territory or was occupying this territory, it may be in a position to have more detailed information on the behaviour of civilians and other factors that can influence the effectiveness of a warning. It is essential to recall that the effectiveness of the warning is to be measured vis-à-vis its impact on civilians who are the beneficiaries of this precaution. On the other hand, if civilians decide not to follow a warning, which may happen for various reasons, including the fact that the warning was not specific enough or gave information that is contradictory to what civilians experienced, this may contribute to establish the ineffective character of the warning but it would not affect the obligations of the attacker to take other precautionary measures, including for the protection of civilians who did not comply with the warning.\textsuperscript{102} IHL does not provide further details on how the attacker is formally required to assess the effectiveness of the warning but a finding of non-compliance could be made if it gives a warning without having first evaluated its effectiveness. Indeed, the IHL norm prescribes that the warning be effective for this norm to be respected. It is therefore the responsibility of the attacker to ensure it carried out this assessment.

2. “\textit{Unless circumstances do not permit}”: the scope of the exception

The requirement to give prior warning is not absolute. Article 57(2)(c) refers to the exception when “circumstances do not permit”, which is also part of the customary law norm. According to State practice, this commonly amounts to situations where the element of surprise is crucial for the attack, or more generally when the warning could compromise the success of the attack or the security of troops.\textsuperscript{103} Additionally, the need to respond immediately to an attack is considered as a relevant factor to assess the feasibility of warnings.\textsuperscript{104}

The evolution of means and methods of warfare impacted on this military consideration. When the only bombardment likely to affect the civilian population came from artillery, usually in a siege operation, the element of surprise was not

\textsuperscript{102} Sassòli and Quintin, 2014, op. cit.
\textsuperscript{103} Study on CIHL, p. 64.
\textsuperscript{104} Israel, Rules of warfare on the battlefield, 2006, p. 27, quoted in updated State practice, ICRC Study on CIHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule20
decisive.\textsuperscript{105} However, as bombardment by long-distance projectiles or bombs dropped from aircraft developed, the element of surprise became more prominent and consequently State practice relied on this exception.\textsuperscript{106} For example, providing a warning in the context of the targeting of fixed targets will most certainly not compromise the success of the attack. This might be more complicated for movable targets.\textsuperscript{107} Additionally, it was suggested that a warning could increase the risk for civilians if the enemy has a record of using them as human shields.\textsuperscript{108} On the other hand this specific situation cannot be used to systematically exclude any warning, especially if this is done on the basis of an interpretation of human shields, which is not in line with IHL or on the basis of vague information about the alleged conduct of the enemy. This would be contrary to the obligation to implement those measures in good faith.

Furthermore, once it is established that circumstances do permit the issuance of a warning, including through taking into account military considerations, those cannot be invoked at a later stage to justify giving a warning under a certain form, such as one which would be so general to render it ineffective. The exception “unless circumstances do not permit” based on military imperatives operates at the level of the IHL norm on warnings, in other words to determine whether or not a warning is required. The characteristic of the warning that needs to be effective cannot be affected by this exception that has already been considered. Such an expansion of the scope of the exception would defeat the purpose of the norm itself.

3. \textit{No impact of warnings on the respect of other IHL norms}

Article 57(5) of API clearly states that precautionary measures do not affect the other legal obligations of the attacker not to attack civilians or civilian objects. Conversely in cases warnings are given, this cannot be construed as evidence that the attacker is respecting other IHL norms. The obligation to give advance warnings is an integral part of the legal regime of protection of civilians under IHL. As a result, a claim that a warning was issued can only be construed as an implementation of a specific rule, provided that the conditions highlighted earlier are met.

Against this backdrop, the claim by Palestine’s delegate to the Human Rights Council that once a warning has been given “if someone is killed, the law considers it a mistake rather than an intentional killing, because [the Israelis] followed the legal procedures”,\textsuperscript{109} suggesting that the death of any warned civilians cannot amount

\textsuperscript{105} J-F QUEGUINER, op. cit., p. 806.
\textsuperscript{106} Sandoz, Y, Swinarski, C. & Zimmermann, B. (eds), op. cit., Article 57, para. 2223.
\textsuperscript{108} Sassòli and Quintin, 2014, op. cit.
to a violation of IHL is legally wrong and baseless. State practice recognizes that all obligations with respect to the principle of distinction and the conduct of hostilities remain applicable even if civilians remain in the zone of operations after a warning has been issued.¹¹⁰

Three fundamental legal implications stem from the above remarks. Firstly, the adoption of precautionary measures does not release the attacker of its other obligations under IHL. Therefore, the mere fact of complying with these specific norms cannot presume respect for the other rules on the conduct of hostilities. This is particularly important when considering the obligation to give advance warning. In that respect, providing advance warning does not mean that the following attack will be lawful under other IHL norms. It also goes without saying that a warning does not turn an attack on an unlawful target into a lawful attack. Secondly, the mere fact for civilians not to follow a warning bears no legal consequences on their status. So they do not lose their protection for remaining in the area after a warning, which can be explained by a wide range of factors such as fear or the lack of means to leave. This is so even if civilians genuinely object to a warning if for example they believe that they would not be attacked. Finally civilians who stayed continue to benefit from the other precautionary measures to be taken by the attacker.

The only way the legal status of a civilian object can change under IHL is if by its purpose or actual use it is making an effective contribution to the military action and that its destruction offers a definite military advantage in the circumstance ruling at the time.¹¹¹ As for civilians, they can only lose their protection if they directly participate in hostilities.¹¹² While voluntary human shields can under certain conditions be considered as direct participation in hostilities, the failure to leave following a warning can in no way be a decisive factor for considering a civilian as acting as a voluntary human shield.

In as much as a violation by the defending Party of IHL cannot justify a violation by the attacker, the norm on prior warning has no bearing on the obligations of the latter to respect IHL.

**V. Overview of the means and methods of warfare or other military tactics used during the Operation “Protective Edge” by Parties to the conflict under the IHL precautionary obligations**

This section does not intend to exhaustively review all incidents that occurred during the “Operation Protective Edge” and that raise legal issues under the IHL obligations on precautions. It does not aim at analysing the selected incidents under all relevant

¹¹⁰ Study on CIHL, p. 65.
¹¹¹ Article 52 (2) of AP I. See also, Janina Dill, op. cit.
¹¹² Article 51 (3) of AP I.
IHL norms either. Therefore, these remarks made in light of IHL precautionary obligations cannot be construed as implying any legal determination under other norms of IHL such as the prohibition of indiscriminate attacks. Furthermore, as pointed out earlier, this section is based on open and public sources related to facts that could not be independently verified by the author of this Expert Opinion. It is only a preliminary assessment, based on the information available as of 27 February 2015, that serves to highlight legal issues that would warrant further independent investigations as a matter of factual and legal determinations, such as in the context of the UN Human Rights Council created Commission of Inquiry on the Gaza Conflict. In that respect, it is also essential to point out that documenting allegations of violations of the norms on the conduct of hostilities requires collecting information about elements prior to an attack or at the time of an attack. Precautions in general and the assessment of feasibility in particular demand an analysis of key information available to the attacker about the target or what steps the attacker took. By definition this data can primarily be provided by the attacker itself. Such a challenge, in addition to other constraints limit greatly the ability to reach factual conclusions. This section will look at both specific incidents and patterns/tactics.

It is worth recalling the relevant specific precautionary measures required under IHL.

Regarding the precautions in attack, in addition to the overall obligation of due diligence to take constant care to spare civilians, the attacker is expected to take all the following precautions provided that these are feasible:

- The obligation to verify including the obligations to verify that the target is a military objective, that is not protected by IHL and that the principle of proportionality is respected;
- The obligation to choose the appropriate target when a choice between several military objectives exists;
- The obligation to choose the appropriate means and methods of attack;
- The obligation to interrupt attacks when it becomes apparent that they are unlawful;
- The obligation to give effective advance warning.\(^\text{113}\)

As noted above, the defender is bound by the prohibition against using civilians to shield military objectives from attacks, which is not per se a precautionary measure. Passive precautions to be taken by all belligerents, despite their uncertain customary status and their recommendatory character, include the duty to the maximum extent feasible to protect civilians against the effects of hostilities.

The undersigned wishes to stress again that the Gaza Strip is one of the most densely populated areas in the world. This contextual element influences the way IHL norms are to be interpreted. This is not to say that this particular environment is generating

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\(^{113}\) This is a summary from Sassòli and Quintin, 2014, op. cit.
IHL does not prohibit the conduct of warfare in densely populated areas either. However, this specific setting does require particular care on the part of the belligerent to protect civilians. Furthermore, it is assumed that in the large majority of cases attacks in the Gaza Strip may affect the civilian population and therefore meet the condition for the norm on advance warning to be applicable *ratione materiae*.

1. **Specific incidents**

   a) The attack on Abu Jame’s home, Khan Yunis

According to information collected by field workers staff supporting Amnesty International’s (AI) work:

On Sunday 20 July 2014, at approximately 7.50pm, following the evening prayer, an Israeli aircraft dropped a bomb on the three-storey home of the Abu Jame’ family in Abu Safar, an area near the al-Zanneh neighbourhood of Bani Suheila, east of Khan Yunis. The attack led to the killing of 25 members of the Abu Jame’ family – 19 children, five women and one man – and Ahmad Sahmoud, a member of the al-Qassam Brigades, Hamas’ armed wing, who was in the vicinity of the house at the time. (…) The house, which was attacked without prior warning, was completely destroyed.114

Although the Israeli authorities did not provide any information on the intended target to date and that survivors denied it, some information suggest that “[t]he apparent target of Israel’s attack was Ahmad Sahmoud, a member of the al-Qassam Brigades, Hamas’ armed wing” considered as “a high-ranking officer in the Khan Yunis command” according to Israeli sources.115 Information provided to Diakonia by Al-Mezan, a Palestinian human rights NGOs investigating the incidents corroborate that account, including that no prior warning was given and that Ahmad Sahmoud was among the persons confirmed to have been killed in the attack.

While crucial information necessary to clarify on which basis an attack was carried out against that civilian building is in the hands of the Israeli authorities, the information above raises specific questions under the rules on precautions in attack. Firstly, the fact that Ahmad Sahmoud was killed in the attack is not sufficient to consider that the Israeli military complied with its obligation to verify the nature of the target. Israeli authorities should share records of the information they collected at the time to confirm the presence of this member of the al-Qassam Brigades. Similarly, despite the fact that IDF sources identify him as a high ranking officer, they would have to provide evidence that they not only collected information on his presence

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115 Ibid., p. 18.
there but also data on the presence of civilians in the building at the time to verify that the attack would comply with the principle of proportionality. This being said, one could reasonably assume that the Israeli army, on the basis of its experience in previous rounds of hostilities in Gaza, including the fact that civilians tend to gather at a relative’s home during fighting, knew that at the timing of the attack, many civilians would be home preparing to break the fast.

The total destruction of the building, the timing of the attack and the death toll among civilians also put in question the legality of the attack under both the obligation to minimize effects on civilians and the obligation to choose appropriate means and methods of attack. Although one may challenge the feasibility of postponing the attack at a time where less civilians would be present (although in a context of constant bombardment, civilians would tend to stay home day and night) given the mobile nature of the target, it is reasonable to assume, until the IDF discloses information in this regard, that if they knew this Hamas military officer was there at the time, they had means to follow his movements and chose to attack at a time he would not be in front of a civilian building. This issue of timing is specifically relevant under the obligation to choose appropriate methods.

Finally, in light of the nature of the target, the element of surprise and the circumstances ruling at the time, a prior advance warning did not seem to be required under IHL as this would have certainly jeopardized the success of the operation (with the possibility that the target flees and goes underground). However, besides the issue of the warning, it is critical to stress that given the number of civilians killed and the fact that the building was a residential infrastructure, the burden of proof lies with the Israeli authorities to prove the extent to which they took additional precautionary measures apart from collecting information on the presence of this Hamas military operative there. Other attacks, such as the attack against the al-Dali building on 29 July 2014 seem to feature the same factual elements that suggest that not all feasible precautionary measures were taken, including in the choice of weapons, given the scale of destruction.

b) The attack on al-Bayoumi’s home in al-Nuseirat refugee camp

According to information collected by field workers staff supporting Amnesty International’s (AI) work:

On Thursday 31 July 2014, at approximately 8pm, an Israeli aircraft almost completely destroyed the three-storey home of the al-Bayoumi family in al-Nuseirat refugee camp, in the central area of the Gaza Strip. When the building was attacked, apparently without prior warning, there were over 40 people inside, including families that had fled their homes in the border areas. The attack killed 14 people, including six children.\textsuperscript{116}

\textsuperscript{116} Ibid., p. 23.
The same sources report that many civilians were home preparing for *iftar* at the time of the attack and that two families who had fled from al-Bureij refugee camp had come to stay in that building. There seems to be contradictory information as to who could have been the potential target of this attack. AI reported that, according to a neighbour:

…there was no fighting in the area on the day of the attack and that no one living in the al-Bayoumi building was involved in any military activities, nor affiliated politically with any faction. However, two neighbours maintained that, following the attack, they found out that at least four members of the al-Qassam Brigades, the armed wing of Hamas, including a battalion commander and a communications officer, were apparently using the empty apartment in the building for some time prior to the attack. One of them was said to have been killed in the attack on the al-Bayoumi home, but his name is not known to Amnesty International and does not appear in the list of named individuals killed below. It was said that another was injured in the attack, while two others escaped and were killed in an attack on a nearby mosque. Amnesty International has been unable to verify this information.\(^{117}\)

While some similar questions to the previous incident arise as to the legality of this attack in terms of precautionary obligations, a particular issue warrants further attention. It is reported that two families had moved several times before arriving at the al-Bayoumi home. Most importantly, one of the families fled al-Bureij refugee camp after the Israeli army dropped warning flyers instructing civilians there to evacuate the area and go to Deir al-Balah or al-Nuseirat camp.\(^{118}\) This means first that the Israeli military could not ignore the presence of many civilians in al-Nuseirat refugee camp given the fact that they instructed them to flee there for their safety, but it also questions the effectiveness of the warnings given. As already noted following the Operation Cast Lead in 2009 by the UN Fact-Finding Mission:

> Whether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage...The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.\(^{119}\)

In this regard, the UN Fact-Finding Mission insisted on the lack of specificity and credibility of many messages and instructions, such as instructions to move to city centres for safety when the city centres themselves had been the subject of attacks.\(^{120}\) While the Israeli army may have provided such instructions in good faith, without knowing where the next attack will take place given the size of the Gaza Strip, this

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118 Ibid., pp. 23-25.
120 Ibid, para. 37.
context may require the warning to be more specific in order to be effective.

c) The Al-Aqsa Hospital

There are several cases of hospitals having been hit by Israeli missiles from air or land over the course of the “Operation Protective Edge”. For example, from 11 July to 17 July, the Wafa Hospital in the Shejai’ya neighborhood, east of Gaza City, was hit on at least three occasions according to information gathered by Human Rights Watch. While it is unclear whether rockets were fired from the hospital, from its vicinity or at all, several warnings were given by the Israeli military including phones calls announcing that the hospital will be bombed, suggesting it was to be attacked. This being said, in at least one occasion the warning instructing staff to evacuate the hospital came five minutes prior to the attack, making it ineffective under IHL given the nature of the infrastructure to be evacuated.

Based on media reports and ICRC statements, another attack reportedly took place on 21 July 2014, where five people were killed and seventy wounded when Al-Aqsa Hospital was hit by Israeli tank shells. While the Palestinian officials’ claim that no warning was given prior to the shelling could not be independently verified, comments by Israeli officials provide conflicting information as to whether the intended target of the attack was the hospital on the basis that weapons were stored there or an ammunition cache nearby. In any case, even if a warning was given, it seems unlikely to have been effective given the fact that, like for the case of the Wafa Hospital, there was no other hospital in Gaza properly equipped to receive patients according to the hospital’s director. Although it is unclear whether the hospital was the actual target based on conflicting statements by Israeli officials, IHL provides special protection to civilian hospitals whereby the protection can only cease if it is used to commit “acts harmful to the enemy” and only “after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded”. It is doubtful that such warning could have been followed at all given the continued shelling of the area at the time.

d) The Jabaliya UN Elementary School

UNRWA schools were struck several times by the Israeli army over the course of the conflict between Israel and Hamas. One of the prominent cases is the Jabaliya


123 Idem.


125 Article 19 of Geneva Convention IV.
UNRWA school, which raises fundamental questions as to the respect for precautions in attack during the “Operation Protective Edge” and illustrates the challenges in applying the relevant norms based on the facts of a specific incident and making legal determination on key issues such as feasibility.

According to a Human Rights Watch investigation into this incident, on July 30 Israeli shells struck in and around the UNRWA-run girls’ elementary school in Jabaliya, killing 20 people, including three children. At the time of the shelling, the school was used as a shelter for some 3300 civilians. Many of those reportedly took refuge there after having been instructed by IDF warnings to leave their homes.

Like in previous incidents, involving the death of civilians, the Israeli military provided unclear or vague explanations as to the reason of such strikes. A spokeswoman was quoted saying that in the morning of the shelling “militants fired mortar shells at [Israeli] soldiers from the vicinity of the UNRWA school”, adding that “[i]n response, soldiers fired towards the origins of fire”. The New York Times reported that military officials stated that Palestinian militants were firing about 200 yards away from the school at a group of soldiers working to destroy a tunnel in the area. They do not appear to have given any further evidence of such claims. As pointed above, it is Israel’s duty to provide additional information that would contribute clarifying what was the intended target and what measures the military took to minimize effects on civilians.

By themselves and in principle, those justifications are not detailed enough to meet the requirement of what is expected from an attacker under IHL in terms of precautions. It suggests a lack of due diligence. However, it is essential to closely analyse all factual aspects of the incident against the relevant legal components of the precautionary obligations.

First, it is important to recall that the precautions to be taken are all those that are feasible. Feasibility being defined as “that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations”, the context of the shelling must be taken into account. One could argue that the need to respond to an ongoing attack might limit the feasible precautions that Israel was required to take. While those military considerations may

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include the protection of the attacker’s own forces as a “valid concern that can be factored in any attack”, as noted earlier, the assessment of feasibility cannot be solely based on military considerations especially if one considers that precautionary norms are norms of a fundamental humanitarian nature. There must be a balance to strike between those elements. Most importantly, it would lead to an interpretation contra legem to consider that the IHL norms on precautions assume that in such contexts of imminent danger no precautions at all must be taken. This would amount to negating the very principles on which the whole set of norms on the protection of civilians are founded. Humanitarian considerations are to be taken into account and would certainly prevail over the sole consideration of the protection of the attacker’s own troops.

It is worth recalling some of the factors listed by the UK Military Manual for a commander to assess feasibility: while it refers to “the urgency of the situation”, it also includes “factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zones and whether they are inhabited”. In that respect, the Israeli military knew the exact coordinates of the UNRWA school and that it was among the shelters used by displaced civilians during the conflict making it clear that any attack in the area would likely affect civilians. According to UNRWA, coordinates had been given specifically by UNRWA to ensure precautionary measures and protection of civilians and civilian objects. The general obligation to take constant care to minimize the impact of attacks on civilians dictates certain measures to be adopted. However the circumstances and facts of the incident suggest that no precautions were taken.

With regard to the specific obligation to verify the lawfulness of the objective, it appears that the school was targeted as such, which might always be the case in situations where allegedly fighters fire from the vicinity of a given building. But as stressed earlier the purpose of precautions in attack is to apply even if in principle the attack is directed against a lawful military objective. Although the imminent danger for Israeli forces who came under enemy fire, if confirmed, might limit the extent of verification possible, a verification is still required. In that regard, one may question the type of verification done by the Israeli army prior to the attack as to the lawfulness of the objective being shelled. Even if the attack is targeting a military objective, precautions also demand to verify that it may not have disproportionate effects against civilians as IHL prohibits attacks that “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”.

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132 Article 51(5)(b) of Additional Protocol I.
Two issues deserve particular attention in that respect. First, those bound by this obligation of verification must collect and rely on military intelligence and information gathered by others within the military, including information coming from the ground, in that case from the soldiers being fired at. Even in cases of imminent threat, there is a minimum set of verification to be done. Information can also come from other credible sources, especially if they are relevant to provide details about a particular situation. In this case, it is essential to note that UNRWA had communicated the precise location of the school and the fact that it was housing thousands of internally displaced people to the Israeli army seventeen times, including the night before the attack. For the obligation of verification to be efficient, it is also expected that prior to launching military operations "[a] military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets", as noted by the Report to the ICTY Prosecutor about the NATO Bombing Campaign. While a Coordination and Liaison Administration (CLA) exists that ensures the communication between international organizations and the Israeli military, this incident, like other attacks that affected UN facilities, put in question the effectiveness of this mechanism to transmit the information from UNRWA to the army as part of the verification process required from the latter. It is reported that the CLA always has a list of the 250 UN facilities across Gaza. In addition, during the Operation “Protective Edge” UNRWA provided a list of the schools serving as shelters. However, UNRWA, expressed concern about the “the lack of coordination between C.L.A. and the kinetic forces in the field”. This issue relates to another fundamental element of precautions. As noted earlier, those norms imply an obligation to learn and the fact that feasibility evolves with experience. In that regard it is important to point out this incident resembles another one that occurred during “Operation Cast Lead” in 2008/2009, where the vicinity of another UNRWA school in Jabaliya, the Preparatory Boys “C” School, was hit by Israeli mortar shells injuring several civilians who took shelter there and killing dozens outside the school. As established by the United Nations Headquarters Board of Inquiry created in 2009 by the UN Secretary-General similar information was shared by UNRWA. Israel’s review of this incident accounts for the following explanation:

The IDF’s ‘investigation of the incident found that, on 6 January 2009, an IDF force operating in the El-Attatra-Jabaliya area came under an effective barrage of 120mm mortars launched from a site about 3.5 km. from the force. The launching site was situated only 80 metres west of the UNRWA school. (…)

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133 Sassòli and Quintin, 2014, op. cit., p. 93.
135 Final Report to the Prosecutor, para. 29, quoted by Sassòli and Quintin, 2014, op. cit., p. 94.
Soon after the source of fire was detected, a scouting unit was dispatched to confirm the location. Approximately 50 minutes after the mortar attack had begun, two independent sources cross-verified the location of the mortars. Only subsequent to this, and after verification of a safety margin of at least 50 metres between the target (i.e., the identified source of mortar fire) and the UNRWA school, did the force respond to the ongoing barrage, by using the most accurate weapon available to it — 120mm mortars.

The IDF acted to defend the lives of soldiers under fire, in order to stop continuing mortar attack. The defensive action targeted an identified source of mortar fire, which represented a concrete and immediate threat to the force. The IDF executed the responsive fire with as much precision as possible, given the available munitions. Indeed, the fact that all the Israeli shells landed outside the school grounds demonstrates the care Israel took not to hit the school itself, consistent with its obligations under the Law of Armed Conflict.\(^\text{138}\)

It must be noted that the fact that the UNRWA school was not hit in 2009 does not in itself mean that all IHL norms on precautions were respected considering that the protection of other civilians in the vicinity of the school is also to be taken into account. It is also crucial to stress that the absence of a deliberate attack against the school does not exhaust the scope of the obligation of verification, which is meant “to avoid attacks directed by negligence at civilians or civilian objects”.\(^\text{139}\) As pointed out by Sassòli and Quintin, if a State fails to take all feasible measures it can still be responsible under international law that foresees responsibility for both dolus (deliberate violation) and culpa (negligence).\(^\text{140}\) The Israeli army seemed to have been aware of the location of the school at the time and took this into account, which might also be the case in the context of the incident on 30 July 2014. But it is left then to Israel to show what types of measures it took to comply with its verification obligation in that particular incident.

However, the type of weapons used and the way they were used in the incident against the UNRWA school on 30 July 2014 raises another question under the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. Various sources indicate that based on inspections of the damage, collected shrapnel, photographs of munitions remnants it suggests the use by Israel of 155mm artillery rounds, which are high explosive shells.\(^\text{141}\) This type of ammunition by its properties and the use of artillery are in principle inadequate to be used in densely populated areas. As pointed

\(^\text{139}\) Sassòli and Quintin, 2014, op. cit., p. 88.
\(^\text{140}\) Ibid, quoting Art. 2 of the Draft Articles,; and para. 10 of the Commentary of the ILC to that Article.
out by experts, this artillery is used as indirect fire in that the target aimed is not seen from the firing position generally from up to 25 miles away and it is a “statistics weapon”, considered effective if it hits within 50 yards of its target.\textsuperscript{142} This is confirmed by an eye witness quoted by media reports saying that “[i]t was clear that they were not aiming at a specific house, but fired lots and it fell where it fell”.\textsuperscript{143} This is also consistent with the damage assessment conducted on site referring to several strikes with the school being hit at least three times.\textsuperscript{144}

It is important to note that the obligation to choose appropriate means and methods of attacks, as a precautionary obligation does not \textit{per se} prohibits the use of any specific weapons. This obligation nonetheless requires considering available means of warfare, the way they will be used and their potential impact on civilians. Due to the characteristics of heavy explosive artillery shells and their lack of accuracy, their use in densely populated areas is not an appropriate as it is not capable of distinguishing between combatants and civilians, moreover in the vicinity of shelter populated with thousands of civilians.

While this obligation to choose does not either create in all circumstances an obligation to use precision-guided munitions,\textsuperscript{145} it is unquestionable that a precision-guided missile would have been the most appropriate means to minimize effects on civilians in this particular. However it requires conducting an assessment of the various factors relevant at the time of the decision to use artillery shells. The author wishes to stress that in this regard this is difficult to reach a definitive conclusion without more comprehensive information to assess whether precision-guided ammunition was available to the IDF at the time and, if it was not, the length and consequences of any delay until it might have become available, given the fact that it is alleged they were under enemy fire. This being said a set of elements suggest that the Israeli army did not consider all feasible precautions under that obligation to choose appropriate means and methods.

First there seems to be a lack of clarity as to the exact origin and location of the enemy fire. This would explain why artillery shells, being effective within 50 yards of the target were used to cover a certain area within the zone about 200 yards away from the school. Furthermore, an Israeli general responding to questions from the \textit{New York Times} indicated that “[t]he sheer orders are you are not allowed to fire artillery or mortar shells into urban areas unless there are imminent risks for human lives – meaning only if you are under deadly fire or under great risk”.\textsuperscript{146} Although this is valid military consideration to justify the use of such weapons, it fails to take into account other elements pertaining to the obligation to minimize effects on civilians

\begin{footnotes}
\footnote{\textsuperscript{142} Ben Hubbard and Jodi Rudoren, \textit{The New York Times}, op. cit.}
\footnote{\textsuperscript{143} Idem.}
\footnote{\textsuperscript{144} UNRWA, Statement, 30 July 2014, op. cit.}
\footnote{\textsuperscript{145} Y Dinstein, 2010, op. cit., p. 142, para. 351.}
\footnote{\textsuperscript{146} Ben Hubbard and Jodi Rudoren, \textit{The New York Times}, op. cit.}
\end{footnotes}
when choosing the appropriate weapons. In the 2009 incident mentioned above, Israel referred to verifying the safety margin before firing mortar shells. While this may be seen as a precautionary measure, it also needed to consider the impact on civilians outside the school as pointed out by the United Nations Headquarters Board of Inquiry. At the time, this panel found that “in firing 120 mm high explosive mortar rounds, the IDF had not maintained an adequate safety distance between whatever its target point might have been and the school”.\(^\text{147}\) Similarly, in the case under review here, the fact that at least six strikes were identified, including three against the school, suggests that even if no precision-guided ammunition were available at the time to respond to the enemy fire, firing six rounds of this type of heavy artillery shells around the UNRWA school could not have been the most precautionary method to use. Another related question is to consider that those heavy artillery shells, assuming they were not precisely guided ones, fail to distinguish between combatants and civilians in densely populated areas.

Finally, it does not appear that an advance warning was given in this particular case, which could be explained by the need to respond immediately to an attack, considered by Israel as a relevant factor to assess the feasibility of warnings.\(^\text{148}\)

2. **Legal review of certain tactics under the IHL norms on precautions**

This section does not intend to provide an exhaustive account of the tactics used by Israel or Palestinian armed groups during the conflict. Moreover the term tactics must be understood as recurring practice exhibiting the same characteristics as to the way hostilities were conducted. It does not aim at taking a position as to whether such practices can amount to policy or have a systematic character as a legal element of the definition of certain crimes under international law. It only intends to identify legal issues arising from certain types of conduct under the norms on precautions as well as under the prohibition to use human shields in IHL.

a) **Barrage strikes and the potential activation of the “Hannibal Protocol” in Rafah**

While “Operation “Protective Edge” was marked by several incidents involving the use of heavy artillery or mortar shelling and resulting in civilian casualties and damage to civilian objects, such as the shelling of the UNRWA school in Jabaliya, this section looks at the tactic used by Israeli army to proceed with barrage strikes (through artillery, mortar, airstrike and/or tank) or heavy bombardment on specific areas in the Gaza Strip. Two incidents warrant a detailed scrutiny though based on different rationales: the shelling of Shuja’iya is neighbourhood and the possible activation of a particular Israeli military doctrine, the so-called “Hannibal Protocol”. However, these are only illustrative of a broader tactic that also saw other civilian

\(^\text{147}\) Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry, op. cit., para. 25.

neighbourhoods in Gaza, such as Khan Younis, Khuza’a, and Beit Hanoun suffer large-scale destruction raising fundamental questions as to the respect of precautionary obligations.

- The Shuja’iya neighbourhood

Over the course of two days, starting on 19 July 2014, the Israeli army conducted heavy shelling of the Shuja’iya neighbourhood using thousands of high-explosive artillery rounds, rockets fired from helicopters and bombs dropped by F-16s jets resulting in numerous civilian deaths and vast damage to civilian objects, including levelling down entire sections of the neighbourhood.¹⁴⁹ Two days before, a ground operation was launched on Shuja’iya to destroy Palestinian armed groups bunkers and neutralize their formations. It is reported that warnings, through dropping leaflets, were given on 16 July instructing civilians to evacuate the area and flee to the city centre while according to Media reports the Hamas’ ministry of interior told residents to ignore the warning, calling it “psychological warfare”.¹⁵⁰ Although this aspect will be addressed later, it is worth stressing at this point that the mere fact that civilians did not follow these warnings did not make them legitimate targets as they retain the protection afforded by IHL.

The analysis of the barrage tactic used in the Shuja’iya neighbourhood requires looking in more details at the weaponry and method used. Based on interviews with US military officials who had access to Pentagon briefings and internal reports a journalist summarized in the following terms the means used during this attack:

11 Israeli artillery battalions — a minimum of 258 artillery pieces, according to the officer’s estimate — pumped at least 7,000 high explosive shells into the Gaza neighborhood, which included a barrage of some 4,800 shells during a seven-hour period at the height of the operation.¹⁵¹

This type and amount of firepower against an entire urban area where thousands of civilians remained raises critical questions under the IHL norms on precaution. First it is doubtful that such tactic can be reconciled with the obligation to take constant care in the protection of civilians. Most importantly, it is at odds with the specific precautionary measures to be taken. The shelling started when the Israeli forces on the ground were faced by a strong resistance from Hamas fighters, especially late afternoon on 19 July, turning the hostilities into urban small guerrilla clashes. While

¹⁵¹ Mark Perry, op. cit.
artillery shelling could be justified to protect troops on the ground, the tactic used by the Israeli army appears to have rapidly changed in scale. A senior US Pentagon officer noted in this regard that Israel’s artillery used “suppressing fire to protect their forward units but then poured in everything they had, in a kind of walking barrage. Suppressing fire is perfectly defensible. A walking barrage isn’t.”152 It is also reported that this “cratering” tactic was used to collapse the Hamas tunnels discovered by the ground units. While protecting troops and destroying tunnels are valid military considerations under IHL, the type of weapons used and the large scale use of them against an entire civilian neighbourhood can hardly be seen as compliant with IHL norms on precautions, in part due to the apparent breach of other material norms.

First the obligation to verify the lawfulness of the objective of a planned attack like this one would require identifying precisely the military targets. In the case under review the objectives seem to include the protection of ground forces, the destruction of tunnels used by Hamas and the neutralisation of Hamas forces. However, the type of weapons and the methods used (shelling in a barrage mode) tend to consider the entire civilian neighbourhood as a target. Under IHL the prohibition of indiscriminate attacks include the prohibition of “attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects”.153 Additionally according to IHL “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.154 This is confirmed by the way the attack was conducted. According to senior US officers interviewed by a journalist, given that rate of artillery fire into the Shuja’iyya neighbourhood, IDF commanders were not precisely targeting Palestinian military formations as much as laying down an indiscriminate barrage aimed at cratering the neighbourhood.155

In addition, it is doubtful that the obligation to choose appropriate means and methods of attacks was respected. The types of weapons and methods used are incompatible with a reasonable assessment of whether they could be the most effective ones to minimize effects on civilians. Furthermore it was argued that even the use of precision-guided artillery rounds would not have done a difference given the intensive shelling.156 Based on military experts’ evaluation a journalist gave the following summary of the combination of circular area of probability and lethal radius of such ‘smart’ shells:

152 Quote from Mark Perry, op. cit.
153 Rule 13 of CHILS.
154 Article 50 (3) of AP I.
155 Mark Perry, op. cit.
156 Idem.
Even the most sophisticated munitions have a circular area of probability, Gard explained, with a certain percentage of shells landing dozens or even hundreds of feet from intended targets. Highly trained artillery commanders know this and compensate for their misses by firing more shells. So if even 10 percent of the shells fired at combatants in Shujaiya landed close to but did not hit their targets — a higher than average rate of accuracy — that would have meant at least 700 lethal shells landing among the civilian population of Shujaiya during the night of July 20 into June 21. And the kill radius of even the most precisely targeted 155-mm shell is 164 feet.

Finally, the attack might also be questionable under the principle of proportionality.

- The potential activation of the “Hannibal Protocol” and the shelling of Rafah

While the full factual account of this incident is still to be established, it warrants a specific analysis. According to various media reports based on interview with Israeli officers, on 1 August 2014, an ambush by a Palestinian armed group commando from a tunnel inside Gaza resulted in two Israeli soldiers being killed and the body of a third soldier taken away. The Israeli army thought the kidnapped soldier was alive at the time but it turned out later that he was most certainly killed in the ambush and that the Hamas fighters took his corps. Following this incident, it is reported that the Israeli army operated on the basis of an operational directive codenamed the “Hannibal” Protocol (or Directive). Given the secretive nature of this directive, it seems unclear whether it was officially initiated but several sources, including within the Israeli military referred to it. It was first drafted in 1986 after three Israeli soldiers were abducted in Lebanon. The directive appears to allow for all necessary action and for a “massive use of force” in order to prevent the capture of an Israeli soldier. Some have interpreted this protocol as even authorizing the killing of their own soldier. It is alleged that it is on the basis of this directive that the Israeli army engaged in a massive shelling of Rafah on 1 August and the following day with barrage artillery shelling, air strikes and tank firing. Palestinian human rights groups estimate the number of civilians killed to over 130. The shelling of Shuja’iyya neighbourhood is also reportedly a case in which this directive was implemented as a soldier was thought to have been kidnapped as well.

Under IHL norms on precautions, the very premise of this directive is at odds with the basic obligation to take constant care to spare civilians. There seems to be no proper verification as to whether the attack targets a lawful objective. On the contrary, while the imperative to prevent the kidnapping of a soldier is in itself a legitimate military objective, the logic and terms of the directive suggest that this military consideration turns an entire area, in this case civilian in nature, into a potential target. Moreover the

157 Idem.
means used and the barrage-type of bombardment, in a densely populated setting such as the city of Rafah, imply that no precautionary measures were taken. In that respect the scale of destruction and loss of civilian lives witnessed in Rafah also showed that there was no attempt to cancel the attack, for the very reason that the directive does not allow such options.

b) The narrative and practice of advance warnings under IHL

The author wishes first to stress that the prevalence of the reference by the Israeli army to the advance warnings given prior to attacks in the context of the “Operation Protective Edge” seems to be unprecedented in modern conflicts. As noted earlier, Israeli authorities framed this precautionary measure as evidence that Israel complied with its IHL obligations or even did more than what this body of norms requires in stark contrast to the conduct of Palestinian armed groups. Against this backdrop, it is important to briefly review this narrative and practice under IHL during the latest conflict in Gaza.

First and foremost, it is fundamental to recall the rationale of the obligation to give advance warning under IHL. This precautionary measure is an integral part of the legal regime protecting civilians. It cannot therefore be construed as a positive measure that when taken would confer lawfulness to the attacker’s subsequent actions or would assume compliance with other material norms of IHL such as the prohibition of indiscriminate attacks. Proceeding otherwise would simply lead to a misrepresentation of the entire set of rules aimed at protecting civilians. In as much as precautions are required in cases of attacks that comply with the principles of military objective and of proportionality, the compliance with precautionary obligations has no legal bearing as to the continuing requirement on the part of the attacker to respect the other norms of IHL. Consequently, the recurring discourse by Israel that warnings were given has no factual or legal implications regarding the determination of potential violations of IHL that occurred during the conflict.

As to the practice of advance warnings itself during the conflict, the few cases analysed earlier shown that the legal review must be done on a case-by-case basis. The absence of warning does not in itself account for a violation of the related obligation, in the same way that the issuance of a warning does not posit a lawful act under IHL.

While the characteristics of Gaza made it virtually impossible for civilians to evacuate to a location that would not be the subject of a later attack and that there were many reasons for civilians not to follow warnings, it is important first to acknowledge that these elements cannot render all warnings that were given ineffective and in violation of IHL. The Israeli army did give in several cases advance warnings prior to launching attacks that were effective and in respect with IHL, in various forms, which were acted upon by civilians at the time. On the other hand, it did not issue warnings
in many other cases, but this was justified under the exception foreseen in the IHL relevant norm such as preserving the element of surprise when attacking mobile targets.

However this unique context also calls for a cautious analysis of cases where warnings were given. In that regard, the fact that the Israeli army issued for the same attack multiple advance warnings in various forms (leaflets, text messages, radio messages) is not a guarantee that these complied with IHL requirements. The most important condition is for the warning to be effective. The feasibility and the effectiveness of a warning must not be determined in abstracto and require considering the context and prior lessons learned in similar situations, including the results of any relevant objective review. In that respect, following “Operation Cast Lead” in 2008-2009, the UN Fact-Finding Mission on the Gaza Conflict, while acknowledging the significant efforts made by Israel to issue warnings, had already stressed the factors that significantly undermined the effectiveness of the warnings. For example, it noted the lack of specificity and credibility of many messages and instructions, such as instructions to move to city centres for safety when the city centres themselves had been the subject of attacks. Such assessment could not be ignored by Israel when determining which type of warning to give during the most recent conflict. In this regard, the practice of the so-called ‘roof-knocking’, consisting of striking the roof of a building with a low or non-explosive missile before destroying, is particularly controversial. It is then paramount to stress that in 2009 already the UN Fact-Finding Mission on the Gaza Conflict provided the following evaluation of this form of warning:

The Mission is doubtful whether roof-knocking should be understood as a warning as such. In the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack…The legal requirement is for an effective warning to be given. This means that it should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.

This is even more so when considering that some warning shots have reportedly injured or killed civilians during “Operation Protective Edge”. Similarly, the issuance of warning without giving enough time to civilians to evacuate renders those ineffective. A recent fact-finding report by Physicians for Human Rights and three Palestinian NGOs highlighted similar problems to those prevalent in 2008-2009 in that “warnings were highly inconsistent, which undermined the ability of civilians to respond effectively and thus secure their safety”. This seems to suggest that the use

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160 Ibid., paras 532-533 (footnotes omitted).
of the ‘roof-knocking’ as a warning was not considered in light of the duty to learn from past practices. It is obvious that it is always easier to assess the effectiveness after the attacks. A warning not followed by an attack may also render other warnings ineffective but might be explained by the fact that following the warning, the mobile target fled and that the attack was not lawful under IHL anymore. However, it appears that in many cases as a matter of policy, the issuance of warning could have been improved compared to 2008-2009 and that in some cases a warning should have been given but the Israeli did not issue one.

c) Storage of ammunition or launching rockets by Hamas from protected objects and the prohibition on the use of human shields

From the outset, it must be highlighted that Palestinian armed groups resorted to means and methods of warfare that violate the prohibition of indiscriminate attacks by firing rockets at Israeli cities either with makeshift rockets that could not be directed at a specific military objective or with more accurate rockets aimed at civilian urban centres. This being said, this Expert Opinion intends to focus on two controversial practices: on the one hand the storage of ammunition and launching of rockets from civilian buildings, and on the other hand the claim that they used human shields, although this is not technically a precaution-related obligation. However, it is critical to recall that such tactics do not relieve Israel from its obligations under IHL. Therefore the claim by Israel in the context of the shelling of the Shuja’iyya neighbourhood that the civilian casualties must be explained by the fact that the civilians had been ordered to stay in their homes and were used as human shields by Palestinian armed groups, an argument used repeatedly in other attacks, has no legal bearing. Furthermore as discussed below, this line of argument is fundamentally flawed and founded on a wrong interpretation of the relevant IHL norms.

While the IHL norms on precautions against the effects of attack place less stringent obligations on the defender than on the attacker and despite their controversial customary status, it is important to review this practice used in the Gaza Strip by Palestinian armed groups. Those duties, notably the obligation to take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks and the obligation to the extent feasible to avoid locating military objectives within or near densely populated areas are relative in nature. The Gaza Strip, being one of the most densely populated areas in the world, the relative nature of those obligations leads to consider that it would be particularly difficult for the Party subject to an attack to take such passive precautionary measures. In other words, the fact that it is not always feasible to conduct military operations away from civilians in this context would mean that those precautions cannot be required systematically from the belligerent. However certain practices, such as storing ammunition in civilian houses or firing rocket from a residential building are acts that directly endanger civilians by turning these objects into lawful military objectives.

https://gazahealthattack.files.wordpress.com/2015/01/gazareport_eng.pdf
This would be different from hostilities taking place in the vicinity of civilian objects as a result of the normal course of the war and as an unavoidable consequence of the particular context. In that respect it could be possible to consider that the Palestinian armed groups, despite the more flexible character of those obligations, have violated those standards in certain specific cases, provided that the feasibility assessment has been conducted.

The case of the use of human shields is even more complicated. This prohibition is contained in Article 51(7) of API that reads as follows:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

As mentioned earlier this prohibition to use human shields differs from passive precautions in that in the former case the defender made some efforts to use civilians (by definition not civilian objects) to shield its military forces and objectives, restricting the scope of prohibited acts. Consequently, the mere fact of conducting military operations in the vicinity of civilians is not in itself constitutive of a violation of the prohibition to use human shields. As noted by the 2009 UN Fact-Finding Mission on the Gaza Conflict, “[f]ighting within civilian areas is not, by itself, sufficient for a finding that a Party is using the civilian population living in the area of the fighting as a human shield”.162 In the same vein, Article 50(3) of API provides that “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. Similarly the ICRC noted that the provisions prohibiting the use of human shields “are couched in terms of using the presence (or movements) of civilians or other protected persons to render certain points or areas (or military forces) immune from military operations”.163 It concluded that “the use of human shields requires an intentional colocation of military objectives and civilians or persons hors de combat with the specific intent of trying to prevent the targeting of those military objectives”.164 Furthermore, it must be stressed that civilians remain protected and that the attacker is still required to take precautionary measures. Similarly the mere fact for civilians to reject an advance warning does not affect their protection. For voluntary human shields to lose their protection as a result of being considered as directly participating in hostilities, it requires to prove that this participation physically hinders enemy military operations.165

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163 Study on CIHL, op. cit., p. 339.
164 Ibid., p. 340.
165 Sassòli and Quintin, op. cit., p. 114.
While more investigations would be needed into the claim that Palestinian armed groups used human shields, the above remarks are essential to clarify the restrictive scope of the norm under IHL. It would then be necessary to establish that they either directed civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of the attacks. In itself, the statement reported by media outlets by the Ministry of Interior of Hamas ordering civilians to ignore warnings issued by the Israeli army might not meet the requirement of deliberate acts intended to shield an objective as it might be explained by various other considerations.
CONCLUDING REMARKS

This Expert Opinion aimed at clarifying the legal meaning and scope of the IHL norms on precautions in the context of certain incidents and claims related to the “Operation Protective Edge” in the Gaza Strip. In light of the above, and under the imperative for further investigations to establish the facts and gather more information, it is submitted that:

1) IHL norms on precautions carry positive obligations in that they require Parties to a conflict to take certain types of measures either when attacking or against the effects.

2) While IHL does not prohibit hostilities in densely populated areas, such settings place greater obligations on the Parties to a conflict, notably with regard to precautions.

3) Rules on precautions in IHL have a twofold function: on the one hand they are preventive and a perquisite to give effect to other norms of IHL on the conduct of hostilities, notably those on the protection of civilians; on the other hand some of those obligations have an autonomous character, especially active precautions, that can be violated even when the attack is lawful under the other IHL norms.

4) Compliance with the norms on precautions has no legal implications on the way other IHL norms operate, nor can precautions be interpreted to change the legal meaning or the scope of those other norms.

5) While precautionary obligations are relative, in that only those measures that are feasible have to be taken, this character cannot serve as reason for Parties to the conflict to evade their obligations.

6) Although the assessment of feasibility requires considering both military and humanitarian factors to determine what was practically possible, the term feasible is a legal element to identify the scope of precautionary obligations and determine what is required to conclude whether the related norms have been respected.

7) Certain precautionary measures to be taken in attack and the assessment of what is feasible imply specific duties in order for the relevant IHL norms to be applied in good faith:
   - In particular notions of feasibility and of effectiveness for advance warnings carry a duty to learn or to take into account past experiences.
   - Obtaining reliable and relevant information is both a prerequisite to decide upon and implement precautions in attack required under IHL and a form of precaution in itself.
   - Repeated cycle of hostilities on the same territory or in case of occupation where the attacker is or was the occupying power provides the attacker with information that must be factored in when assessing
feasibility or with regard to certain measures such as the verification of the lawfulness of an objective.
- There is a specific requirement on the part of the attacker to take steps to collect the relevant information from all sources.

8) Determining whether certain measures are feasible might depend on the economic and technological development of each Party to the conflict.

9) A precautionary measure that proves to be unsuccessful does not mean in itself that the corresponding obligation has been violated. This determination depends on whether the attacker respected its duty to take feasible measures and collected sufficient information.

10) A recurring pattern of adequate precautions taken by the attacker does not exclude a violation in a specific incident. Conversely repeated attacks carried out with the same precautionary measures of dubious effectiveness might, by their cumulative and extensive effects on civilians and civilian objects, mean that they do not comply with the norms on precautions.

11) While there may be legitimate military considerations, recognized under IHL, whereby circumstances do not permit to give an advance warning, such as the element of surprise, such factors cannot later justify giving a warning that is not effective.

12) The effectiveness of warning shall be primarily assessed against the ability or not of the civilians to act upon it.

13) If civilians decide not to follow a warning, this does not affect the obligations of the attacker to take other precautionary measures, including for the protection of civilians who did not comply with the warning, nor to comply with other norms of IHL. In particular, this has no influence on the legal status of civilians that must determined under the relevant norms of IHL, namely the notion of direct participating in hostilities.

14) Israel’s claim that it did more than what IHL requires in terms of precautions during the “Operation Protective Edge” therefore constitutes a fundamental misrepresentation of the way those norms operate: the mere fact of complying with these specific rules, cannot presume respect for the other rules on the conduct of hostilities.

15) Several specific incidents and military tactics used by the Israeli army during the “Operation Protective Edge”, notably the extensive use of heavy artillery shelling, raise serious concerns as to the respect for precautionary obligations under IHL.

16) Passive precautions to be taken by any belligerent against the effects of attack to protect civilians carry lesser obligations than active precautions with regard to the attacker under IHL.

17) Feasible passive precautions, notably precautions to protect the civilian population and civilian objects under their control against the effects of attacks and avoiding to locate military objectives within or near densely populated areas, are greatly limited in a context where the hostilities take place in a densely populated area.
18) Certain practices by Palestinian armed groups, such as storing ammunition in civilian houses or firing rocket from a residential building are acts that directly endanger civilians by turning these objects into lawful military objectives. In that respect, it could be possible to consider that the Palestinian armed groups, despite the more flexible character of those obligations, have violated those standards in certain specific cases, provided that the feasibility assessment has been conducted.

19) The scope and rationale of the prohibition to use human shields under IHL are different from passive precautions: the former rule requires proving that the belligerent defending deliberately use the presence or movements of civilians to try to render military objectives immune from attacks.

20) For Palestinian armed groups to have violated this prohibition, it is necessary to establish that they deliberately either directed civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of the attacks.

21) Under IHL, the statements by Hamas officials ordering civilians to ignore warnings issued by the Israeli army might not meet the requirement of deliberate acts intended to shield a military objective as it might be explained by various other considerations.

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Dr. Théo Boutruche

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