
‘Even war has rules’: a call for global action to protect civilians

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Theme

The deliberate targeting of, and indiscriminate attacks against, civilians are recurrent themes in present-day armed conflicts.

Summary

There is an urgent need to address in a comprehensive manner the problem of systematic and flagrant violations of international humanitarian and human-rights law in ongoing conflicts, including its sources and implications. More specifically, possible lines of action to counter the growing importance of non-state armed actors and the use of explosives in populated areas must be discussed. A Global Action Plan on how to prevent, repress and redress serious violations of international law in armed conflict, taking into account the present and future role of UN peace missions, is a must.

Analysis¹

The deliberate targeting of, and indiscriminate attacks against, civilians are recurrent themes in present-day armed conflicts. The fact that such acts are outlawed in international humanitarian and human rights law and constitute grave crimes under international criminal law has no evident impact on how hostilities are conducted and strategies chosen by the parties in these conflicts. Since 2008 until now, compliance with international legal obligations towards civilians has deteriorated. While the total number of armed conflicts has declined, illegal violence in ongoing conflicts has intensified.² The number of civilian deaths and injured is now reaching levels that have not been registered since the time of the Yugoslav conflict and the Rwandan genocide. The escalation of violence has also led to a sharp increase in the number of persons who are fleeing their homes and countries in search of refuge. There are now more than 60 million refugees, asylum-seekers and internally displaced persons worldwide, the highest numbers ever documented.³

¹ ‘Even war has rules’ was an expression used by Jan Eliasson, UN Deputy Secretary-General on the occasion of the Security Council’s open debate on the protection of civilians held in January this year. See the 7606th meeting of the Security Council (S/PV.7606), 19/1/2016.

² These statistics are available in the International Institute for Strategic Studies’ *Armed Conflict Survey 2015*.

³ An estimated number provided in the UNHCR Mid-Year Trends 2015, p. 3. An updated figure on global forced displacement will be released in June 2016 with the publication of the 2015 Global Trends report.

According to the UN Secretary-General (UNSG) Ban Ki-moon, the blatant disrespect for international humanitarian obligations by parties to armed conflicts is now one of the most critical challenges to civilian protection.⁴ In October 2015, he and the International Committee of the Red Cross (CRC) issued a joint warning about the impact of today's conflicts on civilians and called for concerted action. Furthermore, the 32nd International Conference of the Red Cross and Red Crescent held in December called for the strengthening of international humanitarian law through a state-centred process aimed at reaching a consensus on ways of enhancing compliance. In January 2016 several of the more than 70 speakers at the Security Council's open debate held at the initiative of Uruguay, stressed that, following a year of reflection on how to improve the protection of civilians, 2016 must be a time to turn rhetoric into concrete action to induce compliance with international humanitarian law.⁵

The general contention is that there is an urgent need to mitigate human suffering resulting from a widespread ignorance of basic legal prohibitions that are valid in both international and non-international armed conflicts, such as the prohibitions against violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, against the taking of hostages, and against outrages to personal dignity, in particular humiliating and degrading treatment (common article 3 of the Four Geneva Conventions of 1949). If and when appeals to the law –and claims about the prevalence of an international legal protection of civilians that must be honoured in all armed conflicts– loose practical significance for both perpetrators, state and non-state armed actors, as well as victims, what can and should be done? Is it possible to restore its relevance? What can and should be the role of the UN and regional organisations in this endeavour?⁶

UN Security Council actions

The extreme vulnerability of civilians in new wars is a cause of great concern for the UN Security Council (UNSC), which over the past 16 years has been working actively to promote compliance with international law of armed conflict.⁷ Its first resolution on the topic (S/RES/1265 of 17/IX/1999) acknowledged that the vast majority of casualties in armed conflicts are civilians who are increasingly being targeted by combatants. This situation, it held, reveals the 'erosion in respect for international humanitarian, human rights and refugee law and principles during armed conflict, in particular deliberate acts of violence against all those protected under such law'. In this light, the UNSC condemned the 'deliberate targeting of civilians in situations of armed conflict' and urged

⁴ *Report of the Secretary General on the Protection of Civilians in Armed Conflict* (S/2015/453), 18/VI/2015, par. 28.

⁵ See footnote 1 above.

⁶ The promotion of compliance with international humanitarian law has been on the academic and professional agendas for several years. Recent academic contributions include: Heiker Krieger (Ed.) (2015), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region*, Cambridge University Press; Cedric Ryngaert & Anneleen Van de Meulebroucke (2011), 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-state Armed Groups: An Inquiry into Some Mechanisms', *Journal of Conflict & Security Law*, vol. 16, nr 3, pp. 443-472.

⁷ For an updated account of UN resources, see 'Protection of Civilians in Armed Conflict' Selected Online Resources' provided by UNRIC.

all parties to such conflicts to strictly comply with legal obligations. It also reaffirmed the primary responsibility of states to prosecute genocide, crimes against humanity and serious violations of international humanitarian law. Further highlighted in resolution 1265 were the importance of the international fact-finding commission (art. 90 of the First Additional Protocol to the Geneva Conventions) and international criminal tribunals.

Since then, Council members have met regularly to discuss the lack of protection of civilians and how to counter it. In the process, several additional resolutions have been passed with the aim of singling out different categories of civilians, including refugees and internally-displaced persons, humanitarian personnel, journalists, women and children, and to define their special vulnerabilities. In addition, several forcible measures meant to proffer protection to civilians have been identified and are now being pursued. While the specific measures vary somewhat from case to case, they can roughly be divided into armed and non-armed protection. Whereas the former refers to armed defence of civilians who find themselves exposed to imminent threats of physical violence, the latter denotes a protection that consists of accountability and other justice-related measures, including human-rights monitoring, investigating and reporting on human-rights violations and grave crime, including national and international judicial proceedings.

The empowerment of UN peace missions

A central idea running through all the Council initiatives designed to strengthen the protection of civilians is to empower UN peace operations. Since 1999 when the first UN mission with a civilian protection mandate was despatched to Sierra Leone, several operations have been instructed to resort to armed force to defend civilians in case of exposure to imminent threats of physical violence, and also to monitor and report on human rights violations (S/RES/1270 of 22/X/1999, pars. 10 and 14).

For instance, the UN Mission in the Republic of South Sudan (UNMISS) is instructed to provide both armed and non-armed protection and to consider especially 'violations and abuses committed against children and women, including all forms of sexual and gender-based violence in armed conflict by accelerating the implementation of monitoring, analysis and reporting arrangements on conflict-related sexual violence by strengthening the monitoring and reporting mechanism for grave violations against children'. It has also been directed to coordinate with and to offer technical support to, where appropriate, the African Union's Commission of Inquiry for South Sudan (S/RES/2155 of 27/V/2014, par. 4.b). The UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), established in 2013 and the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), created in 2014, have been given similar mandates (S/RES/2227 of 29/VI/2015, par. 14.e and S/RES/2149 of 10/IV/2014, par. 30.e, respectively). Furthermore, the UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) has been authorised to defend civilians and to assist national and international judicial processes. Specifically, it is meant to 'support and work with the Government of the Democratic Republic of the Congo (DRC) to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC' (S/RES/2147 of 28/III/2014, par. 4.d).

The unarmed civilian protection mandates have been understood to require the direct involvement of international legal professionals. As an illustration, MONUSCO in the DRC has established a *Rule of Law section* comprising 30 international and national lawyers, magistrates and professors of law, who have been assigned to support national and international efforts to bring perpetrators of grave crime to justice. The section has established five prosecution support cells in the Eastern provinces of the country, where grave crime is rampant. These cells are instructed to support the investigatory and prosecutorial capacities of domestic military and civilian courts. Each cell is composed of military and civilian prosecutors as well as police investigators (government-provided personnel) who provide technical advice and logistic support to the prosecutors and investigators of the armed forces of the country in the conduct of investigations of war crimes and crimes against humanity, with a particular emphasis on sex crimes. With the support of the UNDP, the cells have assisted several investigation missions and mobile courts in Katanga, North Kivu, Oriental and South Kivu. They also provide technical support to the military justice authorities in North Kivu in their ongoing investigations into the crimes allegedly committed in the areas of Beni and Oicha.⁸

Also, the experience of the MINUSCA mission is significant. Even if its priority is to protect civilian populations from physical violence,⁹ it is also active in seeking to 'identify and record threats and attacks against the civilian population, including through regular interaction with the civilian population and working closely with humanitarian and human rights organizations' (S/RES/2227 of 29/VI/2015, par. 14.e). The Justice and Corrections section of MINUSCA documents incidents of human-rights violations, including against women and children. It is further committed to supporting the implementation of the *peace accord* agreed in the Bangui Forum held in May 2015, which foresees the creation of a national human-rights commission, a truth commission and other reparation mechanisms. The mission has been actively engaged in the creation of the new *Special Criminal Court* to investigate and prosecute human rights violations since 2003. It is the first time a government has established through national law a hybrid criminal court, following its signing in August 2014 of a Memorandum of Understanding with the UN peacekeeping mission that sketched out the idea of a hybrid justice mechanism.¹⁰ The MINUSCA is currently providing assistance, especially on budgetary matters, to make the new court operational.¹¹

⁸ *Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (S/2015/486), 26/VI/2015, par. 58.

⁹ *Report of the Secretary General on the Situation in the Central African Republic* (S/2015/576), 29/VII/2015, par. 29.

¹⁰ The Special Criminal Court will have a majority of Central African Judges, a Central African President and Chief Registrar, but with an international Chief Prosecutor. See Human Rights Watch (2015), 'Taking Justice to a New Level: The Special Criminal Court in the Central African Republic', 13/VII/2015.

¹¹ *Report of the Secretary-General on the Situation in the Central African Republic* (S/2015/576), 29/VII/2015. For information about the Special Criminal Court, see par. 54 of the report, according to which 'the prosecution office will be headed by an international prosecutor. While the Court will generally apply Central African laws, the death penalty has been excluded. The law does not provide for amnesty or immunity in cases involving crimes against humanity, war crimes or genocide'.

A third example of the same trend is the UN mission in South Sudan, which provides both armed and unarmed protection to civilians. Notably, its human-rights division reports periodically to the UNSC on attacks on civilians, and investigates allegations of human rights violations and grave crimes. However, the continued hostilities in the country render the conduct of investigations difficult.¹² Though the importance of transitional justice measures is stressed in the Mission's programme of work, the significant delay in releasing the report of the AU Commission of Inquiry into the atrocities in the country is a major obstacle to progress. The signing of the [South Sudan peace agreement](#) on 26 August 2015 provides a new framework for countering impunity. The fifth chapter of the agreement encompasses critical elements in this regard, such as the establishment by the AU Commission of a truth commission and a hybrid court for South Sudan. The court will investigate and prosecute individuals accused of genocide, crimes against humanity, war crimes and other violations of international law and applicable South Sudanese law in the period from 15 December 2013 to the completion of the transitional period. It is foreseen that the UN mission will assist in the accomplishment of this goal.

The unarmed strategies are the preferred way of promoting compliance. However, as the June 2015 report of the High-Level Independent Panel on Peace Operations underscores, these methods are often not enough. If and when unarmed protection fails, 'peacekeeping operations with a mandate and capacity to use force have an obligation to protect civilians from armed attacks wherever they are deployed'. Indeed, more than 98% of the military and police personnel of today's UN peace missions have a mandate to protect civilians against such attacks.¹³

Outstanding challenges

Notwithstanding multiple UN-led efforts to promote compliance with international law in armed conflict through peace missions, recent reports attest that the violence against civilians is escalating. Several factors account for the current state of affairs.

For a start, the armed protection mandate has proved difficult to implement. According to the review of the High-level Independent Panel on UN Peace Operations, several missions have been deployed to especially demanding environments in which they encounter great difficulties in seeking to 'close a widening gap between what is asked of them and what they can provide'. In the worst cases, the personnel of these missions struggle simply to protect and resupply themselves. Effective physical protection requires armed peacekeepers to acquire intelligence and knowledge of the particulars of the situation. Moreover, it necessitates adequate infantry and enhanced mobility assets. Nevertheless, many missions lack enough of both.¹⁴ The [International Conference on the Protection of Civilians](#) held in Kigali in May 2015, which brought together the top 30 troop and police contributing countries as well as the top 10 financial contributing

¹² *Report of the Secretary-General on South Sudan (S/2015/296)*, 29/IV/2015, pars. 42-43.

¹³ *Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (A/70/95-S/2015/446)*, 17/VI/2015, par. 90. For a critical account of the financial problems faced, see Amnesty International (2015), 'Central African Republic: More Efforts Needed to Get the Special Criminal Court Operating', 23/XII/2015.

¹⁴ *Ibid*, par. 91.

countries and other stakeholders, aimed at addressing some of the problems encountered in efforts to move from armed protection mandate design to implementation. The outcome was the 'Kigali Principles on the Protection of Civilians', which highlight, among other issues, the lack of clarity from the UN and mission leadership on the 'rules of engagement, including under which circumstances the use of force is appropriate'. More seriously, there is still no generalised consensus on the legitimacy of these kinds of measures. The UN General Assembly Special Political and Decolonisation Committee's annual debate on UN peacekeeping matters held in November 2015 revealed continued polemics over if and when force may be employed in defence of civilians in armed conflicts. Iran and Tanzania were among the countries that objected to the idea of giving UN missions a mandate to provide armed protection, holding that the responsibility for protection lies with the governments of the host states, no matter how weak their institutions might be.

Secondly, in spite of the advancement of the unarmed protection mandate, the deliberate targeting and indiscriminate attacks take place in contexts of near total impunity. In his 'Opening Statement at the 30th session of the Human Rights Council' in September 2015, the UN High Commissioner for Human Rights Zeid Ra'ad al-Hussein pointed to the endemic character of this problem in several ongoing conflicts, among them, the Central African Republic, Sudan, South Sudan and Syria. This reality reveals that UNSC efforts to promote accountability and justice-related measures have not achieved satisfactory results. The active engagement of peacekeepers represents a striking advance in the process of combating impunity in case of human-rights abuses and grave crime. To start with, the position of UN peace operations is unique considering their direct contacts with local communities, including victims and witnesses of violent crime. Secondly, their right to use force in defence of their mandates enables them to safeguard the civilian components of UN missions assigned to report and monitor violent crime. Third, the fact that their activities must be governed by the principle of impartiality renders them especially suited to handle these cases in accordance with standards of fairness and even-handedness. The number of cases reported and investigations conducted by UN missions attest to their capacity to perform this function with some important results. However, the promotion of compliance with international humanitarian and human-rights law in new wars requires full respect for other basic rule-of-law values: not only impartiality but also accountability and transparency.¹⁵

The demand for impartiality in the enforcement of protection mandates raises practical issues, not least in situations in which some armed groups are obvious aggressors while others are not. The 'Brahimi report' (2000) sought to resolve this dilemma. Through an emphasis on the difference between impartiality and neutrality, the report affirms that the requirement of impartiality does not mean that peace operations must treat all armed actors as moral equals unless they actually are. Instead, what is required is that they remain neutral in relation to the actors. For UN missions operating in environments where only some armed groups are aggressors, the requirement of neutrality is taken to mean 'adherence to the principles of the Charter and to the objectives of a mission mandate that is rooted in these Charter principles' (par. 50). In its June 2015 report, the High-level

¹⁵ See *UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (A/RES/67/1), 30/XI/2012.

Independent Panel on UN Peace Operations reaffirmed this approach, stating that 'impartiality of UN missions should be judged by its determination to respond even-handedly to the actions of different parties based not on who has acted but by the nature of their actions'.¹⁶ Moreover, 'missions should protect civilians irrespective of the origin of the threat'. Even so, discussions on even-handedness must take into account the often-complex environment in which the UN missions operate. While inaction is ruled out, there are no documented best practices of what neutrality means.

A somewhat different but no less significant challenge concerns the numerous allegations of sexual exploitation and abuses of women and children by UN peacekeepers. A first response to this grave problem was the adoption in 2003 of a set of special measures to counter sexual exploitation and abuse, and the promotion of a policy of zero-tolerance. In 2005, a comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations was launched. The same year, the UN undertook a series of reforms designed to strengthen the accountability of peacekeepers and to uphold the highest standards of conduct, among them, the creation of a Conduct and Discipline Team in the Department of Peacekeeping Operations. Despite these efforts, however, reports of alleged misconduct, including sexual exploitation and abuse, have not ceased. In May 2015 the UN Office of Internal Oversight Services published the report 'Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations' according to which the challenge remains. Between 2008 and 2013, the UN received 480 allegations concerning sexual exploitation and abuse by members of field missions (peacekeeping operations and special political missions). MONUSCO in the DRC (and its predecessor) is responsible for over one third of the allegations. Others accounting for the majority of allegations are the missions in Liberia, Haiti, Sudan and South Sudan. One third of the total allegations involve a minor as victim (aged under 18). The 'Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic', released in mid-December 2015 shows the magnitude of the problem and the challenges involved in tackling it. In April of 2015, Anders Kompass, former director of OHCHR field operations, was suspended from work and faced dismissal for having passed confidential documents about the abuse of children by French troops in the Central African Republic (CAR) to the French authorities as a result of the UN's failure to stop the exploitation. The Swedish whistle-blower was finally exonerated in this report but the incident is indicative of the obstacles faced.

A third outstanding issue is the complex relation between UN peace missions and international criminal tribunals. Several of the missions instructed to monitor and report on grave crime carry out their mandates in situations that are currently under investigation by the International Criminal Court (ICC), among them: South Sudan, Côte d'Ivoire, CAR, Mali, DRC and Sudan (Darfur). Nevertheless, except for in the DRC, there is no explicit mention of the ICC in the formulation of the mandates of these operations. The absence of references to this court reflects the fact that three out of the five permanent members of the UNSC have refrained from accepting the terms of the Rome

¹⁶ *Supra* note 9, par. 123.

Statute of the ICC. By contrast, EU members of the UNSC –France, the UK and Spain– have accepted the court's jurisdiction. Indeed, since the establishment of the ICC, the EU has promoted its effectiveness.¹⁷ According to the 'EU Guidelines on promoting compliance with international humanitarian law', 'the importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations'. These mandates may include 'collecting information which may be of use for the ICC or in other investigations of war crimes'.¹⁸ For the time being, however, the recommendation reflects an ideal that has not been possible to implement in practice.

Conclusions and recommendations

The UN peace missions have a critical role in the furthering of compliance with basic humanitarian and human-rights obligations in specific settings. From an international legal perspective, the empowerment of such missions represents a serious effort to promote respect for such obligations in situations where states are unable or unwilling to enforce them. More specifically, the armed protection mandate is aimed at preventing the commission of grave crimes in situations of imminent threat. In addition, protection has a repressive function in seeking to reduce the total number of grave crimes perpetrated in a given situation. By contrast, the unarmed protection mandate, which consists of, among other things, the collection of information, documentation and reporting about grave crime contrary to international law, serves to redress grave crimes at the international and national levels. It also aspires to have a preventive function in deterring future crime. However, as this paper has highlighted, the role of these missions in providing civilian protection remains limited in time, space and resources due to the prevalence of international and national political and economic constraints.

Furthermore, the proclaimed distinction between impartiality and neutrality is intended to counter passivity in situations in which only certain armed groups are the obvious aggressors. Yet a more nuanced policy is needed to safeguard standards of fairness and even-handedness in the process of collecting information, reporting and monitoring grave crimes in such situations. A different problem is the continued occurrence of cases involving sexual exploitation and abuse of women and children by UN peacekeepers. These abuses produce new victims and undermine critical values of trust and credibility from the viewpoint of local communities. The adoption of UNSC resolution 2242 (S/RES/2242/2015) of 31/X/2015 calls on UN peace missions to be more gender-sensitive and to end impunity for gender-based crimes reaffirms the importance of accountability and crime prevention. This important resolution was adopted following the

¹⁷ Union's Common Position on the ICC (2003/444/CFSP) and the EU's Action Plan on the ICC. Also see Decision of 13/VI/2002 (2002/494/JHA) by which the Council set up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; the Framework Decision (2002/584/JHA) on the European arrest warrant and the procedures between Member States; the Decision of 8/V/2003 (2003/335/JHA) concerning the investigation and prosecution of genocide, crimes against humanity and war crimes; and Council Decision 2006/313/CFSP of 10/IV/2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115, 28/IV/2006, p. 49.

¹⁸ Council of the European Union, doc. 2009/C/303/06, 2009, 15/XII/2009, par. 16(f).

UNSC open debate on women, peace and security held on 13 October at the initiative of Spain while presiding the Council.¹⁹ Finally, the delicate relationship between UN missions and international criminal jurisdictions, not least the ICC, must be addressed. EU members with seats in the UNSC should promote ICC effectiveness through the explicit mandate of UN peace missions to report grave crimes to this court.

The outstanding challenges posed to international humanitarian and human-rights law and the role of UN missions in countering them is expected to be a key item on the agenda in the first-ever World Humanitarian Summit set to take place in Istanbul on 23-24 May 2016. The Summit will offer a unique occasion to address in a comprehensive manner the problem of systematic and flagrant violations of international humanitarian and human-rights law in ongoing conflicts, including its sources and implications. More specifically, it will need to discuss possible lines of action to counter the growing importance of non-state armed actors and the use of explosives in populated areas. The Summit will provide the global forum needed to set forth a Global Action Plan on how to prevent, repress and redress serious violations of international law in armed conflict, which require taking the present and future role of UN peace missions into account. The UNSG report 'One Humanity: Shared Responsibility', released on 9 February ahead of the Summit, is a desperate plea to restore the basic norms and rules to protect the most vulnerable people in times of war.

¹⁹ Also see note UN Global Study on the implementation of UNSC resolution 1325, launched on 14/X/2015 titled Preventing Conflict, Transforming Justice and Securing the Peace.