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What's Your Advice, Counsel? From Distinction to Detention, Financial Support to Ground Support, and Everything in Between

INTRODUCTION

The following is an informal summary of the discussions that took place in the Workshop Session of the 2nd IDF International Conference on the Law of Armed Conflict, held April 25–27, 2017. In this session, conference participants were given practical scenarios on a range of issues for consideration.¹ In adherence with the Chatham House Rule, the summary is presented without reference to the identity or affiliation of the participants.²

SCENARIO 1: QUESTIONING AND DETENTION

State A (the State) is engaged in an armed conflict with an organized armed group (the OAG) outside the borders of State A. During this operation, the State ground forces are required to maneuver in the outskirts of the village “Valhalla.” According to intelligence reports, both civilians and OAG fighters are likely to be present in the village when State forces pass through; the OAG fighters in the village are in fortified positions, well concealed amongst civilian objects (OAG positions). State intelligence is unable to provide the precise locations of these positions; however, it is reasonably certain that they are located within the “Kia” neighborhood and in the southern and western outskirts of Valhalla.

1. Over 120 participants attended the conference, including practitioners and academics from the following countries and organizations: Australia, Bulgaria, Canada, China, Colombia, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Lithuania, Netherlands, Norway, Poland, the United Kingdom, the United States of America, Spain, South Korea, Switzerland, Turkey, NATO and the ICRC. For this session, participants were divided into groups of approximately 20 people per group, each group consisting of both academics and practitioners and comprising of wide geographic and organizational diversity.

2. The discussions have been edited for this publication (for example, where the same scenario was discussed by more than one group, the discussions have been combined into one summary).

The ground forces maneuver towards the outskirts of the village. Despite the State's efforts in warning the civilian population to vacate the area (including dropping leaflets), intelligence reports assess that approximately 20 percent of the civilian population has remained in Valhalla.

In light of this, the commanding officer (CO) of the ground forces decides to change his maneuvering route towards the eastern side of Valhalla. Consequently, the CO wants to order his forces to stop and question every male who appears to be aged 16–50, so as to inquire if any of them are affiliated with the OAG, as well as to gather intelligence on the OAG positions.

Question 1: What legal advice do you give to the CO regarding this order? Would your advice change if such questioning would require holding the persons for a number of hours in order to properly question them? Would your advice change if the questioning was to inquire to where the civilian population has evacuated?

The discussion considered the legal basis and legal threshold for the deprivation of liberty of persons in an armed conflict, and whether there is a distinction between an international armed conflict (IAC) and non-international armed conflict (NIAC) in this regard.

There was broad agreement that it would be lawful for the CO to order his forces to stop and question every male who appears to be aged 16–50 and that such questioning should be limited to the shortest period of time possible in the circumstances. No precise period of time was specified, with the acknowledgement that strict predetermined timeframes cannot accommodate the different circumstances of each specific case.

There were various suggestions as to the legal basis for such action, some of which were said to also express a standard for carrying out detention during hostilities. These included a commander's inherent authority to detain persons during hostilities; the existence of a military necessity; this not being a case of arbitrary detention; and the ability to take necessary security measures pursuant to Article 27 of the Geneva Convention (GC) IV (in the case that the operation was taking place as part of an IAC in which the treaty would apply). One participant also mentioned in this regard the need to clarify the status of suspected persons in the context of Article 5 of GC III (also applicable only in IACs).

One participant added that the fact that the civilian population in the area had already been warned and had been asked to leave raises a general suspicion about the remaining persons in a way that justifies their questioning.

The participants were not concerned about the fact that the questioning was solely for the purpose of intelligence gathering, so long as it was limited to the shortest period of time possible in the circumstances. At the same time, they agreed that the persons questioned are not obliged to answer the questions they are asked and that they must not be tortured.

One of the participants, who maintained that there is an inherent authority to detain persons during hostilities, recalled the contemporary legal dispute regarding the existence of such authority in non-international armed conflicts (NIACs), in case the scenario indeed described an NIAC. This participant, however, argued that it is doubtful that the actions described in the scenario amount to "detention." Another participant suggested that the scenario involved "tactical questioning," short of "detention."

Question 2: During questioning of the aforementioned persons, one of them admits that he is a member of the OAG. Consequently, the possibility of long term internment is considered. What legal advice do you give to the CO?

On this issue, the participants considered, more specifically, the legal basis for long term internment in IAC and in NIAC.

Regarding an IAC, the participants agreed that there is no difficulty in internment on the basis of one of the applicable legal sources that address this issue, namely, GC IV, GC III, or Articles 33–34 of the Additional Protocol 1 (AP1) (for states party to AP1).

With respect to an NIAC, it was noted that internment is the subject of a contemporary legal controversy. Two participants maintained that it is permissible to intern a person on security grounds until the end of hostilities, pursuant to a procedure of periodic review. Another participant referred to the provisions in GC IV regulating internment, suggesting that they may be applied to the scenario by way of an analogy. No participants suggested that the action in the scenario is altogether prohibited.

Question 3a: During questioning of one of the civilians, Roth, it emerges that he himself has not taken part in any of the OAG's activities, however his relative, who is a member of the OAG, has revealed to him the locations of OAG positions. The CO wants to transfer Roth to a command and control center, located on the border of State A, so that he may indicate to intelligence officers on a map the locations of the OAG positions. What legal advice do you give to the CO?

Question 3b: The CO wants Roth to accompany the forces and point out the locations of the OAG positions. What legal advice do you give to the CO?

Discussion on this issue highlighted the question whether intelligence gathering is a lawful reason for temporarily holding civilians, and what limits may exist therein, particularly with regard to what the person is being asked to do or provide.

The participants did not consider the questioning of a civilian for intelligence-gathering purposes to present a difficulty as a matter of principle. Consequently, most of the discussion focused on possible situations where Roth is being coerced and/or put into risk while accompanying the soldiers and pointing out OAG positions, and whether this would affect the legality of the actions.

With regard to coercion, some participants raised the factual question of whether Roth is being coerced or rather agrees (or at least does not object) to accompanying the soldiers. One participant opined that physical resistance is where the line should be drawn, but others refrained from determining at what point the force's action would amount to illegitimate coercion.

With regard to risk, one participant indicated that there is no difficulty in principle with the fact that Roth is being held by troops, even though they are legitimate military objectives and thus prone to attack, seeing as sending Roth to the command and control center would also mean that he would be held by troops there. One participant assumed that taking Roth to the battlefield would itself put him at an undue risk and therefore cannot be done. Another participant noted that the fact Roth is assisting the force might even make him a direct participant in hostilities and thus prone to attack, but that international law does not prohibit such a result. No agreed-upon conclusions were reached in this regard.

SCENARIO 2: ORGANIZED ARMED GROUPS

The Intelligence Corps of State A (the State) is in the process of gathering information regarding an organization belonging to non-state actor B (the Organization). You, as the State's military legal officer, are presented with an intelligence report on the Organization, including its organizational structure.

The intelligence report explains that the Organization is comprised of two branches. The first can be easily defined as a military branch (or the First Branch). It is solely dedicated to military activities, its structure is hierarchical, and it is comprised of a superior military council in charge of regional commanders who themselves are responsible for several combat units.

The second branch is responsible for managing many civilian affairs, including: economic activity, welfare, education, and culture (the Second Branch). In addition, this

branch also manages some military affairs (additional detail below). It is also hierarchical and is comprised of executive commissions, staff headquarters, and the culture and education agency. The activities of these bodies are as follows:

Executive Commissions: Operating under the control of the Second Branch are three commissions, each responsible for all civilian activities in their “jurisdiction” and, also, for commanding and operationalizing independent military units in addition to those of the First Branch. Besides directly commanding these units during active hostilities, the commissions are also responsible for enlisting fighters as well as administrative maintenance. These combat units’ primary objective is to prevent the advance of enemy forces in the region and they account for approximately 30 percent of the Organization’s fighting force.

Staff Headquarters: These headquarters are made up of three departments: human resources, finances, and infrastructure. Accordingly, the staff headquarters is responsible for general management of human resources in the Second Branch, including the combat units under the responsibility of the executive commissions. Furthermore, throughout hostilities they are expected to issue situational reports regarding combatant casualties to the leadership of the Organization. In addition, the staff headquarters are responsible for acquiring and developing infrastructures and real estate for the First Branch, including infrastructure and real estate for the use of the combat units under the control of the Executive Commissions. Likewise, they are also in charge of the general budgeting of the Organization as well as managing the specific assets of the First Branch.

The Culture and Education Agency: This agency organizes cultural events mainly focused on celebrating the Organization’s ideology. In addition, the agency runs educational programs for the local population in the area in which the Organization operates.

Question 1: In light of the intelligence report, does the Organization, or any part of it, constitute an OAG? If so, which part?

The discussion around this question centered around the issue of what legal criteria exist for determining whether an entity belonging to a party to a conflict is an “OAG,” and whether parts of an entity that maintains both military and civilian functions can be included in such an “OAG.”

A few participants suggested that the Organization should be considered as a whole, regardless of the specific functions carried out

by its different parts. These participants maintained that all members of the Organization are members of an OAG.

Other participants argued that only those branches of the organization that maintain fighting functions (that is, are charged with conducting hostilities) are to be considered part of an OAG. This included the Executive Commissions, which maintain fighting functions as well as other functions. In support of this position, one participant likened the Organization to standing militaries common in developed states, which contain combat, combat support, and combat-service support units. A majority of the participants—utilizing this analogy—maintained that the Staff Headquarters were also part of an OAG (as in a state-run standing military, persons with similar functions—such as servicing, supporting, or managing resources for combat activities—could be targeted). The majority of participants were of the opinion that in light of the facts presented in the scenario, the Culture and Education Agency would not be considered part of an OAG.

Question 2: With regard to those entities defined as OAGs: What are the criteria for determining that a person is a member of the OAG? Does membership in the OAG make one targetable (and if not, which specific members would be targetable)?

It was suggested that membership in an OAG is determined by being part of the organizational structure—being subject to “command and control” is key, while mere “association” would not be sufficient. A determination that a person is part of the OAG’s organizational structure is sufficient for defining membership.

In terms of targeting, the majority of the participants stated that once membership in an OAG is determined, those persons become targetable. For example, a person who provides combat support, or routine services, in a manner subject or subordinate to the OAG’s command structure, would be targetable. The majority objected to using continuous combat function (CCF) as a criterion.

Two participants maintained that CCF is a necessary requirement for determining a person targetable. Under this view, a formal member of an OAG who does not maintain a CCF would not be considered targetable.

One participant, while rejecting the CCF requirement, did argue that there are additional requirements beyond mere membership, such as providing combat or combat support services (such as those reporting on casualties or acquiring infrastructure). In this regard, it was suggested that “combat support services” is a status ascribed to personnel irrespective of whether they fulfil their function or not, and thus personnel providing combat support services would be targetable irrespective of whether their specific activities are actually carried out.

Thus, the majority of participants were of the opinion that all members of the Organization (except for those belonging to the Culture and Education Agency, which under the extant circumstances would not be considered part of the OAG) would be targetable.

Question 3: You are now presented with information concerning a highly qualified engineer, who possesses vital knowhow relating to weapons systems (the Engineer) and has been hired by the First Branch in order to head a vital weapons program. Can the Engineer can be targeted, and on what basis?

The primary issue that arose here was whether persons who are not formally members of the OAG can be considered "functional" members on account of their activities. If they could not be considered as such, it was discussed whether there was sufficient information to determine the persons to be targetable on the basis of them being, at the time, civilians directly participating in hostilities.

Most of the participants were of the opinion that the Engineer could not be considered a member of the OAG (specifically, the First Branch). One participant argued this by highlighting that the Engineer was hired externally by the Organization and did not seem to be subject to the command and control of the Organization. This participant suggested that as a result the Engineer is more analogous to civilian staff than to military personnel.

Another participant countered that it is the actual services rendered by the Engineer that are relevant, and not the mode of engagement of the Engineer (hired or otherwise). In this case, the participant argued that the type of services provided make the Engineer targetable.

Another participant argued that although they do not see the Engineer as a member of the OAG, the Engineer would still be targetable if he were considered to be directly participating in hostilities. With the facts at hand, however, the Engineer appears to be too remote to be considered a direct participant in hostilities.

SCENARIO 3: "FINANCIAL FACILITIES" AND FINANCIERS

During an aerial campaign waged by State B (the State) against an organized armed group (the OAG), state intelligence indicates that striking the financial facilities of the OAG would significantly impair the OAG's military capacities, as these financial facilities fund the acquisition of weapons and pay for fighters' wages.

In particular, the OAG maintains cash storage facilities, from which cash is drawn to directly finance the OAG's

activities. Seventy percent of the money is used to finance strictly operational activities, while the remaining 30 percent is used to finance other activities.

In addition, the OAG manages facilities that mine and store tin. The OAG trades this tin in order to finance its military activities; it also uses this tin to construct military structures and to manufacture means of warfare.

Question 1: In light of recent developments relating to the targeting of financial depots and other so-called war-sustaining targets, would you say that State forces are permitted to target the cash storage facilities of the OAG and the tin mining facilities?

This scenario raised the more general question of what defines a military objective, and whether objects such as money and related objects would fall within the definition, and in what circumstances if so.

All participants agreed that a determination regarding the cash storage would depend on the nexus to the military activities. A number of participants agreed that while the use of additional terminology helps to understand the meaning of "effective contributions to military action," it is important to assess each object on its merits and not pigeonhole contributions into categories with automatic assessments, such as "war-sustaining."

In the case at hand, the large majority of participants argued that as the purpose of most of the funds is to finance operational activities, those funds would be a military objective. One participant argued that lacking any further information about the 30 percent of the funds beyond it being marked for "other activities" and specifically indicating that it is intended for civilian use, they would view the entirety of the funds as a military objective. One participant argued that there does not seem to be enough of a direct link between any of the funds and military activities to declare the funds a military objective.

The participants then discussed whether the attack would conform to the principle of proportionality. One participant argued that a proportionality assessment would only be required if the targeting of these funds would have a close connection with harm to civilians or civilian objects. The fact that targeting financial facilities may have some adverse effect on the lives of civilians is *not* relevant, whereas the value of the target (i.e., the 70 percent of funds used to finance operational activities) *is* relevant.

The majority of participants were of the opinion that the tin mining facilities are likely to be targetable (either due to the fact that they are used to finance military activities or because the materials are used for weaponry), but many argued that additional information was required in order to make a final assessment.

Question 2: You are presented with information on a major donor to the OAG (the Arms Donor), who has requested that all her donations be used for the acquisition of arms. The Arms Donor contributes roughly USD 2 million to the OAG each year. Can she be targeted?

Most of the discussion focused on whether persons may, by virtue of their activities, be identified as “members” of OAGs, and if so, under what circumstances.

Assuming that in this case it is not known that the Arms Donor is an official member of the OAG, most participants argued that the mere contribution of funds would not on its own be considered an activity that indicates membership in the OAG.

However, in a case where a person is known or assessed to hold significant influence over the OAG by virtue of their financing activities (including by directing the use of funds for military activities), a number of participants agreed that such a person would be considered a “member” of the OAG.

It was also suggested that the concept of “civilians directly participating in hostilities” could be relevant to this scenario, but this was not expanded upon.

Question 3: You receive intelligence that the Arms Donor has made another cash donation to the OAG, but this time you do not know of a specific request that the funds be used for arms acquisition. Can the cash donation itself be targeted?

Some participants concluded that once the cash is in the hands of the OAG, it is targetable. This is because an OAG is akin to a state military in that 100 percent of its funds can be assumed to be used for military purposes; accordingly, unless there is information pointing to the contrary, they would consider all the cash to be a military objective. There was also a suggestion that the cash may be targetable while it is being transported to the OAG. Other participants said there is insufficient information to determine the cash a “military objective.”

SCENARIO 4: GROUND MANEUVERS IN URBAN AREAS

It is the second week of the armed conflict between State A (the State), and OAG B (the OAG), which is taking place outside the borders of State A. Ground forces belonging to the State are beginning their ground maneuver, sending a Brigade into a specific urban area controlled by fighters belonging to the OAG. The Brigade must move through a certain route in the area in order to complete its mission and

accomplish its operational objective. There are no alternative routes the forces can take.

According to intelligence briefings, the OAG has set up an ambush in this area effectively rendering the maneuvering path a death-trap. The exact location of the OAG's ambushing forces is unknown, but it is known that they are well-prepared and well-equipped. Several specific buildings are known to be military objectives, and additional (unidentified) buildings are strongly believed to be used by the OAG for military purposes. Intelligence briefings further state that all civilians have evacuated the area.

Question 1: As the Brigade plans its entry into the enemy-held area, it requests close air support with the intention of neutralizing the OAG's forces and preventing them from carrying out their operational plans. Specifically, the Brigade commander plans that fighter jets and gunships strike all eight buildings overlooking the maneuvering path. Three of these buildings have been identified as military objectives; there is no specific information regarding the remaining five buildings other than the general information about the ambush. The Brigade commander asks for your legal advice regarding the lawfulness of her plan.

The discussion centered around what constitutes a "military objective," and what level of certainty is required regarding a specific object in order to be designated as such.

The positions in this regard were divided almost equally amongst the group. One view was that in light of the information regarding the ambush and the use of at least some of the buildings for military purposes, all eight buildings could be targeted. Several arguments were suggested in support of this position. As the purpose of the mission is to control the area, and it seems that the area is devoid of civilian presence, a few participants argued that the entire area (in which the OAG is operating to carry out the ambush) could be considered a military objective and thus the structures could be targeted. Others noted that where the buildings are interconnected (for example, by linking tunnels), all the buildings can be treated as a single compound and a single military objective. It was also suggested that an analogy could be drawn between hilltops and buildings that could be used for ambush positions, and thus the buildings could be considered military objectives by "location." Finally, it was suggested that in light of the specific and general intelligence information noted above, it was probable that all buildings were being used for military purposes and thus constitute military objectives.

On the other hand, there was a view that there was insufficient information to designate the five buildings as military objectives, and that a positive designation could only be made where there was more

specific information indicating which buildings were used for military purposes. It was also suggested that the intelligence regarding the impending ambush would not, on its own, justify targeting those five buildings merely to reduce the risk to the maneuvering forces.

Question 2: The Brigade is now inside the area and engaged in door-to-door combat. Halfway through clearing the area, the Brigade is sustaining heavy fire and is pinned down. The forces have several casualties and wounded soldiers. The exact position of the enemy is still unknown. Can artillery be used in order to disrupt or suppress attacking fire? Is the answer dependent on certain circumstances (availability of alternative means, military significance of taking the specific area, etc.)? Would your assessment change if intelligence assessed there were still twenty civilians present in the area who could be potentially harmed as a result of using artillery?

Participants considered the legality of using artillery in urban areas to disrupt or suppress attacking fire. All participants agreed that the use of artillery in this manner is lawful, with some participants noting the operational benefits that artillery provides, such as speed, availability, and coverage. As with all uses of means of warfare, the forces are obligated to employ the means that will likely result in less collateral damage while allowing the same military advantage.

In this particular case, some participants felt that while no questions regarding the principle of distinction arose, additional information was required in order to make a determination as to whether the duty to take precautions had been fulfilled. Thus for example, participants said that more information was needed regarding the availability and efficacy of alternative means that may have resulted in lesser harm. In this regard, it was noted that artillery may actually be less destructive than other means (such as airstrikes) even in an urban environment.

With regard to the presence of civilians, most participants did not believe this changed the legality of the use of artillery *per se*, but stressed that it would impact the need to assess alternative means and other steps to minimize collateral damage.

SCENARIO 5: TARGETING

It is the first week of an armed conflict between State A (the State) and OAG B (the OAG). The Division Commander is holding his hourly meeting to review new intelligence and operational information concerning potential targets. Seated at the table is the intelligence officer, the operations officer, the civilian affairs officer, and you, the legal adviser.

Newly received intelligence indicates a certain house, so far believed to be a civilian object, is in fact a shelter for the enemy's most senior military commander, Pierre Smith. According to the intelligence officer, a normally reliable source has indicated that the enemy commander is present in the building, but the information could be neither verified nor refuted. The target is time sensitive, on account of the enemy commander frequently changing his location. The intelligence officer assesses that they will not be able to locate the commander again once he moves locations. No collateral damage is expected from an attack on the commander.

Question 1: What legal advice do you give to the commander?

Question 2a: Would your answer change if, after additional intelligence is received, the intelligence officer now assesses there is a 50-50 chance that the building is Pierre Smith's shelter and that he is currently present in it?

Question 2b: Would your answer to the previous question change if, after additional intelligence is received, the intelligence officer now assesses that Pierre Smith is not in the building but that there is a 50-50 chance that another military target of lesser value is present? [Editor's note—This question was not included in the original questions, but it was raised by one moderator at the beginning of the discussion in their group.]

Question 3: Would your answers to the previous questions change if ten civilians are expected to be killed as a result of the attack?

The discussions around this scenario concerned the level of certainty required for identifying a lawful military objective. Participants discussed whether the required level of certainty depends on the value of the target and/or the expected collateral damage from the attack. Participants also discussed the role that the "rule of doubt" plays in determining military objectives.

In one of the groups, an anonymous questionnaire was conducted at the beginning of the session to assess the approach of the participants to these questions. The questionnaire asked participants to determine whether the person would be targetable under the principle of distinction (and not whether the attack would be lawful under the principle of proportionality). The findings are extracted in the table below. (Figures represent participants' votes on whether the objects are *targetable* or *not targetable*.)

	Reliable indication that Smith is present	Assessment that there is a 50% chance that Smith is present	Reliable indication that Smith is not present, but a 50-50 chance that a less-valuable military target is present
No civilian casualties expected	10 - <i>targetable</i> 1 - <i>not targetable</i>	9 - <i>targetable</i> 2 - <i>not targetable</i>	6 - <i>targetable</i> 4 - <i>not targetable</i>
Ten civilian casualties expected	6 - <i>targetable</i> 3 - <i>not targetable</i>	6 - <i>targetable</i> 3 - <i>not targetable</i>	0 - <i>targetable</i> 9 - <i>not targetable</i>

As reflected by these results, in the ensuing discussion participants were generally of the opinion that higher value targets do not require a high level of certainty. With regard to a lesser value target, participants were generally of the view that a lower level of certainty was insufficient. When assessed that civilian casualties could be expected from an attack, a higher level of certainty was argued for both with regard to higher value targets and lower value targets—although the level of certainty was still impacted by the value of the intended target.

Question 4: The intelligence officer presents the following information: A chain of beauty salons owned by the OAG is closed during the hostilities. No employees show up for work, all customers have been notified of the closure, and intelligence assessments indicate the salons themselves are empty. Nevertheless, occasional and temporary entries by unidentified males have been observed. Specifically, it has been noticed that each time one of these males enters a beauty salon (during the hostilities), a rocket is launched from the salon's yard almost immediately. These rockets are aimed at the State's military and civilian infrastructure. What legal advice do you give the commander about possible attacks on persons entering or leaving a beauty salon? What legal advice do you give about possible attacks on any of the beauty salons owned by the OAG?

Participants agreed that the issue raised by this question concerns the principle of distinction. They also discussed whether the "pattern" identified by the intelligence officers would be sufficient for targeting persons who have entered a salon or persons who have left immediately after a rocket was launched, and whether the "pattern"

would allow for a determination that all such beauty salons as military objectives.

There was consensus among the group that there are no legal barriers to authorizing attacks based on behavior pattern analysis.

Some of the participants were of the opinion that the facts in the scenario supported the position that anyone entering a beauty salon constitutes a lawful target. As one participant noted, if the intelligence officers are confident that a rocket will be launched whenever a person enters one of the salons, then it may be reasonably deduced that anyone entering a salon is targetable, and an attack may be carried out even prior to a launch. Other participants maintained that more information was needed in order to authorize an attack, emphasizing that the scenario was not clear as to the level of certainty with respect to the persons entering such salons.

The majority of participants were of the opinion that all the beauty salons owned by the OAG may be designated as military objectives, due to the pattern identified. One participant took a slightly more limited view, arguing that not all beauty salons can immediately be designated as military objectives. However, with the understanding that the salons are closed during the hostilities, and in the presence of evidence that when a person enters one of the beauty salons a rocket is launched, a beauty salon becomes a military objective the moment a person enters.

SCENARIO 6: PROPORTIONALITY

State A and State B are engaged in an armed conflict. State A intends to strike rocket launcher positions, located within a populated village of State B. Intelligence indicates that these rockets are aimed towards a city center in State A that does not contain any military targets. State A would like to strike these positions in order to defend its civilians and civilian infrastructure.

A collateral damage assessment carried out prior to the attack has indicated that five civilian casualties are expected from the strike. In addition, fuel-powered generators, which supply power to a few civilian homes in the village and are situated near the rocket launcher positions, are likely to be damaged. Intelligence assessments raise the possibility that a nearby hospital will also be affected by the attack. While the hospital normally relies on the fuel-powered generators, it also has its own backup generators in case of emergency. It is unclear, however, whether these backup generators will satisfy the hospital's needs—and for how long.

The commander responsible for authorizing the strike asks for your legal advice.

Question 1: What should the commander consider when assessing the military advantage anticipated from the strike?

Participants discussed what constitutes “military advantage,” particularly whether destroying or neutralizing military assets aimed towards civilians or civilian sites can be considered a military advantage.

There was consensus that the rocket launcher position constituted a military objective, as rocket launchers by their very nature contribute towards military action, and attacking them would provide a definite military advantage, irrespective of the fact that the rockets are pointed towards a civilian area.

The degree of this advantage was then discussed with regard to the fact that the launcher is pointing at a civilian area. Most participants were of the opinion that removing the threat from the civilian population should be factored into the proportionality analysis as part of the military advantage to be gained.

One participant drew a distinction between removing a concrete and specific threat towards civilians and civilian objects as a military advantage, and generally protecting civilians. Following on from this, another participant suggested that the general protection of civilians could be a reason for exercising force (*jus ad bellum*), but was not sure whether it could be a factor in *jus in bello* considerations. Both participants agreed, however, that in the scenario at hand, attacking the rocket launchers to remove the threat they posed could be considered a concrete and direct military advantage in a proportionality analysis.

A minority opinion was that the protection of civilians does not provide a *military* advantage, but it could be considered in the context of a self-defense analysis (*jus ad bellum*).

Question 2: What should the commander consider when assessing the collateral damage expected from the strike?

Participants discussed which of the expected and possible effects described in the scenario should be considered as part of the collateral damage assessment.

There was consensus that expected death or injury to civilians, or damage to civilian property, should be taken into account in the proportionality analysis. With regards to the scenario, all participants agreed that the commander should consider the expected death of the five civilians and any expected damage to surrounding civilian property (including the generators). In this context, it was noted that a distinction needs to be drawn between the physical damage to the generators, which should be taken into account as damage to civilian objects, and the effect that such damage may have

on the continued ability of the relevant homes to have access to power, which should not.

During the discussion, it was also noted that the specific character of the particular civilians expected to be harmed is not a *legal* consideration in the proportionality analysis. As such, it would not have an impact on the analysis if the civilians were women, children, or men. However, it was noted that in practice, such factors may have an influence on policy or ethical considerations that commanders may take into account.

With regards to the possible impact on the hospital's services, almost all participants were of the opinion that this should not be a factor in the proportionality analysis. The reasoning for this position was that the impact was "possible," and not "expected." Some participants also noted that the effect on the functioning of the hospital, even if expected and not only a possibility, was too removed from the attack to be relevant to the proportionality analysis.

Question 3: State A is considering striking another military objective—a command and control center in the same village. The target is located in a two-story house, and there is no information available regarding the number of civilians that reside in the house. However, it is known that generally five to ten civilians reside in similar residential buildings in the same area. It is also known that 50 percent of the locals have evacuated the village as a whole. No information regarding the expected civilian casualties as a result of striking this particular command and control center is available, all feasible precautions have been taken, and an effective advance warning has already been issued. The commander charged with authorizing the strike is asking for your legal advice. What should the commander consider when assessing the collateral damage expected from the strike?

During the discussion, participants considered whether one could rely on *general* information indicating the collateral damage expected in order to assess proportionality, where specific information was unavailable.

All participants agreed that in the absence of additional information and after making efforts to exhaust all potential intelligence, one may rely on the best available information—including general information based on statistical or intelligence-based analyses.

One opinion, which received support from other participants, was that the commander must consider the worst-case scenario, while taking into consideration the information concerning the evacuation of the village. Thus, in accordance with this view, the commander in the current scenario would start with the assumption that ten civilians are usually present, and then factor in the 50 percent

evacuation figure—resulting in an assessment of expected harm to five civilians.

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