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“The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives”

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Considering the Principle of Precautions

Introduction

I would like to thank the organizers of the conference for inviting me to speak. It is a great honor and privilege to be here. Before I start, I would like to give the usual caveat - I am here in my personal capacity. The opinions and ideas in my presentation do not necessarily represent the views of the Israel Defense Forces (IDF) or the Government of Israel.

My point of reference for the discussion regarding precautionary duties under customary international law is the language of Additional Protocol I to the Geneva Conventions (API). While it is widely accepted that custom mandates taking certain precautions in attack, it is important to keep in mind that not all states are parties to API (such as Israel and the US) and that there are some disagreements regarding the exact scope, and phrasing, of the customary rule in comparison to Article 57 of API. Nevertheless, API is a *useful* point of reference, considering the fact that so many militaries are bound by it. I will therefore use it as a point of reference during my presentation.

To start, we should recall that in API there are two different obligations with regard to precautions. The first one, "precautions in attacks", refers to "active precautions" that the attacking party needs to take in the conduct of its military operations. The second one, "precautions against the effects of attack", refers to "passive precautions" that the defending party needs to take to protect the civilian population and civilian objects under their control against the effects of the attacks of the other party. In my presentation I will refer only to the first one – the “active” precautions, or "precautions in attacks".

The principle of precautions, under API's Article 57, comprises of these seven components:

1. Constant care to spare civilians and civilian objects;
2. Do everything feasible to verify that the object to be attacked is lawful;
3. Take all feasible precautions in the choice of means and methods;

4. When choosing a target, attack the military objective that will give a similar military advantage but cause the least collateral damage;
5. Refrain from deciding to launch disproportionate attacks;
6. Abort the mission if it becomes apparent that the attack would be unlawful;
7. Provide effective advanced warning, unless circumstances do not permit.

Due to time constraints, I will discuss only the first three. However, before I go into the specific provisions of API regarding precautions, I would like to say a few words regarding the exact role of the principle of precautions in the application of the Law of Armed Conflict (or LOAC) during military operations.

The role of "precautions in attack" in the Law of Armed Conflict

A common way to teach LOAC and its application in combat situations is by dividing LOAC into four main principles, which encompass the essence of the law: military necessity, distinction, proportionality and humanity (or unnecessary suffering). The rules regarding precautions are usually not included here, but are rather raised in a cursory manner. About 15 years ago, I studied LOAC this way here at Sanremo, and a few years later I learned it the same way when I participated in the Graduate Course in the US JAG Legal Center and School in Charlottesville, Virginia. I myself would explain the main essence of LOAC in this same way to commanders and legal advisers in the IDF.

However, in the last few years, since I have had some practical experience in applying LOAC during armed conflict and in giving legal advice to commanders, I have come to the opinion that the rules regarding "precautions in attacks" should have a **stronger role** in our teaching of LOAC. This is because, in practice, I have found these rules to be just as important as the principles of distinction and proportionality, in terms of fulfilling the object and purpose of LOAC, which is to achieve the delicate balance between military necessity and the desire to mitigate civilian harm.

As a result, my suggestion is to teach the rules regarding precautions in attack together with the other four principles mentioned, and to do so in between teaching the principle of distinction and teaching the principle of proportionality. This is because only after the application of the principle of precautions can we properly determine what the collateral damage is expected to be as a result of the attack, and thus conduct a proper proportionality assessment.

"Precautions in Attack"- General Comments

Before I delve into some specific issues, there are several general points I would like to raise regarding the application of the principle in practice.

First, the duty to take precautions is a continuous obligation, which usually applies up until, and sometimes even during, the execution of the attack.

Second, the duty to take precautions relates to those who have the authority and practical capability to take precautions. In this regard, some parties to the Additional Protocol made some declarations and even reservations, stating that some precautions are relevant only from a specific level of command and above¹ - however, I accept the view that there is no reason to interpret the text of API with this qualification. Naturally, there will be cases in which the authority and practical capability to take some precautions will only exist at a specific level of command. However, there are certainly cases in which even soldiers on the ground executing an attack might be required to take some precautionary measures, such as verifying (if feasible) that the attack is executed against a military objective.

Third, the application of the principle is always context dependent. Thus, although the precautionary rules are exactly the same, a change in context may lead to a difference in implementation. For example, there is a big difference between "immediate" targets, like those attacked in response to an immediate threat on the ground, and pre-planned targets, which are planned in advance through a regular targeting process. The difference is not only with regard to the amount of time there is for making a decision; but also, in most cases, with regard to the level of the decision-maker, the availability of professional staff to consult with (such as legal advisers, intelligence officers and engineers), the means reasonably available for conducting the attack, the information the decision-maker can reasonably obtain, and so on.

My last point is that it is important not just to explain LOAC to commanders, but also to establish processes within armies that would help commanders execute their precautionary duties in a reasonable way and with good faith and due diligence.

"Precautions in attack" - Specific Issues

Next, I would like to discuss three issues which are crucial for understanding the exact meaning of the principle of precautions:

What does it mean to "take constant care" in the conduct of military operations?

What does the requirement to do everything feasible to verify that the object to be attacked is lawful under API?

What are "all feasible precautions" in the choice of means and method?

¹ Switzerland, for example, made a reservation stating the "provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion level and above." See Adam Roberts and Richard Guelff, *Documents on the Laws of War* 509 (3rd. ed. 2000).

Constant care to spare civilians and civilian objects

According to Article 57(1): “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. We should note that although the title of Article 57 is “precautions in attacks”, the obligation to take constant care to spare the civilian population appears to apply to all military operations and not only to attacks.

Although the term “constant care” is not defined, the rule is commonly understood as a “general and continuous obligation” to respect the civilian population. A good way to see it is as an obligation for commanders and others involved in military operations to always bear in mind that civilians and civilian objects may be harmed as a result of the operations, and as a result must always be sensitive to the effect the operations may have on the civilian population and the civilian objects, in an attempt to avoid any unnecessary harm. As such, the obligation is “essentially relative in nature” and depends on the circumstances of each specific case.

In this regard we should note the obvious – the duty of “constant care” does not by itself require commanders to give precedence to civilians and civilians objects when it contradicts reasonable military requirements. There is, however, a requirement to be sensitive to the effects of the operations on civilians and to try to mitigate these effects where feasible.

Do everything feasible to verify that the object to be attacked is lawful

According to Article 57(2)(a)(i) *“those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects... but are military objects etc.”*

The wording “shall do everything feasible” is crucial, and is relevant not only with regard to verification but also with regard to other precautions, such as the choice of means and methods. A useful definition, which is widely accepted, is to do what is “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”²

It is important to note that this rule of precaution supplements the principle of distinction. Therefore, while an object might be correctly defined as a “military objective”, it may be further required to verify, as a precaution, that the object to be attacked is lawful. For example, consider a decision to attack a target based on reliable intelligence that the site is currently being used for military training. Where the commander conducting the attack has access to real-time surveillance over the target, he or she will be able to verify the information on which the

² See, e.g., Article 3(10) of Amended Protocol II and Article 1(5) of Protocol III to the 1980 Convention on Certain Conventional Weapons (CCW).

assessment regarding the target was originally based. In such a case, there would exist a legal requirement to so verify.

Like all other precautions in attack, the obligation to verify is also **context dependent**. It is important, however, to suggest some factors the commander should consider when determining whether it is **feasible** to verify a target is a military objective, including:

The likelihood that there was an error in the original classification of the target and the extent to which specific verification may be expected to clarify uncertainties. It is commonly agreed that absolute certainty that the object to be attacked is a "military objective" is never required, since almost always some kind of doubt will exist. Therefore, the applicable legal standard is that of reasonableness - a reasonable commander should have a reasonable certainty, or reasonable grounds to believe, that the target is a lawful one. With regard to verification, there is no requirement for endless efforts to verify every target to be attacked - since this kind of a standard is simply not practicable during combat situations. However, there is a requirement for a **reasonable decision as to what is practicable or practically possible**, taking into account, *inter alia*, the level of doubt existing. The more doubt there is, the more reason there will be to require further verification. In this regard, the commander also needs to consider to what extent the specific verification would provide clarification;

Another important factor might be **the need to reconfirm the information and the intelligence as time goes on**. The commander must ask himself whether the time that has passed since the intelligence assessment changes the reasonableness of the assessment. Here too everything is context dependent. If, for example, there was a decision to attack a bunker which is being used by the enemy, based on reliable intelligence that assessed that it took years to build this bunker, and there is no reason to believe that the bunker is not being used any more for military purposes - it might be reasonable to estimate that months or even years after receiving such intelligence, there is still reasonable certainty to conclude that the target remains a military objective. On the other end, if the commander has intelligence indicating that a senior enemy fighter was at a specific house several days ago, then before carrying out an attack, he would need to assess the reasonableness that this senior fighter is still in the house, and the less certain he is the more he will have to verify that the enemy fighter is still there;

An additional factor is the **time needed for verification and its impact on the success of the attack**. Thus, for example, where there is a short window of opportunity to attack someone who was determined to be as a lawful target based on reliable intelligence, it will be reasonable for a commander to refrain from further verification measures if it would seriously risk the success of the mission.

Another factor is **the level of risk for civilians in case of an erroneous identification of the target**. The higher the risk for the civilian population, the more will be required in terms of

verification. In the example just mentioned, there probably would be a difference (not only with regard to the application of the principle of proportionality but also with regard to precautions) between a case in which it is estimated that there are some civilians in the house who would be killed or injured as a result of the attack, and between a case in which it is estimated that there are no civilians present;

The last factor is **competing demands regarding the means needed for verification**. Thus, for example, if an army is involved in wide scale combat operations, commanders will use **Intelligence, Surveillance and Reconnaissance (ISR)** assets (like drones) for various tasks including accompanying the ground forces during combat, locating enemy fighters, acquiring intelligence in order to be able to identify more objects as military objectives, and **also verifying that some of the objects to be attacked** are indeed military objectives. These competing demands with regard to ISR assets must be necessarily taken into account when assessing the feasibility of further verifying whether a target is indeed a military objective.

Take all feasible precautions in the choice of means and methods

The next precautionary requirement has to do with the choice of means and methods of attack with a view to avoiding or minimizing collateral damage. There are several means and methods which might be relevant in this regard.

The first is requiring information regarding the target or the collateral damage anticipated. If, for example, there is an inhabited house which is being used for command and control purposes in an ongoing battle, the building would be considered as a "military objective". Even so, the commander might nevertheless ask for more information about the exact location in the building which is being used for command and control, if he assesses that it is feasible to get such information and that the information would help him to be more discriminate with the targeting and thereby reduce the likelihood of collateral damage. Likewise, if there is a military necessity to attack a large house which has been defined as a "military objective", and there is uncertainty regarding the amount of collateral damage expected from an attack, a commander might look for ways to get this kind of information in order to be able to better estimate the need for further precautionary measures to reduce the collateral damage anticipated.

In addition, when executing an attack, the timing of the attack might be critical in saving civilian lives. Thus, for example, when attacking a weapons factory, there might be a precautionary requirement to attack when the factory is not operating (if this is feasible), in order to save the lives of civilians present.

As for weaponeering, a commander needs to determine which weapon to use and in what way to use it in order to try and achieve a specific level of damage to a given target. As a result, a decision has to be made regarding the best weapon available to him or her for executing a

specific attack, taking into account both the military aim of the attack and the desire to minimize collateral damage. If a force is under fire, for example, the commander would need to consider which weapon he or she can practically use in order to effectively protect the forces while minimizing the risk for civilians. Sometimes the only means feasible for that mission might be the M109 Howitzer, but in other cases there might be a precautionary obligation to use more precise weapons, if such weapons are available and can effectively protect the forces with less collateral damage. In addition, if a commander has snipers in the force, there might be situations in which it would be required to use them under the principle of precautions, in order to be able to achieve the military mission while minimizing collateral damage.

The same considerations arise with regard to missile warfare. Also there is no specific obligation to use only precision guided weapons. There are situations in which it would be feasible for a commander to choose a weapon with greater precision or lesser explosive force, with a view to minimizing collateral damage. In such cases, a decision has also to be made regarding other elements in attack which can help minimize collateral damage, like planning the desired impact point, the angle the bomb enters the house, or even the possibility to use a delayed fuse which would explode several milliseconds after impact and as a result produce less fragmentation problems, and therefore hopefully cause less collateral damage.

In all such kinds of considerations, a commander has a legal duty under the principle of precautions to choose the means and methods with a view to mitigating the collateral damage. This applies for means and methods that are feasible to employ, meaning **practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.**

Again, the decision is **always contextual**. However, there are some factors which might be relevant to many scenarios:

The feasibility of requiring more information regarding the target or the presence of civilians or civilians objects - The factors mentioned regarding the feasibility to verify are relevant also here: the level of uncertainty that exists, the expectation to clarify these uncertainties, the time and the means needed for getting such information, and competing demands on the means necessary to clarify such uncertainties.

The likelihood of achieving the military mission – A number of years ago, a well-known attack was conducted by the Israeli Air Force on a house in which all the high-level leaders of a certain terrorist organization were meeting. The decision was made to attack one floor only in order to minimize potential collateral damage. It turned out that the meeting took place on another floor, and therefore the strike was not successful in taking out the terrorist leaders. Of course, it is important not to consider cases in hindsight. However, if in a case like this a commander reasonably estimates that although there is a good chance the enemy leaders are on a specific

floor, the potential for successfully achieving the mission would be much higher if the whole building was destroyed, then there would be no precautionary requirement to only attack a specific floor (as long as other LOAC principles and rules are satisfied).

Force preservation - Force preservation is a legitimate military consideration. If, for example, there are two options for achieving a specific goal - targeting an object or sending ground forces to achieve the same aim, but sending the troops in would pose a much higher risk to them - a commander might reasonably conclude that in this specific context it is not feasible to send in the forces. This view was also adopted by the well-known ICTY's Prosecutor decision in the case of NATO's aircraft operating at a high altitude that was safer for the pilots³, although doing so made it difficult for them to see the target and therefore could have caused more collateral damage.

Weapons inventory and the possible length and intensity of the conflict - There is no legal requirement to **always** use precision munitions. A commander who has only a small amount of PGMs available, for example, might prefer to use them only for the execution of specific attacks, in which they are the most needed. He might also reasonably decide to hold on to some PGMs for a later stage in the conflict, if he expects the conflict to be lengthy and estimates he may need the extra missiles for later stages of the conflict.

Conclusion

To summarize, these are my four main points:

The application of the principle of precautions is always context dependent. The same precautionary duty might lead to different expectations in different situations.

The requirement to give "constant care" means the decision-makers always need to be sensitive to the effects of their activities on the civilian population and civilian objects, and to consider what can be done to mitigate any unnecessary effects thereon.

The terms "all feasible precautions" and "everything feasible" are terms of art in LOAC and key elements in understanding the duties under the principle of precautions in attack, and should be understood as "what is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."

It is very important to establish processes within armies that would help commanders execute their LOAC duties in a reasonable way and with good faith and due diligence.

³ See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, United Nations, International Criminal Tribunal for Yugoslavia (Jun. 13, 2000), at <http://www.icty.org/sid/10052>, para.s 63-70.