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DIGITAL PSYCHOLOGICAL OPERATIONS AND THE LAW OF ARMED CONFLICT: AN EXPOSITION OF THE RULES AND PROTECTIONS AFFORDED TO NON-COMBATANTS IN INTERNATIONAL ARMED CONFLICT

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‘I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.’

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Abstract

The use of operations in armed conflict that aim to shape a target audience's perceptions, attitudes, and behaviours is not new to the theory or practice of warfare. But digital technology has revolutionised the speed, scope, and scale at which such operations can be delivered and permit the creation of tailored psychological effects down to an individual level. However, as digital technology has evolved, the rules of the LOAC, which predate such technology, have remained essentially unchanged.

Across eight sections, this paper considers the broad range of LOAC rules that regulate psychological operations delivered using digital means (‘digital psychological operations’) and the protections afforded to non-combatants from the more harmful applications of these tools and techniques.

The first two sections consider the circumstances in which a DPO may amount to an ‘attack’ or ‘military operation’ under the LOAC. If these thresholds are reached, the rules applicable to targeting will apply. The third and fourth look respectively at the obligation to ‘respect’ and ‘ensure respect’ for the LOAC and the prohibition of acts or threats intended to spread terror among civilians. The fifth moves from obligations of general application to those concerning ‘protected persons’. How DPOs may implicate prohibitions related to collective penalties and measures of intimidation and terrorism is discussed before sections six through eight consider different aspects of the duty to treat protected persons humanely. This includes the explicit prohibitions of outrages upon personal dignity and the invitation of public curiosity.

The paper concludes by observing that the rules are generally fit for purpose, but a lack of contemporary interpretative guidance hinders analysis. In the absence of authoritative insight grounded in the information age, less orthodox sources, like the policy decisions of companies such as Twitter, may be persuasive as they seek to limit the excessive digital ambitions of states in armed conflict.

List of Abbreviations

AP I	-	Protocol Additional to the Geneva Conventions of 12 August 1949 ('Additional Protocol 1')
CIA	-	Central Intelligence Agency
DoD	-	Department of Defense (US)
DPO	-	Digital psychological operation
FSB	-	Federal Security Service (Russia)
GC	-	Geneva Convention (I-IV) 12 August 1949
HUMINT	-	Human intelligence
IAC	-	International Armed Conflict
ICC	-	International Criminal Court
ICRC	-	International Committee of the Red Cross
ICFST	-	International Convention for the Suppression of the Financing of Terrorism 1999
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the former Yugoslavia
IHL	-	International humanitarian law
ISIS	-	Islamic State of Iraq and Sham (Islamic State of Iraq and the Levant/ Da'esh)
LOAC	-	Law of armed conflict
NIAC	-	Non-international armed conflict
RTLM	-	Radio Télévision Libre des Milles Collines (Rwanda)
SCSL	-	Special Court for Sierra Leone
STL	-	Special Tribunal for Lebanon
VCLT	-	Vienna Convention on the Law of Treaties 1969
POW	-	Prisoners of War

Introduction

"[A] new-generation [of] warfare will be dominated by information and psychological warfare that will seek to achieve superiority in troops and weapons control and depress the opponent's armed forces personnel and population morally and psychologically. In the ongoing revolution in information technologies, information and psychological warfare will largely lay the groundwork for victory.[1]"

Colonel S.G. Checkinov and Lieutenant General (Retired) S. A. Bogdanov, Russian Armed Forces, 2013.

This paper is focused on the legal infrastructure found in the law of armed conflict (LOAC) which regulates, or potentially regulates, an armed force's use of digital tools and techniques to create psychological effects in a target audience during an international armed conflict (IAC). Of particular interest are the protections afforded to non-combatants from what are designed in this paper as digital psychological operations (DPOs).

The use of operations that aim to shape a target audience's perceptions, attitudes, and behaviours are not new to the theory or practice of warfare, whether directed towards enemy combatants or a civilian population. Winning 'hearts and minds' during an occupation or counter-insurgency is a well-worn military aphorism predicated on changing attitudes and behaviours.[2]

But the evolution of the internet and its ever-increasing accessibility, coupled with the prominent role of networks, data, algorithms, and machine learning in the functioning of digital systems, has galvanised a transformative effect with regard to the delivery of psychological operations in armed conflict. Audiences can be reached more efficiently and in a more targeted manner. Content can be generic or tailored down to an individual level in seeking to generate the desired

[1] Colonel Chekinov, S.G. and Lieutenant General Bogdanov, S.A., "The Nature and Content of a New-Generation War," *Voyenna mysl* [Military Thought], (No.4, October 2013) translation available at http://www.eastviewpress.com/Files/MT_FROM%20THE%20CURRENT%20ISSUE_No.4_2013.pdf>

[2] For a wider discussion, see for example Hazelton, Jacqueline L., Bullets Not Ballots: Success in Counterinsurgency Warfare (Cornell University Press, 2021)

cognitive effect. While the scope, scale, and potential speed of psychological operations have been fundamentally altered by the opportunities presented by digital technology.

Relatively recently, psychological operations depended on television and radio broadcasts, newspaper articles, and pamphlets. But a belligerent may now utilise a range of digital vectors of communication. These include social media platforms, web pages, forums, messaging applications, dating websites and applications, media comment sections, streaming platforms, video game applications, videoconferencing tools, and more. Vectors of this kind offer parties to an armed conflict new ways to innovate and gain some form of military or political advantage by creating psychological effects.

However, as digital technology has evolved, the rules of the LOAC have remained essentially unchanged. Accordingly, this paper considers how the LOAC regulates DPOs and protects non-combatants using rules drafted before the technology enabling such activity existed. In doing so, a range of LOAC rules will be considered across eight sections. The first four concern rules of general application, while the latter four sections are more specific and generally cover the narrower category of 'protected persons'.

The first section analyses whether DPOs can be considered an 'attack' under the LOAC and thus trigger the full spectrum of targeting rules. Three examples follow the general discussion highlighting some of the more challenging cases. The second section looks at the general obligation to protect civilians from dangers arising from military operations and the extent to which this duty might apply to DPOs. The third section explores the responsibility to 'respect' and 'ensure respect' for the LOAC and uses an aspect of the famous *Nicaragua* case[3] to discuss the attendant obligation not to encourage breaches of the LOAC. The fourth section dissects the rule prohibiting acts or threats the primary purpose of which is to spread terror

[3] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986

among the civilian population and, through examples and case law, demonstrates the rule's application to DPOs.

The fifth section moves from obligations of general application to those concerning 'protected persons', as defined in the LOAC. After a brief discussion of 'protected persons' attention turns to the rule prohibiting collective penalties, measures of intimidation or of terrorism and the extent to which DPOs may implicate these prohibitions. The sixth section discusses rules requiring a party to an IAC to treat different categories of individuals humanely and how this duty manifests in the context of DPOs. The seventh section addresses the role DPOs may play in perpetrating outrages upon personal dignity, with reference to recent domestic case law relating to the depiction of fighters posing with the mutilated remains of the deceased and other examples. The final section relates to the obligation to shield protected persons and prisoners of war (POWs) from insults and public curiosity. The section addresses unsettled aspects of the rule's application and reviews certain exceptions, novel applications, and its regulatory impact on DPOs.

Before proceeding with the analysis, it is necessary to define certain terms and address the scope of the paper. First, when describing psychological operations of a digital nature, the lexicology is unsettled. For example, under US military doctrine, any of the terms 'psychological operations', 'information operations', 'military information support operations', and 'cyberspace operations', could apply.[4] Accordingly, this paper uses 'digital psychological operations' as the preferred terminology to convey the nature of the act or acts under contemplation, namely 'psychological operations conveyed to a target audience by digital means.'

[4] For example see Lin, Herb, 'Doctrinal Confusion and Cultural Dysfunction in the Pentagon Over Information and Cyber Operations.' *Lawfare* (31 March, 2020) https://www.lawfareblog.com/doctrinal-confusion-and-cultural-dysfunction-pentagon-over-information-and-cyber-operations and Major Cowan, David and Major Cook, Chavesco (both US Army), 'What's in a Name? Psychological Operations versus Military Information Support Operations and an Analysis of Organizational Change', *Army University Press* (6 March, 2018) https://www.armyupress.army.mil/Journals/Military-Review/Online-Exclusive/2018-OLE/Mar/PSYOP/

'Psychological operations' are 'planned activities using methods of communication and other means directed at target audiences in order to influence perceptions, attitudes and behaviour, affecting the achievement of political and military objectives.[5]' This broad definition is based on the meaning assigned to 'psychological operations' in NATO terminology.[6]

Lastly, the paper is concerned with the protections afforded to non-combatants under the LOAC from DPOs. Consequently, matters such as the misuse of protected symbols, protections afforded to medical units, and rules pertinent to combatants will not be addressed. The use of DPOs as forming part of a precaution in attack is considered tangential to the primary focus of the paper and also excluded. The supplementary and interpretive role played by international human rights law (IHRL) is relevant to DPOs in armed conflict but will not be addressed in any detail, given the LOAC focus of the paper.

[5] NATO Allied Administrative Publication No 6 (AAP-06), NATO Glossary of Terms and Definitions (English and French) Edition 2013 https://www.jcs.mil/Portals/36/Documents/Doctrine/Other_Pubs/aap6.pdf p166

[6] See Allied Joint Publication 3.10.1, Allied Joint Doctrine for Psychological Operations, Ed.B, Ver 1 (with UK National Elements) September 2014 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450521/20150223-AJP_3_10_1_PSYOPS_with_UK_Green_pages.pdf

Digital Psychological Operations and the Threshold of 'Attack'

The first section of this paper explores the meaning of 'attack' under the LOAC and the extent to which DPOs can be captured by the term. It is observed that most DPOs will not ordinarily meet the threshold of 'attack', but there are marginal and complex cases which could feasibly do so. The legal calculus as to whether these borderline cases amount to an attack will depend on a subjective interpretation of the relevant terms. Case law from the International Criminal Court (ICC) and other forums highlight that the extent and nature of operational activities captured by the term 'attack' is, at least to an extent, unsettled.

'Attack'

Firstly, the definition of 'attack' is found in Art. 49 of AP I and means "*acts of violence* against the adversary, whether in offence or defence.[7]" While the Article refers to 'the adversary', this test applies equally to conduct directed towards civilians and civilian objects.[8] As the 1987 commentary to Art. 49(1) of AP I makes clear the term 'attack' is nuanced and should be interpreted in a manner "not exactly the same as the usual meaning of the word.[9]"

Specifically, "attack" is said to be synonymous with "combat action.[10]" This insight was reflective of the delegates' desire to attach a broad meaning to 'attack'.[11] But while the terms' attack', 'combat action', and 'acts of violence' should be interpreted expansively, DPOs directed towards a civilian population will not typically meet these thresholds. In conducting a DPO, a belligerent's underlying intention is to influence the perceptions, attitudes, and behaviours of a target audience by delivering a persuasive message from a plausible source using an appropriate

[7] Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Additional Protocol 1) Art.49(1) (Hereafter 'AP I')
[8] See AP I Art.49(2) & (3)
[9] See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, "Commentary on Protocol I relative to international armed conflicts", (1987) Art. 49 (1), para. 1879
[10] Ibid para. 1880
[11] Ibid para. 1880

method of communication to achieve political and military objectives.[12] A communicative message of this nature will rarely amount to an 'act of violence'.

Emphasising that DPOs will struggle to meet the threshold of attack, Professor Roger O'Keefe, in his capacity as an *amicus curia*, provided evidence to the International Criminal Court (ICC) on the meaning of 'attack' in 2020. He expressed that "an "attack" is an act of *armed* violence directed against military forces of an opposing party, provided those forces have not fallen into the power of the party directing the violence, or against persons or objects under the control of an opposing party.[13]" Such a statement is uncontroversial and accords with the understanding assigned to the term by many countries, including the UK.[14]

However, defining an 'attack' as an 'act of violence' or 'act of armed violence' is not without complications. Indeed, the definition was drafted in the 1970s, before the so-called 'information revolution'[15] facilitated by access to cheap, internet-enabled digital technology, offered new methodologies to harm an enemy and influence civilian populations.

For example, the tactical ingenuity observed in cyberspace by state and non-state actors alike has placed significant stress on the meaning and interpretation of 'attack', and there exists a significant body of scholarship which has explored how the law regulates or could regulate cyberwarfare.[16] Offensive cyber operations[17] delivering reversible or temporary military effects,

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[12] Informed by the NATO definition of psychological operations. Allied Joint Doctrine for Psychological Operations 3.10.1 (Ed.B, Ver 1) September 2014 para. 0102 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450521/20150223-AJP_3_10_1_PSYOPS_with_UK_Green_pages.pdf

[13] International Criminal Court (ICC), *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda*, Observations by Professor Roger O'Keefe Pursuant to Rule 103 of the Rules of Procedure and Evidence, No. ICC-01/04-02/06 A2, 17 September 2020 (O'Keefe Observations), p. 3. Emphasis added.

[14] See UK Joint Service Publication 383, The Joint Service Manual of the Law of Armed Conflict (2004 ed.) para 5.20 – 5.20.2

[15] Joint-Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, 8 Nov 2010 (As Amended Through 15 Feb 2016) p80

[16] E.g. Schmitt, Michael N. (Ed.), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0)

[17] Offensive Cyber Operations: "Actions in or through cyberspace that create effects to achieve military objectives". AAP-06(2021) NATO Glossary of Terms and Definitions p94

or aimed solely at intangible objects like data, have caused particular difficulties for the terminological ontology of 'attack'. Equally, in certain narrow circumstances, the manipulation of data by DPOs raises questions about the reach and scope of the term.

Should a DPO reach the threshold of ‘attack’, the full spectrum LOAC rules concerning targeting will apply. These include the rule of distinction,[18] where the activity can only be directed towards military targets, taking precautions in attack,[19] and proportionality,[20] among others.

Marginal examples

Several recent examples demonstrate how changing tactical approaches have begun to blur any neat distinction between information-based propaganda and 'acts of violence'. This blurring is significant, and the three examples below highlight how the targeted use of information can strain the legal calculus of whether a DPO is an attack.

The first example involves using a DPO against the family members of an enemy combatant to help reveal their location on the battlefield. The second example takes inspiration from national criminal law. It considers how the content of a digital message can cause direct physical harm to a target, in this case, a strobe light image being sent to a known sufferer of epilepsy. The third example explores aspects of the modern phenomenon of 'doxing' involving the release of an individual’s personal information online. Depending on the context, violence may be directed towards the ‘doxed’ individual if individuals viewing the material are motivated to do so.

US Colonel Liam Collins reported the first example in a 2018 article titled "Russia Gives Lessons In Electronic Warfare,[21]" which concerned aspects of the ongoing Russia/Ukraine IAC.

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[18] AP I Art.48
[19] See AP I Art.57
[20] AP I Art.51(5)(b)
[21] Colonel Collins, Liam, ‘Russia Gives Lessons in Electronic Warfare’, *Dispatches from the Modern War Institue*, published by the Association of the United States Army, (26 July, 2018) https://www.ausa.org/articles/russia-gives-lessons-electronic-warfare

In the piece, Colonel Collins describes how Russia and Russia-sponsored separatists were "adept at identifying Ukrainian positions by their electrometric signatures." In doing so, the Ukrainian forces could be targeted kinetically and through DPOs on an individual level as the functionality of their mobile phones could be detected in the electromagnetic spectrum and used to reveal their position. Russian forces sent text messages using mobile phone emulators[22] to Ukrainian combatants to undermine their morale and cohesion. Examples included "retreat and live" or informing individuals that they were "surrounded and abandoned.[23]"

Psychological warfare of this kind, delivered at the tactical level and targeting specific individuals, has been referred to as "pinpoint propaganda,[24]" and was taken a step further in Eastern Ukraine. Russian forces sent texts to Ukrainian combatants' family members stating, "[y]our son is killed in action." The message often prompted a call or text to the respective person, allowing individuals and groups to be geolocated with precision and subsequently targeted by Russian artillery on a time scale close to real-time. As Colonel Collins observes, "[t]hus, in one coordinated action, electronic warfare is combined with cyberwarfare, information operations and artillery strikes to produce psychological and kinetic effects.[25]"

Using the same example, one commentator notes that what was new about this tactic was "that the development of information technology had enabled a state to use psychological warfare against a soldier's civilian family *during an active attack* on the battlefield…a world where not

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[22] A mobile emulator is a resource for emulating or simulating a mobile device or smartphone environment. See Rouse, Margaret 'Mobile Emulator' *Techopedia*, 22 Dec 2014 https://www.techopedia.com/definition/30676/mobile-emulator#:~:text=A%20mobile%20emulator%20is%20a,operating%20system%20and%20display%20interface.

[23] Colonel Collins, Liam, 'Russia Gives Lessons in Electronic Warfare', *Dispatches from the Modern War Institue*, published by the Association of the United States Army, (26 July, 2018) https://www.ausa.org/articles/russia-gives-lessons-electronic-warfare

[24] Satter, Raphael and Vlasov, Dmytro 'Ukraine Soldiers Bombarded by 'Pinpoint Propaganda' texts', *Associated Press News*, (11 May, 2017) https://apnews.com/article/technology-europe-ukraine-only-on-ap-9a564a5f64e847d1a50938035ea64b8f

[25] Colonel Collins, Liam, 'Russia Gives Lessons in Electronic Warfare', *Dispatches from the Modern War Institue*, published by the Association of the United States Army, (26 July, 2018) https://www.ausa.org/articles/russia-gives-lessons-electronic-warfare

only general civilian populations are targeted with propaganda, but also specific combatants' families in real time despite being away from the front.[26]"

This analysis makes an intellectual separation between the artillery strikes and the DPOs yielding the intelligence to conduct an accurate attack. In doing so, it can reasonably be argued that the DPO directed towards the family members does not reach the threshold of 'attack' despite their fundamental role in the targeting process. The attackers seek behavioural change from the individuals, but they are not the subject of any 'act of violence'. Accordingly, LOAC rules applicable to kinetic targeting do not apply to the family members.

Additionally, although dubious from an ethical perspective, the DPO could also be considered a precaution in attack.[27] The Russian forces could argue that the DPO helps them more readily identify the location of enemy combatants on the battlefield and consequently allows them to direct their efforts away from civilians and civilian objects.

However, given the axiomatic moral shortcomings of the tactic which runs contrary to the overall tenor of the LOAC in its desire to minimise civilian harm during armed conflict where feasible, an alternative view can also be taken. In circumstances where there is a contingent operational nexus between a successful DPO and an accurate strike, the totality of the acts and their consequences can, conceivably, be considered together rather than subject to disaggregated legal analysis.

Such a view would arguably align more closely with the customary international law rule of distinction articulated in Art. 48 of AP I, requiring parties to the conflict to "at all times distinguish between the civilian population and combatants.[28]" While this is a minority position, a

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[26] Scarasso, Lucas, 'Text Messages from Hell: Restraint and Information Warfare', *The Modern War Institute at West Point,* (21 April, 2020) https://mwi.usma.edu/text-messages-hell-restraint-information-warfare/ (emphasis in the original)

[27] Art.57(1) AP I "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

[28] Art.48 AP I – Discussed in more detail in another section.

consequence-based approach to identifying the scope of an 'attack' did find some favour in recent case law before the ICC and may offer a means of proscribing a tactical methodology likely to cause significant psychological harm in affected family members.

In 2021, the ICC considered the appeal of Bosco Ntaganda. One aspect of the appeal involved consideration of the meaning of 'attack' and whether the term captured *'ratissage'* operations.[29] Two of the five appellate judges adopted a 'traditional' approach to the term, understanding 'attack' to mean "combat action", elaborating that this meant "the use of armed force to carry out a military operation at the beginning or during the course of armed conflict.[30]" While the other three appellate judges adopted slightly different approaches.

Judge Ibáñez Carranza adopted the most expansive view in her dissenting opinion. She agreed with the definition of 'attack' expressed by the Pre-Trial Chamber in the case and argued that "[i]n characterizing certain conduct as an "attack", what matters is the consequences of the act, and particularly whether injury, death, damage or destruction are *intended* or *foreseeable consequences* thereof.[31]" In taking this view, she considered the term to include "the preparation, the carrying out of combat action and the immediate aftermath thereof…[32]"

Applying the view of Judge Carranza to the example from Ukraine, she may have concluded that the DPO directed towards the family members formed part of the attack, based on either the intended consequence of the operation or as an activity preparatory to combat action.

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[29] Acts committed outside the conduct of hostilities that may include the abduction, assault, or killing of civilians and the ransacking or looting of residential, commercial, or public property. See Katz, E., Sterio, M., Worboys, J., '"Attacks" Against Cultural Propoerty and Hospitals: Broad in Time, Broad in Substance.' *Articles of War,* The Lieber Institute, (17 Nov, 2020) https://lieber.westpoint.edu/attacks-against-hospitals-cultural-property-broad/

[30] *Prosecutor v Bosco Ntaganda*, International Criminal Court, Judgment (Appeals Chamber), No.ICC-01/04-02/06 A A2, Opinion of Judges Morrison and Hofmański, 30 Mar 2021, para.1164; Pomson, Ori, 'Ntaganda Appeals Chamber Judgement Divided on Meaning of "Attack", *Articles of War*, Lieber Institute, (12 May, 2021) ''https://lieber.westpoint.edu/ntaganda-appeals-chamber-judgment-divided-meaning-attack/

[31] *Prosecutor v Bosco Ntaganda*, International Criminal Court, Judgment (Appeals Chamber), No.ICC-01/04-02/06 A A2, Opinion of Judges Morrison and Hofmański, 30 Mar 2021, para.1166 emphasis in original

[32] Ibid para.1168

Given the relative paucity of case law informing the interpretation of the LOAC, the opinion of individuals like Judge Carranza can carry weight. Although a dissenting opinion, it may yet prove persuasive in shaping national thinking of what the term ‘attack’ might encompass and potentially point to how the LOAC may develop, particularly in evolving to address matters like the DPO under current contemplation.

As Reeves and Watts observed in an article forming part of a wider symposium on 'attack' in 2020, "[t]hough it is acknowledged that only States make international law, it would be naïve to ignore the impact of the ICC and other tribunals.[33]" Interestingly, as part of the same symposium hosted by the US Military Academy’s Lieber Institute for Law and Warfare, which included articles penned by several of the *amicus curiae* who assisted the court in the Ntaganda appeal, the authors did not reach a consensus on the precise nature of operations captured by 'attack'.[34]

Before turning to the second borderline case, it is worth recalling the breadth of activity the drafters of AP I wished to assign to the term ‘attack’. As mentioned above, the 1987 Commentary confirms that 'attack' is synonymous with 'combat action.' Later in the commentary, it states that there was a "general feeling" among the delegates that the term 'attack' was sufficiently elastic to cover the placement of a mine to the extent that a person was "directly endangered" by the action.[35] Noting that some variants of anti-personnel and anti-vehicle mines require a predetermined minimum amount of downward pressure to activate and will sit stagnant otherwise, the delegates' view introduces the idea that an 'act of violence' can be conditional on a future event.

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[33] Colonel Reeves, Shane and Watts, Sean, ‘Military Considerations and the Ntaganda “Attack” Question.’ *Articles of War*, Lieber Institute, (24 Nov 2020) https://lieber.westpoint.edu/military-considerations-ntaganda-attack/

[34] See the Lieber Institue ‘Attack Symposium’ (2021-2022). Various articles available at https://lieber.westpoint.edu/category/attack-symposium/

[35] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, “Commentary on Protocol I relative to international armed conflicts”, (1987) Art. 49 (1), para. 1881

Additionally, the commentary suggests that specific means and methods of warfare may require a person to experience a proximate threat of harm for an action to be considered an attack. These deductions raise interesting questions about the use of DPOs in specific contexts. For example, an intelligence officer of a belligerent sends a message via social media to an enemy commander in an attempt to persuade them to surrender. This is clearly not an act of violence. But what if the officer knows the enemy commander has epilepsy and in addition to seeking to induce their surrender, purposefully attaches a moving image (or gif) that creates a strobe light effect when the commander reads the message? The message's primary purpose is communicative, but if a seizure is triggered and the individual is removed from the fight, perhaps, just as good.

Applying the AP I delegates rationale that a conditional act of violence can amount to an 'attack' to the extent an individual is "directly endangered", it is difficult to conclude that sending a strobe light message to someone with epilepsy is *per se* excluded from this formulation. The example parallels the subject matter of the first prosecution of its kind in the long-running and unresolved case of *The State of Texas v John Rayne Rivello*.[36] In 2016, Rivello was charged by the FBI with criminal cyberstalking with the intent to kill or cause bodily harm. He was later indicted on a charge of assault with a deadly weapon for sending a strobe image via Twitter to a journalist with a message stating "You deserve a seizure for your post.[37]" The lawyer for the victim told the New York Times that, "this electronic message was no different than a bomb sent in the mail or anthrax sent in an envelope.[38]" Should Rivello be convicted, the case would set a historical precedent and perhaps also tangentially inform the development of the LOAC.

[36] *United States of America v John Rayne Rivello*, The United States District Court for the Northern District of Texas Dallas Division, 3 Oct 2017, Case 3:17-mj-00192-BK https://www.justice.gov/opa/press-release/file/949676/download

[37] Kang, Cecilia, 'A Tweet to Kurt Eichenwald, a Strobe and a Seizure. Now, an Arrest.', *The New York Times*, (17 March, 2017) https://www.nytimes.com/2017/03/17/technology/social-media-attack-that-set-off-a-seizure-leads-to-an-arrest.html; Office of Public Affairs, U.S. Department of Justice, 'Maryland Man Arrested for Cyberstalking', Press Release (17 March, 2017) https://www.justice.gov/opa/pr/maryland-man-arrested-cyberstalking

[38] Ibid

A conclusion that this conduct constitutes an "attack" under the LOAC is easier to reach when considered on an individual level where an enemy's point of weakness is identified and exploited using a particular tactical approach. Expanding the example, if the belligerent were to target a wider audience, like an adversary's Facebook users, would the legal calculus change as the level of abstraction increases?

In a hypothetical scenario, a belligerent creates a propaganda video containing a strobe light effect and seeks to promote the video as a paid advertisement on Facebook, potentially reaching millions of people, including the civilian population. Assuming the US is a party to the conflict, approximately 1% of Americans have epilepsy[39] and an estimated 72.04% of American internet users regularly access Facebook.[40] This creates a sizeable number of Facebook users likely to suffer from epilepsy. If the embedded advert did trigger a number of epileptic seizures, could this be considered an 'attack'?

It is difficult to say definitively, but if this activity can be considered an 'attack', it will fall at the lowest end of the scale in qualifying as such. The preferable view may be that the LOAC is not necessarily the best body of law to regulate this form of propaganda. Instead criminal and civil law may offer more appropriate solutions. Nonetheless, the examples highlight how a DPO can reach the threshold of attack due to the type of content that digital technology allows to be communicated and form a method by which harm can be inflicted.

A third and final example concerns the use of a DPO to publish personal information about a target in circumstances where the release of this information places their physical safety in jeopardy. One such example is the modern phenomenon of 'doxing'. 'Doxing', sometimes

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[39] 'Epiliepsy Data and Statistics', *Centers for Disease Control and Prevention*, (29 March 2023) citing Zack MM, Kobau R. 'National and state estimates of the numbers of adults and children with active epilepsy — United States, 2015'. Morbidity and Mortality Weekly Report (Vol 66, 2017) pp.821–825
https://www.cdc.gov/epilepsy/data/index.html

[40] DIxon, S., 'United States: Facebook Usage Penetration 2018-2027', *Statista*, (10 Feb, 2023)
https://www.statista.com/statistics/183460/share-of-the-us-population-using-facebook/

expressed as 'Doxxing', is a term that emerged in the 1990s to describe a form of revenge in hacking culture that involved revealing the identity of people who wished to remain anonymous.[41] This usually involved releasing private information recovered via nefarious means or aggregated from various public sources.[42]

The terminology 'dropping documents' or 'dropping dox' morphed over time to 'doxing' and took on a more expansive meaning. It now concerns the "intentional public release onto the internet of personal information about an individual by a third party, often with the intent to humiliate, threaten, intimidate, or punish the identified individual.[43]"

In its military application, doxing represents a form of DPO used by both sides in the Russia/Ukraine IAC since 2014 to deanonymize, delegitimise, and target members of the enemy intelligence services and armed forces, suspected collaborators, and alleged war criminals.[44] Examples include the doxing of 620 Russian FSB agents and 1,600 Russian soldiers suspected of perpetrating war crimes in Bucha, Ukraine, attributed to Ukrainian intelligence;[45] the release of personal pertaining to Ukrainian politicians and members of the Ukrainian armed forces, including an officer stationed at the 'Center for Information and Psychological Operations' in Odesa by a pro-Russian cyber actor calling themselves

[41] Kapersky Resource Centre, 'What is Doxing - Definition and Explanation', *Kapersky Online*, (2023) https://www.kaspersky.com/resource-center/definitions/what-is-doxing
[42] Douglas, D. 'Doxing: A conceptual analysis', *Ethics Information Technology*, 18, 2016 p199
[43] Ibid p199
[44] See for example Ball, Tom, 'Names and addresses of 620 FSB Officers published in data breach', *The Times*, (29 March, 2022) https://www.thetimes.co.uk/article/names-and-addresses-of-625-fsb-officers-published-after-data-breach-q68sqdh2t; Burgess, Matt, 'Russia is Leaking Data Like a Sieve', *Wired*, (13 April, 2022) https://www.wired.com/story/russia-ukraine-data/; these categories are taken from Douglas, D. 'Doxing: A conceptual analysis', Ethics Information Technology, 18, 2016 p200
[45] Prentice, Alessandra, 'Ukraine intelligence publishes names of 620 alleged Russian agents', *Reuters*, (28 March, 2022) https://www.reuters.com/world/europe/ukraine-intelligence-publishes-names-620-alleged-russian-agents-2022-03-28/

'JokerDNR',[46] and the identification of suspected Russian collaborators, military and intelligence personnel on a Ukrainian state-aligned website called 'Myrotvorets'.[47]

While the concept of doxing may seem tangential to the idea of 'attack', the targeted application of this technique has incited or inspired violence towards certain victims, including the killing of several individuals whose details were published on the Myrotvorets website in 2015.[48] Depending on the context and circumstances, it may be a tactic regulated more by international criminal law than the LOAC. But equally, if an expansive view of 'attack' is adopted, like the formulation of an 'attack' outlined by Judge Carranza in the *Ntaganda* Appeal Case above, where preparatory acts may also fall within the definition, then it is at least conceivable that targeted doxing may be captured by the term where injury and death are *intended* and *foreseeable* consequences, and the act can reasonably be viewed as integral and preparatory to the violence.

This formulation could apply, for example, if one party to an armed conflict used doxing to direct attacks against certain targets, in other words creating what might colloquially be called a 'kill list'. Activity similar in nature to the example was partially observed during the early stages of Russia's wider invasion of Ukraine in February 2022, when a US Ambassador's letter to the UN High Commissioner for Human Rights warned Russia was "creating lists of identified Ukrainians to be killed or sent to camps following a military occupation.[49]" While such lists were not

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[46] Mador, ZIv, 'Dark Web Insights: Evolving Cyber Tactics Aim to Impacct the Russia/Ukraine Conflict', *Trustwave Blog*, (3 March, 2022) https://www.trustwave.com/en-us/resources/blogs/spiderlabs-blog/dark-web-insights-evolving-cyber-tactics-aim-to-impact-the-russia-ukraine-conflict/

[47] Loyd, Anthony, 'Ukraine's blacklist: Killers, lawyers, writers, and spies', *The Times*, (25 January, 2022) https://www.thetimes.co.uk/article/ukraines-blacklist-killers-lawyers-writers-and-spies-0gccbbwp0

[48] Mirovalev, Mansur, 'Peacemaker: The Ukrainian website shaming pro-Russia voices', *Al-Jazeera*, (27 August, 2019) https://www.aljazeera.com/features/2019/8/27/peacemaker-the-ukrainian-website-shaming-pro-russia-voices

[49] 'U.S. letter to the U.N. alleging Russia is planning human rights abuses in Ukraine' published by the Washington Post (21 February, 2021) https://www.washingtonpost.com/context/read-u-s-letter-to-the-u-n-alleging-russia-is-planning-human-rights-abuses-in-ukraine/93a8d6a1-5b44-4ae8-89e5-cd5d328dd150/?itid=lk_inline_manual_4.; Chappell, Bill, 'The U.S. warns that Russia has a 'kill list' of Ukrainians to be detained or killed', *NPR*, (21 February, 2022) https://www.npr.org/2022/02/21/1082096026/russia-kill-list-ukraine; Sabbagh, Dan, 'Russis is creating lists of

published in the public domain, Russia could have used DPOs to do so and invite attacks on the individuals identified.

Support for the proposition that a reasonable expectation of causing harm matters in determining whether an act constitutes an 'attack' can be found in two prominent academic works concerning the domains of cyberspace and space. In the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, a cyber attack is defined as a "cyber operation, whether offensive or defensive, that is *reasonably expected to cause injury or death* to persons or damage or destruction to objects.[50]" While the Oslo Manual on Select Topics of the Law of Armed Conflict, addressing the concept of attacks in outer space, states that "acts of violence against the adversary, whether in offence or defence…must be intended to cause - *or must be reasonably expected to result* in – death, injury, destruction or damage.[51]" While these works don't address the temporal scope of an attack, they arguably leave open the possibility that targeted doxing might do so to the extent the actions are reasonably expected to cause harm.

Case law stemming from two separate ad hoc international criminal tribunals also gives some weight to the idea that communicative acts and psychological operations can form part of an attack in certain circumstances. The cases pre-date the widespread arrival of cheap, internet-enabled digital technology but the communicative acts discussed could easily be replicated today as part of DPOs across various mediums and vectors.

Ukrainians 'to be killed or sent to camps', US claims', *The Guardian,* 21 Feb 2022 https://www.theguardian.com/world/2022/feb/21/us-claims-russia-creating-lists-of-ukrainians-to-be-killed-or-sent-to-camps-report;

[50] Schmitt, Michael N. (ed.), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, (Cambridge University Press, 2017) Rule 92 – Emphasis added

[51] Dinstein, Yoram and Dahl, Arne Willy, Oslo Manual on Select Topics of the Law of Armed Conflict: Rules and Commentary, (Springer, Cham, 2020) ('Oslo Manual'), Rule 8 – Emphasis added https://library.oapen.org/bitstream/id/7065a5e9-c8a8-4cc7-a7f9-7f8f4fadd056/2020_Book_OsloManualOnSelectTopicsOfTheL.pdf

In the case of *The Prosecutor v Nahimana, Barayagwiza, and Ngeze* before the International Criminal Tribunal for Rwanda (ICTR), a case concerning the use of radio broadcasts to instigate and commit genocide and crimes against humanity, several witnesses at the trial testified that being named in a 'RTLM'[52] broadcast was akin to a "death sentence", with various examples of civilian murders supporting the assertion. The station also disseminated inflammatory and discriminatory propaganda targeting the Tutsi minority and Hutu politicians considered sympathetic towards the Tutsis.

When considering the extent to which the broadcasts caused acts of murder and genocide, the Court reasoned that,

> "The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.[53]"

The Court concluded that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM.[54]"

The appeal case of Serbian ultranationalist politician Vojislav Šešlj before the International Residual Mechanism for Criminal Tribunals (IRMCT) reached a similar conclusion about the role Šešlj played in the perpetration of crimes against humanity in the Balkan conflict. On 6 May 1992, Šešlj delivered an incendiary speech at a political rally in Hrtkovci, Serbia, denigrating the Croats and read aloud a list of names of individuals who should leave the town. Armed conflict

[52] Radio Télévision Libre des Milles Collines
[53] *Prosecutor v Nahimana, Barayagwiza, and Ngeze,* International Criminal Tribunal for Rwanda, Trial Judgement, ICTR-99-52-T, 3 December 2003, para. 952
[54] Ibid para. 953

was ongoing in the region but had not affected Hrtkovci hitherto. Violence along ethnic lines erupted in the town, and some Croat families were forced to trade their homes for one in Zagreb, Croatia.

The Court considered Šešlj's actions in Hrtkovci to be fundamental to the spread of violence and attacks on the local Croat population and found him guilty of "instigating persecution (forcible displacement), deportation, and other inhumane acts (forcible transfer) as crimes against humanity and for committing persecution (violation of the right to security) as a crime against humanity in Hrtkovci.[55]"

While both cases deal with international criminal law, the *ratio decidendi* in each matter supports by analogy the proposition that in assessing whether an activity meets the threshold of an 'act of violence' and an 'attack', a holistic assessment of events is required. This should be based on the intention behind the acts and the reasonably foreseeable outcome, including where communicative acts may cause death and injury.

Accordingly, while doxing will generally not be considered part of an 'attack', the use of such a tactic as part of a DPO to direct attacks or identify targets in circumstances where injury or death are reasonably foreseeable raises the possibility that the activity forms an integral part of the 'act of violence'. The argument for such a view is stronger in circumstances when such action could result in violence of a considerable scale, like in Kyiv during the Russian invasion of February 2022, the Rwandan Genocide, or the Bosnian Wars of the early 1990s, when psychological operations played a prominent and inflammatory role.

Such an expansive view of 'attack' is likely *lex ferenda*. However, as states look for novel ways to gain an advantage in armed conflict, the use of DPOs to trigger violence or direct attacks may increase. This raises novel questions of interpretation and may, in time, lead to an evolution in

[55] *Prosecutor v. Vojisla V Seslj,* Mechanism for International Criminal Tribunals, MICT -16-99-A, Appeal Judgment, 11 Apr 2018, para.181

the meaning of ‘attack’ under the LOAC in line with the view offered by Judge Carranza discussed above. An iteration of the rule will afford additional protections to civilians in the form of the protections found within the rules of targeting.

In conclusion, it is worth reiterating that most DPOs will not meet the threshold of 'attack', defined in AP I as "acts of violence against the adversary, whether in offence or in defence." However, the proliferation of digital technology has opened new vectors for the creation of psychological effects in a target audience and brought into focus the meaning of ‘attack’ in certain novel instances explored in this section. The following section builds on some of the analysis above and considers the general obligation to protect civilians from dangers associated with military operations.

Protection of the Civilian Population

This section considers the general obligation under Art.51(1) AP I to protect civilians from dangers arising from military operations and whether this duty is relevant to DPOs directed towards a civilian target audience in an IAC. The nature of the rule is initially discussed before the analysis pivots to understand whether DPOs fall within the ambit of 'military operations' and, resultantly, what the obligation may entail. The section concludes by considering what protections are conferred on the civilian population if DPOs are considered to be military operations.

Art.51(1) states:

> "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances."

The second sentence of Art.51(1) is "preambular in nature and provides that the concrete rules in paras. 2 to 8 are intended to give effect to [the] general protection.[56]" Paragraphs (2) –(8) of Art. 51 primarily focus on the prohibition of certain types of 'attacks' e.g. indiscriminate attacks.[57] But the general protection is framed with reference to 'military operations', a wider concept, feasibly encompassing DPOs, particularly those that increase the possibility of a civilian being placed in harm's way. Reference to 'other applicable rules of international law' in Art. 51(1) concerns other relevant rules of customary international law and treaty law.[58]

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[56] Bothe, M., Partsch, K.J., Solf, W.A., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, (Martinus Nijhoff Publishers, 2013) p341

[57] AP I Arts.51(4) & (5)

[58] E.g. Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations, 1907); the Geneva Conventions and Additional Protocols, and international regimes prohibiting certain weapon systems, for example, gas, biological weapons, and chemical weapons. And see

Before considering the meaning of the rule in more detail, the context to its drafting is worth highlighting. At the series of Diplomatic Conferences that ran from 1974-1977 prior to the signing of AP I, many delegations noted with approval the underlying humanitarian purpose of Art. 51 (Art. 46 in the Draft Protocol), with the UK delegation stating that it "welcomed all the provisions which were designed to protect civilians and civilian objects and accordingly placed restraints on military action.[59]" The Polish delegation echoed this sentiment and said, "[t]he whole article, with its general rules, would fill some of the gaps in existing rules of a more specific character.[60]"

However, a proposed amendment to what became Art. 51(1) by the Ghanaian delegation, to protect the civilian population from "propaganda in whatever form", did not find favour and was withdrawn four days after being introduced on 14 Mar 1974.[61] The reasons for the withdrawal are unclear, but excluding such specificity hinders analysis when seeking to identify if DPOs fall within the rule's scope.

Indeed, certain scholars have postulated that psychological operations do not qualify as 'military operations' due to their communicative and non-kinetic character.[62] Such a conclusion is easier to reach in a pre-digital age when psychological warfare relied on analogue means of delivery. But the rationale is more difficult to justify as the battlefield uses of digital technology become increasingly sophisticated.

International Committee of the Red Cross, Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1987) para. 1937

[59] International Committee of the Red Cross, Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva, 1974-77, Vol.6: summary records of the plenary meetings of the Conference: fourth session (Bern, Federal Political Department, 1978) p.164, para 121 https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_06.pdf

[60] Ibid para 130

[61] International Committee of the Red Cross, Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva, 1974-77, Vol.3: table of amendments: amendments to draft Additional Protocol I, (Bern, Federal Political Department, 1978) p202 'CDDH/III/28 'Ghana, 14 March 1974' https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_03.pdf

[62] Droege. C., 'Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians', *International Review of the Red Cross* (Vol.94, No.886, 2012) p.556

As a practical matter, the examples discussed above of DPOs being woven into battlefield targeting by using family members as triggers, inciting violence by doxing targets' personal information, and delivering 'pinpoint propaganda' are all reflective of operations of a military character.

Additionally, states are investing significantly in formations seeking to use DPOs as an aspect of warfare. For example, the British Army's 77th Brigade was founded in 2015 to use non-lethal means "to adapt behaviours of the opposing forces and adversaries.[63]" The Australian Armed Forces established an 'Information Warfare Division' in 2017 which seeks to take advantage of the changed 'character of conflict and warfare' in the digital age.[64] While the digitally focussed US Combatant Command 'Cyber Command' has as it is publicly stated raison d'etre, "Operate, Defend, Attack, Influence, Inform![65]" The latter two verbs fall squarely within the remit of DPOs.

Consequently, any assertion that DPOs should not be considered military operations as a practical matter is rejected. But in assessing whether DPOs should be considered a 'military operation' as a matter of law, it is necessary to explore the meaning of the term and understand the distinction between 'attacks' and 'military operations' given the way Art.51(1) was framed by the drafters.

'Attack' and 'Military Operations'

Firstly, the rules under consideration are found in Section IV AP I, broadly called 'Part IV: Civilian population'. In this section, the meaning of 'attack' as an 'act of violence' is set out, but the terms 'military operations' and 'operations', both interchangeably[66] used in the same

[63] 77th Brigade, Information Operations, British Army Website (Ministry of Defence, Crown Copyright, 2023) https://www.army.mod.uk/who-we-are/formations-divisions-brigades/6th-united-kingdom-division/77-brigade/
[64] Joint Capabilities Group - Information Warfare Division, Australian Defence Force Website (Australian Government (Defence), 2023) https://defence.gov.au/jcg/iwd.asp#:~:text=The%20Information%20Warfare%20Division%20
[65] United States Army Cyber Command Website, (Department of Defense, 2023) https://www.arcyber.army.mil/
[66] See Sandoz, Yves, Swinarski, Christophe, & Bruno Zimmermann eds., International Committe of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (ICRC/Martinus Nijhoff Publishers, Geneva, 1987), para. 1875

Section, are left undefined. The terminological nuance and ambiguity have attracted academic debate, particularly as these concepts apply to digital technology and the cyber domain.[67]

As well as Art. 51(1), reference to 'operations' is found in the first rule of Section IV, Art. 48, which codifies the 'Basic Rule' of distinction. This states that parties "shall at all times distinguish between the civilian population and combatants" and "shall direct their *operations* only against military objectives.[68]" In this context, the meaning of 'operations' is akin to 'attack' as the rule is intended to prohibit the targeting of civilians and civilian objects.

However, the rule is expressed with reference to the term 'operations' instead of 'attacks', which is defined in the subsequent Article. This drafting decision has presented a headache in defining the activity captured by 'operations', as logically there must be a normative difference between the two concepts to justify the drafting decision not to use 'attacks'. Indeed, this is supported by the use of the terms 'attack' and 'military operations preparatory to an attack' in Article 44(3) and (5) of AP I which discuss combatants distinguishing themselves from the civilian population in attack and aspects of a combatants status upon capture by an adversary.

The ICRC's 1987 Commentary offers some, if not particularly satisfying, guidance. It says "the word "operations" should be understood in the context of the whole of the section; it refers to military operations during which violence is used, and not to ideological, political or religious campaigns.[69]" In doing so, this description equates 'operations' to 'attack', which, as discussed, would exclude most DPOs. However, the Commentary then fudges the definition offered by referring to English and French dictionary terminology.

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[67] E.g. Schmitt, M.N., '"Attack" as a term of art in international law: The cyber operations context.' NATO Cooperative Cyber Defence Centre of Excellence (2012) pp.1-11. https://ccdcoe.org/uploads/2012/01/5_2_Schmitt_AttackAsATermOfArt.pdf

[68] AP I, Art. 48,

[69] Pictet, Jean (with the participation of Siordet, Frédéric; Pilloud, Claude, Schoenholzer, Jean-Pierre, René-Jean, Wilhelm & Uhler, Oscar) International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, para. 1875

The former says that military operations are "all movement *and acts* related to hostilities that are undertaken by armed forces,[70]" expanding the definition considerably; while the latter states that military operations are, "battles and manoeuvres of all kinds, taken as a whole, as carried out by armed forces in a defined area, with a view to gaining a specific objective.[71]" The French dictionary terminology provides a slightly tangential definition and introduces several qualifications absent from the English dictionary meaning.

As a tool to aid understanding of the difference between an 'operation' and 'attack', the Commentary's analysis falls short. Equating operations with those involving violence is too narrowly framed and renders the choice to use the two separate terms in the drafting of AP I redundant. While the cited English dictionary definition, suggesting all 'acts related to hostilities' are 'operations', is too expansive, as the majority of DPOs used in armed conflict could arguably fall within this categorisation.

As Dinstein notes, it is "incontrovertible that non-violent psychological warfare (to give an undisputed example) may be lawfully directed at civilians.[72]" As such, the English dictionary definition is inappropriate. The French dictionary definition appears to be a product of its time (the commentary was published in 1987), restricting the definition to 'battles and manoeuvres." Such nomenclature seems incongruous and limited in a digital age of multi-domain operations.

Accordingly, the Commentary creates confusion when analysing DPOs in the context of this rule. Dinstein offers a better view and considers 'attacks' to be a "subset of military operation.[73]" Building on this, the more recent commentary to AP I of Bothe, Partsch and Solf notes that Art. 48 was drafted with limited time available to the delegates and contains several ambiguities. They suggest that 'attack' concerns "those aspects of military operations that most directly affect

[70] Ibid emphasis added
[71] Ibid
[72] Dinstein, Y., The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2016) p143, para. 383
[73] Ibid p206, para.524

the safety of the civilian population and the integrity of civilian objects.[74]" As such, "the concept of 'attacks' does not include dissemination of propaganda, embargoes, or other non-physical means of psychological or economic warfare.[75]" The term 'operations', is afforded a different meaning to attack, and "deals generally with those aspects of military operations that are likely to cause civilian casualties or damage to civilian objects.[76]"

The definitions offered by Bothe et al. are persuasive in that a subtle normative distinction can be drawn between 'attacks', characterised by an act of violence, in offence or defence, and 'operations', which, more abstractly, are likely to cause civilian casualties or damage to civilian objects. This resolves some of the ambiguity created by the drafters. But whether an action falls to be considered an 'attack' or 'military operation' it ultimately has the same effect in law, in that the full spectrum of targeting rules and civilian protections apply.

Whether a DPO falls within the normative framework of 'military operations' or 'attack' will depend on the circumstances and have at its foundation a reasonable belief that one or more recipients will act upon the DPO with an identifiable causal link to them suffering harm as a result. As discussed in the first section, these circumstances will not capture most DPOs.

The preceding analysis is reflected, at least in part, by US Department of Defence Law of War Manual under the heading of 'Non-Violent Measures That Are Military Necessary'. One passage confirms that the "principle that military operations must not be directed against civilians does not prohibit military operations short of violence that are military necessary. For example…seeking to influence enemy civilians with propaganda.[77]"

[74] Bothe, M., Partsch, K.J., Solf, W.A., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (Martinus Nijhoff Publishers, 2013) p325
[75] Ibid p289
[76] Ibid p325/326
[77] United States Department of Defense Law of War Manual (June 2015, Updated Dec 2016) para 5.2.2.1

Accordingly, while most DPOs can, in a practical sense, be considered military operations, the legal meaning of the term will exclude most. For those that may fall within the bracket of 'military operations' or 'attack', there is an obligation to extend a general protection against dangers.

General Protection Against Dangers

Returning to Article 51(1), the civilian population enjoy a 'general protection' against dangers arising from any military operation as that term has been defined. 'General protection' is undefined in AP I and as Dinstein notes, "it is not clear what dangers arising from military operations – other than attacks – the drafters of AP I had in mind.[78]"

The ICRC Commentary simply says that "[t]here is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum.[79]" However, the Bothe et.al commentary offers greater granularity and contrasts a 'general protection' with 'special protection', which "the Parties are obliged to extend to the wounded, sick and shipwrecked, medical and religious personnel, women, children, civil defense personnel and to certain specific objects and areas under the Conventions and Protocol I.[80]"

Citing the records of the diplomatic conferences which preceded AP I, Bothe accords 'general protection' a more specific meaning and posits:

> "General protection as used in Section 1 of Part IV involves a prohibition on making civilians or civilian objects the object of direct attack, a requirement to avoid excessive collateral loss or damage as a result of attacks on military objectives, an obligation on the part of the Party in control of civilian population to refrain from using civilians as a

[78] Dinstein, Y., The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2016) p143, para. 383

[79] Sandoz, Yves, Swinarski, Christophe, & Bruno Zimmermann eds., International Committe of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (ICRC/Martinus Nijhoff Publishers, Geneva, 1987) para. 1935

[80] Bothe, M., Partsch, K.J., Solf, W.A., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (Martinus Nijhoff Publishers, 2013) p.341

shield for his military operations, and to take appropriate and feasible precautions against the effects of attacks.[81]"

As such, the drafters' intention appears to have been to link the idea of civilians enjoying a 'general protection against dangers' directly to the concept of 'attack' and, by extension, to the prohibitions found in Article 51(2)-(8). This position finds favour with scholars such as Dinstein, who opines that the general protection set out in Article 51(1) is best understood by "linking civilian protection to attacks (or acts of violence) and excluding ancillary acts related to hostilities.[82]"

Resultantly, if a DPO is considered an 'attack' or 'military operation' under the LOAC, the belligerent is bound to afford civilians a general protection from harm under Art.51(1) and apply the wider rules associated with targeting to the activity. Although DPOs likely to engage Art.51(1) are comparatively rare, the novel use of digital technology in armed conflict may bring the rule more frequently into play.

Having situated the use of DPOs in the wider context of 'attacks' and 'military operations', the next section looks at the duty to 'respect' and 'ensure respect' for the LOAC.

[81] Ibid Footnote 1 p341

[82] Dinstein, Y., The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2016) p143

Respect and Ensure Respect for the LOAC

This section considers the obligation to 'respect' and 'ensure respect' for the LOAC. The elements and scope of the rule will be analysed before attention turns to the regulatory impact on DPOs.

The first Article of each Geneva Convention ('Common Article 1'), AP I, and AP III[83] contain an obligation for the High Contracting Parties to 'respect' and 'ensure respect' for the respective conventions.[84] Each obligation is similar, and Common Article 1 reads:

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

As noted by the perspicacious Nigerian delegation at the Diplomatic Conferences preceding the conclusion of AP I, Common Article 1 of the 1949 Conventions broke new ground by introducing the idea of a unilateral obligation on the part of each High Contracting Party, which was not based on the concept of reciprocity.[85]

The duty to 'respect' the various treaty provisions is uncontroversial and reflects the general requirement of states to enter agreements in good faith, given expression in the customary international law principle of '*pacta sunt servanda*' and codified in Art.26 of the Vienna Convention on the Law of Treaties (VCLT).[86] Of relevance to DPOs, the US Department of Defense Law of War Manual provides the following guidance in operationalising this aspect of the rule: "Propaganda must not: (1) incite violations of the law of war; nor (2) itself violate a law of war rule.[87]"

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[83] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005 (AP III);
[84] GC I - IV Art.1; AP I Art.1(1); AP III Art.1(1)
[85] Bothe, M., Partsch, K.J., Solf, W.A., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (Martinus Nijhoff Publishers, 2013) p42
[86] Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, 23 May 1969
[87] United States Department of Defense Law of War Manual (June 2015, Updated Dec 2016) Para. 5.26.1.3.

With regard to the phrase, 'ensure respect', Schmitt and Watts highlight that there is disagreement as to the meaning and scope of the obligation.[88] On the one hand, the ICRC and certain academic writers claim the duty extends beyond the organs of the state and the groups it controls during an IAC and requires a party to ensure all other states respect the Conventions and Protocols, including non-belligerents.[89] In other words, as a matter of legal obligation, the parties must use influence vis-à-vis other states and promote adherence to the LOAC.

This is the view adopted by the ICRC in its updated Commentaries to GC I - GCIII[90] and in its study of customary international humanitarian law.[91] The latter cites comments found in the *Nicaragua* Merits judgment of the International Court of Justice (ICJ) in support of its position.[92] If this accurately reflects the LOAC, then DPOs could be a tool to encourage other states to respect the provisions of the Conventions.

On the other hand, as Schmitt and Watts designed it, this' external obligation' arguably goes beyond what the treaty requires and does not reflect state practice. As they submit, "the Common Article 1 obligation to "ensure respect" refers to the legal duty of States that are party to an international armed conflict, and Party to the instruments, to take those measures that are

[88] Schmitt, M. and Watts, S. 'Common Article 1 and the duty to "Ensure Respect".' International Law Studies, (Vol, 96, 2020) pp. 677-678.
[89] de Chazournes, Laurence Boisson & Condorelli, Luigi, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', International Review of the Red Cross, (Vol.82, No.837, 2000) p 69
[90] International Committee of the Red Cross, Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War (2020) paras. 151–222 (2020); International Committee of the Red Cross, Commentary to Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (2017) paras. 147-148, 175-179, 186-195; International Committee of the Red Cross, Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (2016) paras. 125-126, 153-179
[91] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 139 & Rule 144.
[92] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para. 220; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 144

required to ensure their nationals and others under their control comply with the 1949 Geneva Conventions and Protocols I and III.[93]"

In articulating their view of what 'ensure respect' means, Schmitt and Watts contextualise the rule by reference to the *travaux préparatoires* of the treaties, leading scholarship, and the absence of consistent state practice supporting an expanded reading of the obligation.[94] One particularly impactful quotation is taken from a piece written by Sir Adam Roberts. He posits that there "appears to be little or nothing in the records of the 1949 Diplomatic Conference to suggest an awareness on the part of government delegates, or indeed ICRC participants, that the phrase 'to ensure respect' implied anything beyond internal observance.[95]" Accordingly, the view of the rule offered by Schmitt and Watts appears preferable and more realisable as a legal obligation attaching to a sovereign state participating in an IAC.

Negative Obligation and *Nicaragua*

Turning from the rule's scope to its application to DPOs, the duty to 'respect' and 'ensure respect' requires parties to an IAC to abstain from encouraging violations of the LOAC. Although self-evident, focused or general DPOs can encourage violations of the LOAC, and as such, the rule restricts their content in this regard. This negative obligation is the natural corollary of the positive duty to respect the Convention obligations and, as mentioned above, demonstrates good faith in a party's adherence to the treaty rules.

For example, in the *Nicaragua* case mentioned above, the US was found to have encouraged a non-state actor, the Contras, to violate the LOAC through the provision of a manual called 'Psychological Operations in Guerilla Warfare. Some of the techniques identified in the manual

[93] Schmitt, M. and Watts, S. 'Common Article 1 and the duty to "Ensure Respect",' *International Law Studies*, (Vol, 96, 2020) p.679.
[94] Ibid pp.689-693
[95] Roberts, Adam, 'The Laws of War: Problems of Implementation in Contemporary Conflicts', *Duke Journal of Comparative and International Law* (Vol, 6, no. 11, 1995) p30

would amount to clear breaches of the LOAC if perpetrated,[96] and the Court was critical of certain instructions found under the headings, 'Implicit and Explicit Terror' and 'Selective Use of Violence for Propagandistic Effects'. These sections provided direction, among other acts, concerning the possible necessity of shooting civilians attempting to leave a town; the 'neutralisation' or assassination of judges and other state officials, and the use of provocation at mass demonstrations to create 'martyrs'.[97]

Although the ICJ appeared to accept that the manual may have been provided to the Contras by the Central Intelligence Agency (CIA) as a means of attempting to moderate their battlefield behaviour,[98] it also observed that the manual was distributed at a time when it was known the Contras were acting in ways contrary to the LOAC. In such circumstances, the Court concluded that in light of the manual's content, it was 'likely and foreseeable' that further breaches of the LOAC may result from giving the Contras access to such material.[99]

In assessing the legal implications, the Court took the view that the obligation not to encourage breaches of the LOAC stems not just from Common Article 1 of the Geneva Conventions but also "from the general principles of humanitarian law to which the Conventions merely give specific expression.[100]" Resultantly, in providing the manual of instruction to the group, the Court found that the actions of the US "encouraged the commission…of acts contrary to the principles of international humanitarian law.[101]"

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[96] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para. 220 & 118; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 144 https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144

[97] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para.118

[98] Ibid para.220

[99] Ibid para.256

[100] Ibid para.220

[101] Ibid para.292(9)

The *Nicaragua* case offers useful guidance for the delivery of DPOs in an armed conflict. Firstly, the Court attributed to the US the clandestine act of providing the manual to the Contras. As such, where states seek to obfuscate the delivery vector of a DPO, for example, by using fake online personas on social media platforms to deliver a particular message or effect, this does not absolve the state of its legal obligations under the LOAC.

Various states' militaries have recently been identified in open-source reporting as using false accounts on different social media sites to promote their DPOs, including Thailand, Myanmar, the US, and Russia.[102] But the duty to respect and ensure respect endures despite the covert nature of the DPOs.

Secondly, the Court's finding that the distribution of a training manual to an armed group can breach the obligation to refrain from encouraging acts that violate the LOAC highlights how relatively minor acts can engage the provision. Thus, if targeted DPOs were to encourage breaches of the LOAC at an individual level, the rule would likely capture these. For example, encouraging civilians to poison a water source that was indispensable to the survival of the local population.[103]

Similarly, if a party released more egregious material, akin to ISIS propaganda promoting the idea of 'sexual *jihad*', a concept that encouraged its male fighters to relieve sexual tensions with

[102] Tanakasempipat, Patpicha, 'Facebook removes Thai military-linked information influencing accounts' *Reuters*, (3 March, 2021) https://www.reuters.com/article/us-facebook-thailand-idUSKBN2AV252; Ellis-Petersen, Hannah, 'Facebook removes accounts associated with Myanmar military', *The Guardian*, (27 August, 2018) https://www.theguardian.com/technology/2018/aug/27/facebook-removes-accounts-myanmar-military-un-report-genocide-rohingya; Lyngaas, Sean, 'Fake Facebook and Instagram accounts promoting US interests had ties to US military, Meta says', *CNN*, (22 November, 2022) https://edition.cnn.com/2022/11/22/politics/meta-report-fake-accounts-us-military/index.html; Nakashima, Ellen, 'Pentagon opens sweeping review of clandestine psychological operations', *The Washington Post*, (19 September, 2022) https://www.washingtonpost.com/national-security/2022/09/19/pentagon-psychological-operations-facebook-twitter/; Vincent, James, 'Facebook removes Russian misinformation network pushing fake news about the war in Ukraine', *The Verge (online)*, (28 February, 2022) https://www.theverge.com/2022/2/28/22954451/facebook-twitter-remove-misinformation-network-russian-propaganda-ukraine-invasion

[103] See Art.54(2) AP I; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 53

women to fight more effectively and, by extension, legitimised sexual slavery, this would almost certainly be unlawful as it directly or impliedly encourages grave breaches of the LOAC.[104]

Thirdly, the *Nicaragua* case qualifies the obligation not to encourage violations of the LOAC. In this regard, any encouragement by a party to breach a rule must be done in circumstances where it is 'likely' or 'foreseeable' that the behaviour encouraged will be realised. So when national manuals, such as the DoD Law of War Manual cited at the top of this section, require US propaganda not to incite violations of the laws of war, this guidance should be understood as not soliciting violations that are likely or foreseeable. The prevailing circumstances will determine what is 'likely' or 'foreseeable'.

For example, if a belligerent was besieging a town and a DPO sought to foment suspicion and infighting amongst the defenders and civilians, a message from a purportedly credible source might say, "collaborators are everywhere and must be taken care of." Absent any additional information, it is unlikely that the DPO breaches the prohibition against encouraging violations of the LOAC. It is not likely or foreseeable that such a message will trigger a violent response towards or between civilians.

However, in a scenario partially reflective of events linked to the Ukrainian state-aligned 'Myrotvorets' doxing website,[105] if a DPO was directed towards the besieged and provided the names and locations of several civilians within the town accompanied by a summary of human intelligence (HUMINT) that the individual had passed to the besieger alongside a picture of them labelled 'traitor', there is a more compelling argument that harm is likely and foreseeable. As

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[104] Gerstel, Dylan. 'ISIS and Innovative Propaganda: Confronting Extremism in the Digital Age', *Swarthmore International Relations Journal* (2016) p3 https://works.swarthmore.edu/cgi/viewcontent.cgi?article=1004&context=swarthmoreirjournal

[105] Kostyuk, N. & Zhukov, Y., 'Invisible digital front: can cyber attacks shape battlefield events?' *Journal of Conflict Resolution*, (vol 63, no. 2, 2019) p320 https://doi.org/10.1177/0022002717737138; Kupfor, Matthew, & Query, Alexander, 'Shadowy organization adds former Western top officials to 'enemies of Ukraine' list, *Kyiv Post*, (17 February, 2020) https://www.kyivpost.com/ukraine-politics/shadowy-organization-adds-former-western-top-officials-to-enemies-of-ukraine-list.html?cn-reloaded=1

captured in the Australian Law of Armed Conflict manual, "[p]ropaganda that would incite illegal acts of warfare, as for example killing civilians, killing or wounding by treachery or the use of poison or poisonous weapons, is forbidden.[106]"

In conclusion, as the rules under contemplation affect DPOs, the positive duty to 'respect' and 'ensure respect' for the LOAC is given expression by the negative duty not to encourage violations of the LOAC. As extrapolated from the *Nicaragua* judgment, the threshold for acts that might breach the rule is likely to be low. The negative obligation is qualified to the extent that any actions encouraging violations of the LOAC must have a 'likely' and 'foreseeable' chance of being realised, and this calculus will depend on the prevailing circumstances. Adopting the language used in the US and Australian manuals relating to the laws of war from the preceding discussion, it is not permitted for DPOs to incite breaches of the LOAC or incite illegal acts of warfare.

Moving away from respecting and ensuring respect for the LOAC, the next section considers the rule prohibiting acts or threats intended to spread terror among the civilian population.

[106] Australian Defence Doctrine Publication 06.4 'Law of Armed Conflict', 11 May 2006, para.8.45 https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf

Acts or Threats Intended to Spread Terror

This section explores the protection given to the civilian population from acts or threats intended to spread terror. After a brief background to the rule, the analysis will focus on the constituent elements of the prohibition and their meaning. With reference to domestic law, international criminal law and various examples, the interaction between the prohibition and DPOs will be explored throughout.

Firstly, the rule under consideration finds expression in the second sentence of Art.51(2) AP I, which reads:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

The rule articulated in the second sentence exists independently of that found in the first and can trace its origins back to the work of the 'Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties' created by the Preliminary Peace Conference which met at Versailles in 1919.[107] Based on evidence gathered, the Commission accused Germany and her allies of orchestrating a "system of terrorism" during the war and recommended that a court be established to hold perpetrators accountable.[108] While that outcome failed to materialise, it catalysed a normative shift in seeking to proscribe acts and threats intended to terrorise the civilian population.

[107] Report of the Commission on the Responsibility of the Authors of the [First World War] and on Enforcement of Penalties (29 March 1919) - Report submitted to the Preliminary Conference of Versailles by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Versailles, 29 March 1919. https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1917&context=ilshttp://www.internationalcrimesdatabase.org/upload/documents/20150610T161554-Laura%20Paredi%20ICD%20Brief_final.pdf
[108] Ibid

The present rule is one of general application in an IAC and considered to form part of customary international law.[109] Violations are not grave breaches of AP I, per Art. 85 of the treaty, but have been treated as war crimes by the International Criminal Tribunal for the former Yugoslavia (ICTY), with individuals held criminally accountable for intending to spread terror among civilians.[110]

At the national level, and with reference to a series of examples, the ICRC's Study of Customary International Humanitarian Law notes that the "prohibition of acts or threats of violence aimed at terrorising the civilian population is set forth in a large number of military manuals [and] violations of this rule are an offence under the legislation of numerous states.[111]"

Of the military manuals cited in the study, several describe "threats of violence whose primary purpose is to spread terror among the civilian population," as a prohibited form of propaganda,[112] explicitly capturing DPOs as falling within the rule's scope. As discussed below, recent conflicts involving the Islamic State of Iraq and Sham (ISIS) and between Russia and Ukraine provide examples of DPOs likely to breach the prohibition.

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[109] *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29, 5 Dec 2003, para.90; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 2

[110] E.g. *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29, 5 Dec 2003; Prosecutor v *Dragomir Milošević*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29/1, 12 Dec 2007; *Prosecutor v Ratko Mladić*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-09-92-T, 22 Nov 2017; *Prosecutor v Radovan Karadžić*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-5/18-T, 24 Mar 2016; *Prosecutor v Vidoje Blagojević and Dragan Jokić*, International Criminal Tribunal for the former Yugolsavia, Trial Chamber Judgment, IT-02-60, 17 Jan 2005.

[111] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 2 footnote 4; Australian Defence Doctrine Publication 06.4 'Law of Armed Conflict', 11 May 2006, para.5.35; UK Joint Service Publication 383 The Joint Service Manual of the Law of Armed Conflict (2004 ed.) para.5.21

[112] Australian Defence Doctrine Publication 06.4 'Law of Armed Conflict', 11 May 2006, para.5.35; UK Joint Service Publication 383 The Joint Service Manual of the Law of Armed Conflict (2004 ed.) para.5.21; US Department of Defense Law of War Manual (June 2015, Updated Dec 2016) para. 5.26.1.3;

The Elements of Acts or Threats of Violence Intended to Terrorise the Civilian Population

Unpacking the elements of the rule, the term 'acts' was preferred to the term 'attacks' by the drafters. However, as discussed above, Art. 49(1) of AP I defines 'attacks' as "acts of violence against the adversary…" Thus, for the purposes of this rule, the terms 'acts' and 'attacks' can be treated as coterminous and, as such, unlikely to apply to DPOs.

In relation to threats, this aspect of the rule appears to be treated with a degree of intrigue in the 1987 ICRC Commentary to AP I. The writers explain that "[i]t is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations.[113]"

Indeed, threats of violence intended to terrorise a civilian population have received comparatively little academic attention. Where the matter is addressed, commentators often reference the attempts of various belligerents in World War Two to shatter civilian morale through strategies such as bombing urban areas and note that the rule also covers 'threats' of a similar nature.[114] However, this analysis is limited in understanding the substantive scope of the rule and does little more than indicate that a threat of some gravity must be made to engage it. What is not addressed, for example, is how broadly such a threat must be disseminated. If a DPO is used to threaten the indiscriminate bombing of a city, is the rule engaged if only sent to the adversary's political head of state or other key leaders? Or must the DPO be a 'proclamation', reaching some or all of the population who may be impacted? In this regard, an analysis of what constitutes a 'threat' is necessary.

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[113] Sandoz, Yves, Swinarski, Christophe, & Bruno Zimmermann eds., International Committe of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (ICRC/Martinus Nijhoff Publishers, Geneva, 1987) para.1940

[114] E.g. Dinstein, Y., The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge University Press, 2016) p144

‘Threats’ and Intention

‘Threats’ are referred to elsewhere in AP I. Art.75(2), for instance, proscribes various threats of a criminal nature, such as threats to murder, torture, or take hostages.[115] However, no definition is provided for the term ‘threats’ in the treaty. Consequently, in seeking to understand what may be required to establish a breach a rule by making a threat, guidance must be found from other sources. Domestic criminal law provides one option.

In this regard, threats typically involve the communication of a statement, including through digital means, threatening harm to the recipient or a third party, such as a family member, in circumstances where the victim fears the threat will be carried out. For example, under the law of England and Wales, the offence of making ‘threats to kill’ is expressed in the following terms:

> “A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years.[116]”

Key to the *mens rea* aspect of the crime in common law jurisdictions is the intention to threaten the victim, and implied is a level of capability to carry out the threat insofar as the victim must fear the threat will be executed. For example, the Californian Penal Code 422 Statute concerning ‘criminal threats’ reflects the dual requirement of intention and capability, requiring a threat to convey “a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety.[117]”

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[115] See AP I, Art.75(2)(a) & (c)
[116] The Offences against the Person Act 1961 section 16 (Threats to Kill): https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents
[117] California Penal Code, Part 1. Of Crimes and Punishments [25 - 680.4] (Part 1 enacted 1872) Title 11.5. Criminal Threats [422 - 422.4] (As amended in 2000) https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=422

Applying the domestic guidance to a DPO, intention or a 'gravity of purpose' in respect of any threat can be conveyed by digital means. But whether the DPO can demonstrate a capability to carry out the threat will depend on the circumstances in which it is made.

An example of a DPO demonstrating intent and capability stems from the capture of Mosul by ISIS in 2014, as the armed group were becoming more powerful in the Levant. Gory footage of the group beheading battlefield prisoners[118] formed part of a "choreographed social media campaign,[119]" which was designed to find its way to the city's defenders. Despite being greatly outnumbered, ISIS were able to capture Mosul, and commentators later credited the DPO with helping facilitate the collapse in morale among the Iraqi Army and Police forces due to the threatened consequences of opposing the group.[120] The acts underlying the success of the DPO were however, serious breaches of the LOAC as it applies to a non-international armed conflict (NIAC).

The idea that 'intention' is a necessary element of a threat is carried across from national approaches to the LOAC. The prohibition under Article 51(2) concerns acts or threats, the *primary purpose* of which is to spread terror among the civilian population. The issue of intending to spread terror was considered by the ICTY Trial Chamber in the *Galic* case, a matter involving the indiscriminate use of artillery and snipers when besieging the town of Sarajevo. The court observed that:

> "The prohibition of 'acts or threats of violence which have the primary object of spreading terror' is directed to intentional conduct specifically directed toward the spreading of

[118] See for example, "Another video posted on ISIS channel showing the beheading of the captain Shadi Suleiman," *Liveleak* video, 1:53, August 6, 2014, http://www.liveleak.com/view?i=5f6_1407367840&comments=1; Mitew, T. E. & Shehabat, A. "Black-boxing the Black Flag: Anonymous Sharing Platforms and ISIS Content Distribution." *Perspectives on Terrorism* (Vol.12, Issue 1, 2018) p83

[119] Singer, P.W., Like War: The Weaponisation of Social Media, (Mariner Books, 2019) p4

[120] Singer, P.W., Like War: The Weaponisation of Social Media, (Mariner Books, 2019) p4-5; Stern, J., Berger, J.M., ISIS: The State of Terror, (Echo Press, 2016); Stevens, Mike 'Resistance and Information Warfare in Mosul and Raqqa', *The RUSI Journal*, (Vol. 165, Issue 5, 2020) p11

terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful.[121]"

Indeed, in the *Galic* Appeal Judgment, the Court emphasised that the intention and 'primary purpose' underlying the act or acts in question were of central importance to the rule. Whether the acts caused "actual terrorisation of the civilian populations,[122]" was a related matter of fact, but not a necessary requirement in establishing a violation of the prohibition.

As summarised in the *Dragomir Milošević* case:

"While the nature of the acts or threats of violence may vary, the important element…is that the acts or threats of violence are committed with the specific intent to spread terror among the civilian population.[123]"

Incidental Harm

In addition to stressing the importance of intention, the passage above highlights that incidental harm caused by lawful actions under the LOAC falls outside the scope of the rule. This sentiment is reflected in the UK's Manual of the Law of Armed Conflict, which says the rule under Art.52(1) "does not apply to terror caused as a by-product of attacks on military objectives or as a result of genuine warnings of impending attacks on such objectives.[124]"

[121] *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29, 5 Dec 2003, para.101
[122] *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber Judgment, IT-98-29, 30 Nov 2006 para.104
[123] *Prosecutor v Dragomir Milošević*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT 98-29/1, 12 Dec 2007, para.878; *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber Judgment,, IT-98-29, 30 Nov 2006 para.102
[124] UK Joint Service Publication 383 The Joint Service Manual of the Law of Armed Conflict (2004 ed.) para. 5.21.1

That incidental harm is not part of the prohibition is significant to DPOs. As highlighted in recent armed conflicts between Azerbaijan and Armenia,[125] Russia and Ukraine,[126] and various counter-terrorism operations,[127] real-time footage from unmanned aerial systems (UAS) and other aerial assets assist commanders in maintaining situational awareness, conducting reconnaissance, and assisting the targeting process, among other functions.

Additionally, the footage recorded by such equipment of battlefield success can be used as part of DPOs to deliver a potentially potent message to the adversary's civilian population and help rebut the adversary's propaganda narratives. This tactic has been a prominent feature of Ukraine's DPOs during its ongoing war with Russia. Ukrainian officials and official social media channels have repeatedly sought to circumvent Russian censorship of news concerning the invasion by releasing pictures and footage of successful Ukrainian operations and dead Russian combatants.[128]

The acts underlying the DPOs show lawful uses of force, and the second act of releasing footage of a lawful attack does not alter the legality of the underlying act. Indeed, the secondary

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[125] Hecht, Eado, 'Drones in the Nagarno-Karbakh War: Analyzing the Data', *Military Strategy Magazine*, (Vol.7, Issue 4, 2023) https://www.militarystrategymagazine.com/article/drones-in-the-nagorno-karabakh-war-analyzing-the-data/#:~:text=%E2%80%9CAzerbaijan's%20UAVs%20obliterated%20Armenia's%20formidable,humiliating%20ceasefire%20imposed%20by%20Russia.

[126] Khurshudyan, Isabelle & Illyushina, Mary, 'Russia and Ukraine are fighting the first full-scale drone war', *The Washintgon Post*, (2 December, 2022) https://www.washingtonpost.com/world/2022/12/02/drones-russia-ukraine-air-war/

[127] Bobbilier, Sophie, 'Interim Report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations', *International Committee of the Red Cross*, Case Study, (September, 2013) https://casebook.icrc.org/case-study/general-assembly-use-drones-counter-terrorism-operations; Rollins, John W., 'Armed Drones: Evolution as a Counterterrorism Tool', *Congressional Research Service*, (10 March, 2023) https://crsreports.congress.gov/product/pdf/IF/IF12342

[128] E.g Dawson, Bethany, 'Drone footage shows Ukrainian forces trapping fighters from Russia's Wagner Group in lethal crossfire', *Yahoo/Business Insider* (from Official State Border Service of Ukraine Telegram Channel - original subsequenttly deleted), (14 January 2023) https://uk.movies.yahoo.com/drone-footage-shows-ukrainian-forces-095522372.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABNOuPNJZ2EcXJ0Uc-xPfgn7InnAc2HEimfVqndRWwdaMEwALYVB474YhVW0qVcJdDm27IBBaHbFuC2_gj1cC95n1GG1d1HUNxWTU7JUd6erpQUEojt7g-pxtDmb0LAt7N5YHEs-dN1oj39OiDWXaCai_rLaGIBYdWPa3iBh_TNQ; Crane, Emily, 'Ukrainian officials post grim photos of dead Russian soldiers online', *The New York Post* (imagery taken from official Ukrainian Telegram Channels), (2 March, 2022) https://nypost.com/2022/03/02/ukrainian-officials-post-photos-of-dead-russian-soldiers-online/

act of releasing a DPO serves an additional military function: to negatively affect the morale of enemy combatants and the adversary's civilian population.

Such footage will not engage the rule under Art.51(2) to the extent that the events depicted comply with the state's LOAC obligations. Any psychological or emotional response, including terror, experienced by an adversary's civilian population as a consequence of seeing the DPO will likely be considered incidental to the lawful use of violence depicted therein.[129]

Meaning of 'Terror'

Turning now to the meaning of 'terror', the *Galic* case was the first international criminal case to deal specifically with the prohibition found in Article 51(2). As part of the Trial Judgment, the Court accepted the Prosecutor's definition of 'terror' and acknowledged this to mean "extreme fear," observing that the *travaux préparatoires* of the Diplomatic Conference preceding AP I did not suggest a different meaning.[130] This definition has been cited with approval in subsequent cases at the ICTY and the Special Court for Sierra Leone (SCSL).[131]

While the Court was not required to consider threats of violence specifically, and expressly declined to do so when delivering the Trial Judgment,[132] it did in a footnote to the judgment, offer examples of circumstances that would likely create 'extreme fear' in the civilian population:

> "Certain threats of violence would undoubtedly involve grave consequences. For example, a credible and well publicized threat to bombard a civilian settlement indiscriminately, or to attack with massively destructive weapons, will most probably

[129] For a wider discussion of incidental harm in the context of lawful attacks, see Schmitt, M. and Highfill, C. 'Invisible injuries: concussive effects and international humanitarian law', *Harvard National Security Journal*, (Vol.9, no. 1, 2018). pp. 73-99

[130] *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29, 5 Dec 2003, para.137

[131] E.g *Prosecutor v. Dragomir Milošević*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29/1, 12 Dec 2007, para. 883; *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Special Court for Sierra Leone, Case No. SCSL-04-14-A, Appeals Chamber Judgement, 28 May 2008, para. 350.

[132] *Prosecutor v Galic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29, 5 Dec 2003, para.110

spread extreme fear among civilians and result in other serious consequences, such as displacement of sections of the civilian population.[133]"

Reference to 'grave consequences' suggets that a certain threshold of harm must be reached for the rule to be engaged. However, this sits uneasily with the Court's finding that the civilian population does not need to be terrorised to establish a rule breach.

But the existence of such a 'result requirement' was confirmed in the later *Dragomir Milošević* Appeal Judgment with the view being that 'grave consequences' did not necessarily mean civilians suffering "death and serious injury to body or health.[134]" Rather death and serious injury were indicative of 'grave consequences' but not an evidential requirement, as situations of 'extreme fear' could be created in a civilian population without the infliction of serious violence.[135]

The interpretation adopted by the ICTY is significant to this study, as it confirms DPOs can engage the rule without violence being directed towards the target audience. An example of a DPO involving grave consequences and 'credible and well-publicised threats of violence' comes from the NIAC involving ISIS which spread across Iraq and Syria in the mid-2010s.

As the group gained territory, its multifaceted digital media campaigns, involving as many as 90,000 social media posts per day,[136] evolved and portrayed its own brand of 'Islamic Rule' over the territory occupied. Footage of men accused of homosexuality being thrown from the roof of a hotel after a faux trial, in Palmyra, Syria,[137] and depictions of crucified bodies, allegedly

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[133] Ibid para.110

[134] *Prosecutor v Dragomir Milošević*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-29/1, 12 Dec 2007, para. 33

[135] Ibid

[136] Blaker, Lisa 'The Islamic State's Use of Online Social Media,' *Military Cyber Affairs* (Vol. 1, Issue 1, 2016), Article 4, p1

[137] Anonymous author, 'Inside look at ISIS' brutal persecution of gays', *CBS News*, (2 December, 2015) https://www.cbsnews.com/news/isis-persecution-gay-men-murder-lgbt-muslim-society/

involved in passing information to "the enemy",[138] were part of a strategy intended to terrorise and subdue resistance in the local population and recruit similar-minded fighters. This strategy almost certainly caused 'extreme fear' in populations under occupation or nearby and likely contributed to the displacement of tens of thousands of Syrians and Iraqis.[139] If these atrocities and threats, direct or implied, were committed as part of an IAC, they would almost certainly constitue a breach of the Art.51(2) rule.

Civilian population

The final aspect of definitional clarification regarding the rule prohibiting acts or threats of violence the primary purpose of which is to spread terror among the civilian population is to consider the meaning of civilian population. Art. 50(2) of AP I states, "the civilian population comprises all persons who are civilians" and civilians are not members of an armed force.[140]

The rule under Art.51(2) is framed by reference to the civilian population. But even with the broad reach offered by DPOs, it is unlikely that a threat of any nature could reach an entire civilian population of an adversary. The issue was addressed at the ICTY in the case of *Kunarc, Kovac and Vukovic*, where the Appeals Chamber held:

> "…the use of the word 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack

[138] Anonymous author, 'Crucifixions and vice patrols show Islamic State maintains Mosul Grip', *Reuters*, (9 November, 2016) https://www.reuters.com/article/us-mideast-crisis-iraq-city-idUSKBN1341UJ
[139] Anonymous author, 'Exiled At Home: Internal displacement resulted from the armed conflict in Iraq and its humanitarian consequences', *The Euro-Mediterranean Human Rights Monitor*, (13 June, 2021) https://reliefweb.int/report/iraq/exiled-home-internal-displacement-resulted-armed-conflict-iraq-and-its-humanitarian
[140] AP I, Art.50(1)

was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[141]"

An analogous approach was adopted by the International Group of Experts (IGE) who contributed to the groundbreaking and influential 'original' and '2.0' versions of the Tallinn Manual on International Law Applicable to Cyber Warfare.[142]

In the 'original's' commentary to a rule providing a cyber-specific parallel to the Article 51(2) prohibition, the experts "agreed that terrifying one or only a few individuals, even if that is the primary purpose of the act or threat, does not suffice, although engaging in an act of violence against one person in order to terrorize a significant segment of the population would violate this Rule.[143]"

The ISIS example above provides an indication of how the latter aspect of the IGE's opinion could operate. DPOs showing individuals being thrown from buildings after faux trials and crucifixions punishing alleged 'collaborators', involving only a small number of people, could terrorise large segments of a population. The portrayal of rape and sexual slavery as part of ISIS propaganda could equally fall into this category.[144]

To conclude, this section has explored the meaning of the rule under Art.51(2) prohibiting acts or threats the primary purpose of which is to spread terror among the civilian population, with a particular focus on threats. The rule prohibits a DPO from intentionally causing extreme fear in a civilian population. To target a population means to affect more people than a limited or

[141] *Prosecutor v Kunarc, Kovac and Vukovic*, International Criminal Tribunal for the former Yugoslavia, IT-96-23 & 23-1, Appeals Chamber Judgment, 12 Jun 2002, para. 90

[142] Schmitt, Michael N. (ed.), Tallinn Manual on Law Applicable to Cyber Operations (Cambridge University Press, 2013); Schmitt, Michael N. (ed.), Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, (Cambridge University Press, 2017)

[143] Schmitt, Michael N. (ed.), Tallinn Manual on Law Applicable to Cyber Operations (Cambridge University Press, 2013) p.105

[144] See for example Salih, Dima, "Through the Lens of ISIS: The Portrayal of the Female Enemy and Sexual Violence in ISIS Online Magazines Dabiq and Rumiyah", Master's Thesis, The University of Helsinki, January 2019 https://helda.helsinki.fi/bitstream/handle/10138/300519/DimaSalihMaster%27sThesis.pdf?sequence=2&isAllowed=y

randomly selected number of people. However, incidental harm, including fear, terror, or any other psychological reaction, to seeing a lawful DPO, is not covered by the scope of the rule.

Collective Penalties, Measures of Intimidation or of Terrorism

Complementing the general prohibition of Art. 51(2) is an earlier, broadly designed rule applicable to 'protected persons' found in Art.33 GC IV forbidding collective penalties, intimidation and terrorism as a means of repression and control. Art.33 represents an iteration of earlier prohibitions on collective penalties found in the Hague Regulations of 1899 and 1907,[145] but with measures of intimidation and terrorism added. The latter aspects of the current rule are of greater interest to the study of DPOs than collective penalties. But certain comments in the ICRC's Commentary to AP I which contains a similar prohibition of collective penalties, trigger the need to look more closely at the potential use of DPOs to engage the rule.

Art.33 reads:

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[146]"

Two additional sentences in Art.33 refer to the concepts of pillage and reprisals, which are not addressed in this study. Before considering Art.33 in detail and how it may apply to DPOs, the meaning of 'protected person' will be discussed. 'Protected persons' will be the subject of several rules analysed across this section and others that follow.

[145] Convention (II) with Respect to the Laws and Customs of War on Land and its annex, Art. 50: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (Hague Regulations, 1899); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations, 1907); Pictet, Jean, (with the participation of Siordet, Frédéric; Pilloud, Claude, Schoenholzer, Jean-Pierre, René-Jean, Wilhelm & Uhler, Oscar) International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 p225

[146] Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art.33 (hereafter 'GC IV')

‘**Protected Person’**

The term ‘protected persons’ is used in each of the Geneva Conventions but the scope of who is considered to be a ‘protected person’ changes in each of the four Conventions. This is understandable as the focus of each treaty is different. The focus of the GC IV is the protection of civilians. In this regard, Art.4(1) GC IV defines ‘protected persons’ as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”[147]

According to the ICRC Commentary of 1958 (the ‘Pictet Commentary’), the rules found in Part III of GC IV (Arts. 27 to 135) relating to ‘protected persons’ are intended to cover two categories of civilians who had been under-protected by international law to that point and thought to be at risk of ill-treatment should they fall into the hands of another party to the conflict.

The two categories of civilians were, i) persons of enemy nationality living in the territory of a belligerent State, and ii) the inhabitants of occupied territories.[148] Territories are occupied when actually placed under the control of a hostile army[149] and are subject to the ebb and flow of armed conflict.[150] DPOs have no bearing on whether an area is occupied.

A third category could also be added to those ‘at risk’, namely, “civilian internees”. Internment is “an exceptional measure of control that may be ordered for security reasons in an armed conflict,[151]” and has been defined as the deprivation of liberty of a person that has been initiated

[147] GC IV, Art.4(1) emphasis added.
[148] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, p45
[149] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land – Section III: Military Authority Over the Territory of the Hostile State – Regulations: Art.42
[150] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, p.21
[151] See Pejic, J., “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, *International Review of the Red Cross*, (Vol. 87 No. 858 June 2005) p376 https://www.icrc.org/en/doc/assets/files/other/irrc_858_pejic.pdf

or ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee.[152] It is these three categories of people who find themselves "in the hands of" a foreign party to an IAC or an occupier that qualify as 'protected persons' and as such, benefit from the protections set out in GC IV.

Thus, 'in the hands' is not a literal expression. Instead, the term has a more abstract legal meaning, incorporating personal, national, and spatial aspects.

Collective Penalties

Returning to the rule under Art.33 GC IV, as one publication notes, "[t]hese provisions prohibit measures that terrorise the local population in order to impose obedience, and prevent certain hostile acts, for example collective punishments for alleged collaboration with or other forms of support to the enemy.[153]" As already explored above, DPOs can be used to terrorise and intimidate a civilian population making the rule under Art.33 relevant to this study.

While a violation of the rule is not considered to be a 'grave breach' of GC IV, the Pictet Commentary highlights that collective penalties and measures of intimidation and terrorism are distinct but related manifestations of a particularly base form of ill-treatment.[154] The behaviours represent forms of action that are not militarily necessary and fall below a minimum humanitarian threshold when seeking to elicit behavioural change in a group of people, whether through the creation of a deterrent effect or fear. Although considered to be related by the Pictet Commentary the activities found in Art.33 of collective penalties, measures of intimidation, and

[152] See Sandoz, Yves, Swinarski, Christophe, & Bruno Zimmermann eds., International Committe of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (ICRC/Martinus Nijhoff Publishers, Geneva, 1987) Art. 75(3), para. 3063

[153] Geneva Academy Briefing No.7 'Foreign Fighters under International Law', *Geneva Academy of International Humanitarian Law and Human Rights*, October 2014 p26 https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf; See also Sassòli, M., 'Terrorism and War', *Journal of International Criminal Justice*, (Vol. 4, Issue 5, 2006), p.967

[154] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, p225/226

terrorism, the only reference to the latter term in the Geneva Conventions of 1949, will each be considered separately in the analysis below.

Firstly, in addition to being prohibited under Art.33 GC IV, collective penalties (or punishments - the terms are used interchangeably) are proscribed with regard to POWs under Art.87 GC III, and for those not otherwise protected by the Geneva Conventions under Art.75(2) AP I. 'Collective penalties' are undefined in the LOAC, but the ICRC's 2020 Commentary to GC III offers the following definition taken from Black's Law Dictionary "[a] penalty inflicted on a group of persons without regard to individual responsibility for the conduct giving rise to the penalty.[155]" This formulation likely excludes DPOs from consideration under this aspect of the rule. It is difficult to conceive of a likely scenario where a DPO could impose a collective sanction on a group following the commission of some transgression.

However, when considering the meaning of 'collective punishment', the ICRC Commentary to Article 75(2) identifies that the term "collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and *harassment of any sort*, administrative, by police action or otherwise.[156]" This phraseology is repeated in the ICRC's Study of Customary International Humanitarian Law which identifies 'collective punishments' as a rule of international custom extending beyond criminal sanctions and including "sanctions and harassment of any sort…[157]"

The suggestion that extra-judicial 'harassment of any sort' might be sufficient to engage the prohibition concerning collective penalties appears to be an overly broad interpretation and

[155] International Committee of the Red Cross, Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War (2020) para.3689; Bryan A. Garner (ed.), Black's Law Dictionary, 11th edition, (Thomson Reuters, 2019) p.331

[156] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, "Commentary on Protocol I relative to international armed conflicts", International Committee of the Red Cross, (Martinus Nijhoff Publishers, 1987) Art. 75(2)(d) para.3055 (emphasis added)

[157] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 103

moves away from the core of the rule concerning the improper imposition of a punitive measure against a group of civilians. 'Harassment' is not a precise term and assumes different meanings across national jurisdictions. One dictionary definition suggests it to mean "an act or instance of harassing; torment, vexation, or intimidation.[158]"

If 'harassment of any sort' reflects the *lex lata* of the rule in question, then DPOs repeatedly directed towards the same group or occupied urban area could theoretically be prohibited as a form of collective punishment. For example, if, through a daily drumbeat of text and social media messaging, an occupier's DPO sought to dissuade civilians aged 18-50 from taking direct part in hostilities and after several unknown civilians had attacked the occupying forces, would this constitute harassment and by extension a collective penalty? An affirmative answer seems implausible.

Indeed, no supporting evidence for the assertion that acts of harassment can constitute a collective penalty is found in the Commentary to AP I. Equally, in the ICRC's customary international law study, there is similarly a lack of evidence to support the proposition. For instance, a number of military manuals are cited as evidencing a customary rule concerning the prohibition of collective penalties. But none of the manuals published in English links collective punishments with harassment.[159]

Case law concerning collective punishments is sparse but the matter was addressed in the case of the *Prosecutor v Fofana and Kondewa* before the Special Court for Sierra Leone (SCSL) which concerned brutal collective punishments among other things. The Court was cognisant of the ICRC Commentary referred to above and did take a broad view of what may constitute collective punishment. It decided that "the prohibition is to be understood as encompassing not

[158] https://www.dictionary.com/browse/harassment (Dictionary.com, 2023)
[159] E.g. The UK, US, Australia, Canada, New Zealand. Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 103 footnote 7

only penal sanctions but also any other sanction that is imposed on persons collectively[160]" and further held that "the term "punishment"…should be understood in its broadest sense, and refers to all types of punishments, not only those imposed by penal law.[161]"

Accordingly, while the case supports the view that collective penalties should be interpreted broadly it is inconclusive as to whether it extends to acts of harassment. Under the law of England and Wales, 'online harassment' involving repeated attempts to impose unwanted communications on a person or contact them in a manner that could be expected to cause distress or fear is an offence.[162] But whether domestic legislation of this nature is useful when interpreting the meaning of collective penalties in the LOAC is uncertain.

For instance, a DPO can seek to cause distress or fear in a civilian target audience but still serve a lawful and legitimate military purpose. Building on the hypothetical scenario presented further above, if a DPO seeks to dissuade civilians under occupation from directly participating in hostilities and identifies that they may be lawfully attacked if they do, or subject to criminal prosecution or internment, this could cause distress and fear in the civilian target audience. It is nonetheless an accurate reflection of the law and a communication that is not proscribed by any rule of the LOAC. The analysis would not change even if the message was repeatedly conveyed to the target audience as a means of promoting security and force protection.[163]

Accordingly, the law is ambiguous in relation to collective penalties, which has relevance to DPOs should acts of harassment fall within the ambit of the prohibition. Based on a lack of evidence to support the view that acts of harassment do fall within the rule's scope and the

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[160] *The Prosecutor v Moinina Fofana, Allieu Kondewa,* Special Court for Sierra Leone, Trial Judgment, Case No. SCSL-04-14-T, 2 August 2007 p56, para.179

[161] Ibid p297, para.978

[162] The Crown Prosecution Service (England and Wales), 'Cyber/ online crime', (2022) https://www.cps.gov.uk/crime-info/cyber-online-crime; The Crown Prosecution Service (England and Wales), 'Stalking or Harassment: Legal Guidance, Domestic Abuse, Cyber/ online crime' (23 May, 2018) https://www.cps.gov.uk/legal-guidance/stalking-and-harassment

[163] 'Measures of control and security' are discussed further in another section.

potential challenges in operationalising such an expansive view, it is submitted that a narrower reading is preferable and a more accurate reflection of the law.

As the Pictet Commentary observes, collective penalties are not, "sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.[164]" Incorporating acts of harassment perpetrated via DPOs into such guidance requires such a broad reading of 'penalties of any kind' that the rule would arguably lack meaning and specificity. As such, the better view is that the rule concerning collective penalties doesn't apply to DPOs.

Having considered collective penalties under Art.33 GC IV and concluded that this aspect likely doesn't apply to DPOs, attention now turns to 'measures of intimidation'.

Measures of Intimidation

The term 'intimidation' is undefined in the LOAC. As Sassòli writes, "legal definitions serve a purpose: they clarify the field and application of the legal rules that employ those terms.[165]" However, the prohibitions under Art.33 fall short in this regard, and guidance must be found from other sources when considering how the prohibitions may regulate DPOs.

The Cambridge Dictionary states that 'intimidation' means "to frighten or threaten someone, usually in order to persuade the person to do something he or she does not wish to do.[166]" The communicative nature of this definition supports the view that measures of intimidation can be perpetrated using DPOs.

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[164] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (1958) p225

[165] Sassòli, M., International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, (Edward Elgar Publishing Ltd, 2019) p500

[166] https://dictionary.cambridge.org/us/dictionary/english/intimidate (Cambridge Dictionary, 2023)

The dictionary phraseology also accords with comments found in the Pictet Commentary which links measures of intimidation to collective penalties and offers that "[d]uring past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts.[167]"

Consequently, as Sassòli concludes the "context of and field of application of the prohibitions" under Art.33, "show that they were meant to prohibit collective measures taken by mainly State authorities against a civilian population under their control to terrorise them in order to forestall hostile acts.[168]" Accordingly, the measures proscribed represent different harmful methodologies which seek to facilitate the exercise of control. DPOs, as a method of seeking behavioural change, fall within this spectrum.

Supplementing the very general guidance above, at the national level, crimes involving 'intimidation' are often linked with attempts to undermine the course of justice and involve witnesses or members of the judiciary.[169] One of the more instructive and granular definitions of 'intimidation' can be found in US Federal Law, which deems the term to involve "a serious act or course of conduct directed at a specific person that causes fear or apprehension in such person and serves no legitimate purpose.[170]" Usefully, a 'serious act' is noted to include a "single act of threatening, retaliatory, harassing, or violent conduct that is reasonably likely to influence" the target of the behaviour.[171]

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[167] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p225-226
[168] Sassòli, M., International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, (Edward Elgar Publishing Ltd, 2019) p500
[169] E.g. Section 51 Criminal Justice and Public Order Act 1994 (England and Wales) https://www.legislation.gov.uk/ukpga/1994/33/section/51
[170] 18 U.S. Code § 1514 'Civil action to restrain harassment of a victim or witness' (d)(1)(D) https://www.law.cornell.edu/uscode/text/18/1514#d_1
[171] Ibid (d)(1)(F)

This framework adds considerable colour to the possible meaning of ‘measures of intimidation’ and it is likely that the drafters of Art.33 had a definition along these lines in mind when proscribing acts that would target a collective group. For example, if a DPO involving a single act or course of conduct was directed towards members of the judiciary in an occupied area and threatened immediate removal from position if any civilian accused of acting contrary to the interests of the occupier was not convicted of a criminal offence, this would be captured as an act of harassment by the definition above. Lending weight to this assessment, it would additionally fall foul of a separate LOAC rule intended to safeguard the functioning of courts while under occupation.[172]

From the US Federal Law definition and the comments in the Pictet Commentary tying the prohibitions under Art.33 to acts intended to intimidate and terrorise a population, it can be reasoned that are three key issues when considering measures of intimidation and DPOs. Firstly, the nature and gravity of the act or acts; secondly, an intention to intimidate the target or targets, and thirdly, the lack of any legitimate purpose to the behaviour. This last aspect could also be expressed as the absence of military necessity to justify the actions.

First, the nature of the act or acts. The US Federal definition highlights that there is a wide latitude of behaviours which can be captured by the term ‘intimidation’, including threats, harassment, and violence. There is no positive reason why the ambit of the term would be more restricted when considered through the lens of the LOAC. Indeed, the formulation of Art. 33 and the juxtaposition of measures of collective penalties, intimidation and terrorism suggest the drafters envisioned a broad interpretation. However, any act or course of conduct is likely to require a degree of gravity to constitute a breach of a wartime rule aimed at preventing excessive acts by an armed force in occupation.

[172] GC IV, Art.64

The ICC assesses the gravity of an allegation by making a qualitative and quantitative assessment of the matter. It will consider not just the nature of the alleged criminality but also the scale of the acts, the manner of commission, and the wider impact.[173] This approach offers indicative guidance when considering the seriousness of any measure of intimidation.

As this might apply to DPOs which are always communicative in nature, any assessment of seriousness will be context driven and involve an analysis of the content of the DPO, the targets, and potentially the vector chosen for delivery. For instance, if a DPO was released on a digital platform predominantly used by adolescent children, such as a computer gaming platform, then this is likely to aggravate any aspect of intimidation forming part of the action. Such an assessment will help determine if a DPO is likely to breach the Art.33 prohibitions, and if so, whether it likely constitutes a measure of intimidation or of terrorism. The latter is discussed further below.

Secondly, with regard to intention, it is likely that any measure of intimidation must be intended to breach the Art.33 prohibition or that it is a reasonably foreseeable outcome the civilian population will be intimidated or terrorised. One aspect of DPOs worth noting in this regard is how readily the action can be communicated to the intended target audience. DPOs are deliberate actions in armed conflict designed to elicit behavioural, attitudinal, or perceptional change in the target audience, but how targeted they are can vary greatly depending on the manner in which they are delivered.

[173] Pre-Trial Chamber I, 'Situation in Darfur, Sudan, Decision on the Confirmation of Charges' ICC-02/05-02/09-243-Red (8 February, 2010) para 31; Pre-Trial Chamber II, 'Situation in the Republic of Kenya' (n 26) ICC-01/09-19 (31 March, 2010) para 188; Pre-Trial Chamber I, 'Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation' ICC-01/15-12 (27 January, 2016) para 51; Longobardo, Marco, 'Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes', *Questions of International Law*, (Vol.33, Nov 30, 2016) pp.21-41 http://www.qil-qdi.org/factors-relevant-assessment-sufficient-gravity-icc-proceedings-elements-international-crimes/#_ftn27%22

A campaign released on a widely used social media site like Facebook, for example, which is not tailored to reach a particular target audience, may be too abstract to engage the rule as a measure of intimidation, even if the content could be considered intimidating. Art.33 affords protection to protected persons. General statements on a digital platform may lack the specificity or precision to argue that certain protected persons are being intimidated by the action.

A high-level of abstraction can be contrasted with the same content being delivered through geo-targeted text messages to residents of an occupied town. It is far easier to assess a DPO as being an intended measure of intimidation when the latter modality of DPO is used.

Thirdly, the lack of any legitimate purpose or military necessity may indicate a breach of the rule. According to the ICRC, military necessity permits "measures which are actually necessary to accomplish legitimate military purpose and are not otherwise prohibited by international humanitarian law.[174]" However, in the context of 'measures of intimidation' the boundaries of what is prohibited by the LOAC is fairly opaque.

For instance, a distinction must be made between measures of collective intimidation and legitimate measures seeking to exercise control and promote security in an occupied area deemed to be militarily necessary. A hypothetical scenario illustrates the point. A DPO may form part of a security measure adopted by an armed force that imposes a curfew on a recently occupied town during hours of darkness. This is not a measure of intimidation.

However, if the same DPO threatened to track the movements of the town residents through different means and 'exact revenge' should they be found to break the curfew, this is likely a measure of intimidation. The DPO seeks to 'frighten and threaten' the civilian population, to use

[174] International Committee of the Red Cross, 'Glossary - A-Z', (2023) https://casebook.icrc.org/glossary/military-necessity

the dictionary expression, into compliance and arguably goes beyond what is militarily necessary.

Regarding the second scenario, it can be argued that the application of the principle of humanity is why the DPO is likely to be considered a measure of intimidation going beyond that which is militarily necessary. The LOAC principle of humanity seeks to minimise suffering and destruction during armed conflict. However, both 'military necessity' and the 'principle of humanity' are terms of art and must be interpreted subjectively.

Treaty law provides interpretive guidance, as AP I identifies as a 'Basic Rule' that, "[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.[175]" While the 'Marten's Clause' found in Hague Convention IV and largely mimicked in Art.1(2) AP I gives expression to the principle of humanity. The former reads:

> "...in cases not included in the Regulations adopted by them (the Parties), the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[176]"

However, as Schmitt identifies, there is a 'delicate balance' to be struck between effective military operations and the requirements of humanity. As he argues, "[i]n order to maintain an acceptable balance between the two principles, strict fidelity to the existing IHL rules is essential.[177]" The principle of military necessity imports a degree of flexibility to the prohibition of measures of intimidation as matters but does not excuse clear breaches of the prohibition. Whether a DPO amounts to an obvious breach of the Art.33 prohibition can be assessed, as

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[175] AP I, Art.35(1)
[176] Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Regulations, 1907) Art.22
[177] Schmitt, M.N., 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', *Virginia Journal of International Law*, (Vol.50, Issue 4, 2010) p838

discussed, by reference to its nature and gravity, the intention behind it, and the lack of a legitimate purpose or militarily necessary.

Accordingly, this section has analysed the meaning of ‘measures of intimidation’ and how such a concept may apply to DPOs. While there is no exhaustive list of what may constitute an act of intimidation, analysis of the meaning in US domestic law indicates what may have been contemplated by the drafters of GC IV. Digital technology offers a different means of delivering ‘measures of intimidation’, but the rule appears sufficiently flexible to absorb the methodological change.

Noting the prohibition under Art.33 concerns ‘measures of intimidation or of terrorism’, aspects of the analysis above will also be relevant when considering ‘measures of terrorism’ in the next section. However, as will be explored, the drafting choice to use the term ‘terrorism’ creates challenges of interpretation as this term has evolved since the GCs were drafted in 1949.

Measures of Terrorism

This aspect of the rule is an extension of the previously discussed ‘measures of intimidation’ which, when taken together, prohibit a belligerent from intimidating and terrorising a civilian population under their control. There is also overlap in this section with the previously discussed prohibition on acts or threats of violence the primary purpose of which is to spread terror among the civilian population but the Art.33 rule is distinct. In this respect, it is drafted more broadly, as the terminology used is ‘measures…of terrorism’, and applies to a narrower category of people, ‘protected persons’.

This section considers the ambit of the rule under Art.33 and its application to DPOs but leaves to one side some of the operational aspects as these have been discussed above in relation to the Art.51(2) prohibition and ‘measures of intimidation. Instead, focus is placed on the nature of activity captured by the term ‘terrorism’.

Defining 'Terrorism'

The meaning of the term 'terrorism' is not defined in the LOAC and has largely evaded definitional consensus in international law more generally. According to the United Nations' Office of Counter-Terrorism, the international community has elaborated nineteen separate international legal instruments to combat the threat of different acts of terrorism without settling on a specific definition.[178] Sassòli observes that the lack of consensus as to the meaning of terrorism is largely side-stepped in the treaties with each enumerating a list of crimes relevant to each particular convention.[179]

The lack of clarity as to definition presents a challenge in identifying DPOs which could potentially engage the rule. Equally, it does not assist in understanding the boundaries of the relationship between the prohibition under Art.33 and the Art.51(2) rule concerning acts of or threats of violence the primary purpose of which is to spread terror among the civilian population. 'Spreading terror' and 'terrorism' are different normative concepts.

Indeed, as mentioned in the context of collective penalties and measures of intimidation, the Art.33 prohibitions has in mind actions by an armed force intended to collectively punish and intimidate protected persons extra-judicially. As highlighted previously, the Pictet Commentary suggests the rule envisages "intimidatory measures to terrorise the population.[180]" Whereas, 'terrorism' is typically associated with the use of political violence. The Cambridge English Dictionary succinctly defines terrorism as "(threats of)violent action for political purposes.[181]" There is some degree of overlap in these statements, they are not congruous.

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[178] United Nations Office of Counter-Terrorism, 'International Legal Instruments', (2023) https://www.un.org/counterterrorism/international-legal-instruments

[179] Sassòli, M., International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, (Edward Elgar Publishing Ltd, 2019) p506

[180] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p226

[181] https://dictionary.cambridge.org/dictionary/english/terrorism (Cambridge Dictionary, 2023)

Given the guidance found in the Pictet Commentary, it is safe to assume that more egregious examples of 'measures of intimidation' are captured. For example, DPOs directed towards protected persons depicting the serious ill-treatment of suspected 'collaborators', akin to the ISIS propaganda mentioned earlier. But less certain, is whether 'measures of terrorism' incorporates other expressions of what 'terrorism' involves found, in particular, in public international law.

Of the nineteen treaties referenced above, the most informative definition of terrorism is found in the near-universally adopted International Convention for the Suppression of the Financing of Terrorism 1999 (ICSFT).[182] The treaty adopts a dualistic approach to defining acts of terrorism. The first branch of the definition incorporates multiple different meanings offered by nine other international treaties which address a range of nefarious behaviour from the seizure of aircraft to the theft of nuclear material.[183] This is in keeping with Sassòli's insight that terrorism treaties create offences to avoid defining the term.

However, the second branch is more general in character and indicates behaviour potentially captured by the substantive scope of Art.33. Both branches are complementary and found under Art. 2(1)(a) and (b) of the 1999 Treaty which states:

> "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex; or

[182] International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999 (189 parties) https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en
[183] Ibid Art.2(1)(a)

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

The widespread adoption of this international treaty gives it considerable legal weight. At the heart of the general definition adopted are acts of unlawful violence directed towards civilians with the intention of intimidating them or seeking to effect a certain behavioural reaction from a government or organisation.

This formulation is to an extent more expansive than acts or threats intended to spread terror among the civilian population, as actions targeting civilians must be intended to 'intimidate' rather than cause 'extreme fear'. In this regard, the treaty supports the proposition that 'measures of intimidation' and 'measures of terrorism' form part of the same continuum of harm, with acts of terrorism being more harmful than acts of intimidation. But the phraseology used recalls the discussion above concerning 'attack' and 'military operations'. Accordingly, if this definition captures DPOs, it will likely only be those able to reach those high thresholds of harm.

Of greater significance to DPOs, neither limb of the definition above appears to countenance the possibility that forms of threats can constitute an act of terrorism. The exclusion of 'threats' from the Article 2(1) definition above can be contrasted with those offered by the United Nations General Assembly (UNGA) and NATO who implicitly and explicitly left open this possibility. In 1994, General Assembly Resolution 49/60 regarding 'Measures to Eliminate International Terrorism' declared that:

> "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[184]"

While NATO defines terrorism in its 2021 Glossary of Terms and Definitions as:

> "The unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives.[185]"

At the national level, and notwithstanding the NATO definition, member states have adopted different approaches to whether individuals can perpetrate acts of terrorism using threats. For example, the 2019 US Department of Defense Manual for Military Commissions defines the offence of 'terrorism' without reference to threats and states that the offence is committed where a person "intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished.[186]"

This differs from the British Armed Forces, who incorporate the body of criminal law from England and Wales into their Service Law,[187] including the Terrorism Act 2000. Section 1 of the Act defines terrorism as the 'use or threat of action designed to influence the government or

[184] United Nations General Assembly Resolution, 'Measures to Eliminate International Terrorism', A/RES/49/60 17, February 1995 https://undocs.org/en/A/RES/49/60
[185] AAP-06 'NATO Glossary of Terms and Definitions', (2021 Edition) p130
[186] U.S. Department of Defense, 'Manual for Military Commissions' (2019 Edition) Part IV-19 https://www.mc.mil/Portals/0/pdfs/Manual%20for%20Military%20Commissions%202019%20Edition.pdf
[187] UK Armed Forces Act 2006 s.42

international governmental organisation or to intimidate the public or a section of it, and to advance a particular political, religious, racial or ideological cause.'

These contrasting views represent a fraction of the debate surrounding the meaning of 'terrorism', especially the issue of threatening terrorism and is reflective of the lack of an established consensus.

Indeed, the problem of differing understandings of what might be captured by the term 'measures of terrorism' can be seen in the interlocutory decision of the Appeals Chamber for the Special Tribunal for Lebanon (STL) which considered the definition of the crime of terrorism though the lens of international law.[188]

When considering whether there was a settled definition of terrorism under customary international law, both the Prosecutor and Defence Office are noted to have vigorously argued against the idea.[189] However, the Appeals Chamber, conducted a wide-ranging review of legal instruments and state practice, and concluded that "at least in time of peace", a rule relating to the crime of terrorism had emerged, characterised by three key elements:

i. The perpetration of a criminal act (such as murder, kidnapping, hostage-taking arson, and so on), or *threatening such an act*;
ii. The intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
iii. When the act involves a transnational element.[190]

While the decision of the Tribunal restricted its findings to peacetime and dismissed the views of the legal teams appearing before it, the decision serves as at least indicative evidence that

[188] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Special Tribunal for Lebanon, STL-11-01/1, 16 February 2011
[189] Ibid p49 para.83
[190] Ibid p49-50, para.85 emphasis added

threats of terrorism, however so defined, *may* breach the LOAC in an IAC as a matter of international custom. However, in formulating the test above, the intention to spread fear among a population has replaced the intention to intimidate them, as cited in the ICSFT. An undefined 'transnational element' has also been added to the term. The decision re-emphasises the amorphous nature of attempts to define terrorism and the difficulty in finding authoritative sources to inform analysis of what, if any DPOs are captured as a 'measures of terrorism'.

In conclusion, if a DPO can be viewed as a severe form of intimidation targeting protected persons, it will likely be captured by the Art. 33 GC IV prohibition as a 'measure of terrorism'. However, the extent to which this term incorporates other expressions of 'terrorism', found in public international law or elsewhere is far less certain. A narrow interpretation of the rule linking terrorism to collective penalties imposed upon a civilian population is preferable in providing a greater degree of certainty as to the rule's substantive scope and leaves aside the definitional challenge which has occupied public international law. Such a reading accords with the Pictet Commentary, which notes the "prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons."

Having considered the prohibition on a belligerent's use of DPOs to collectively intimidate or terrorise protected persons, the next section explores the notion of humane treatment.

Humane treatment

The following section considers the general obligation to humanely treat protected persons and combatants who are *hors de combat* and how this obligation manifests with regard to the use of DPOs directed towards a civilian target audience. Various LOAC treaty provisions outline the requirement to treat specific categories of people humanely,[191] and the obligation is outlined in AP I as one of the 'Fundamental Guarantees' for protected persons and those not benefiting from other favourable protections under the LOAC.[192] Art.27 of GC IV, Art.75 of AP I, and related customary international law are the primary focus,[193] but the discussion will extend beyond these rules. Art.27 GC IV and Art.75 AP I are both lengthy and rich in regulatory detail. Consequently, the section will address only the more salient aspects of their regulation of DPOs. In doing so, a number of examples will highlight how an abstract concept like 'humane treatment' applies to the use of DPOs in armed conflict.

Humane treatment

Art.27 GC IV, labelled 'Treatment I. General Observations', concerns the treatment of protected persons in an IAC and contains the explicit requirement to treat protected persons humanely. It reads:

> "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."

[191] E.g. GC I Art 12(2); GC II, Art. 12(2); GC III, Arts. 13, 20, 46; GC IV, Arts. 27, 32, 37(1), 127(1)
[192] AP I, Art.75(1)
[193] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 87

Art.75(1) AP I applies to a broader range of individuals than protected persons, as will be discussed below, and states:

> "...persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances…"

'Humane treatment' is undefined in the LOAC and intentionally so. As the Pictet Commentary to GC IV notes, "[t]he word "treatment" must be understood here in its most general sense as applying to all aspects of man's life. It seems useless and even dangerous to attempt to make a list of all the factors which make treatment 'humane'.[194]" Echoing the sentiment of attaching broad meaning to the concept, the ICTY Trial Chamber in the *Aleksovski* case, a matter involving allegations of inhumane treatment of civilian detainees through physical and psychological abuse at a prison facility, posited that:

> "[i]nstead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of mistreatment that are without question incompatible with humane treatment.[195]"

The 'odious forms of mistreatment' were noted to find expression in treaty obligations and customary international law and, as highlighted by the Court, require a degree of severity to be classed as 'inhumane'. In this regard, the Court cited with approval an extract from the 1998 trial judgment in the case of *Prosecutor v Delalic et al.*, a matter concerning the severe ill-treatment of detainees at a detention facility in Bosnia and Herzegovina, which found that although each case would turn on its facts:

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[194] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p204

[195] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.49

> "Inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes *serious* mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain and ordinary meaning of the term inhuman treatment in the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Convention fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.[196]"

Reference to intentionally causing serious mental suffering or injury or a serious attack on human dignity indicates that the threshold is relatively high for any DPO to be considered 'inhumane'. Reflecting this high bar, the Rome Statute requires intentionally inhumane acts to cause 'great suffering, or serious injury to body or to mental or physical health' to constitute a crime against humanity.[197] Accordingly, only particularly heinous DPOs are likely to meet the threshold of inhumane treatment.

Article 27 GC IV

Having discussed the meaning of 'humane', attention now turns to other aspects of Art.27 GV IV relevant to DPOs. The Pictet Commentary to Art.27 posits that "Article 27, placed at the head of Part III [of GC IV], occupies a key position among the Articles of the Convention. It is the basis of the Convention, proclaiming as it does the principles on which the whole of 'Geneva Law' is

[196] *Prosecutor v Delalić, Mucić, Delić and Landžo*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para.543 emphasis added

[197] Rome Statute of the International Criminal Court, 2187 United Nations Treaty Series 90, (2000) (hereafter the 'Rome Statute') Art.7(1)k.

founded. It proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women.[198]"

As cited above, the first of four paragraphs state that:

> "Protected persons are entitled, in all circumstances, to *respect* for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely *treated*, and shall be *protected* especially against all acts of violence or threats thereof and against insults and public curiosity."

'Respect', 'treated', and 'protected' are italicised to highlight that parties to the treaty (considered to be reflective of CIL[199]) must refrain from certain harmful acts; behave to a certain humane standard, and actively protect protected persons from violence and threats of it, and against insults and public curiosity (the latter two will be discussed in a separate section below). Reference to 'threats' in the verbiage clearly indicates that communicative acts, including DPOs, as well as physical acts, were intended to be captured by the provision. This flows from the rule's construction and is replicated in Art.75 AP I, which specifically proscribes several different types of threats concerning serious acts of ill-treatment.[200]

With regard to the matters a party must 'respect', these being honour, family rights, religious convictions and practices, and manners and customs, none of the terms are defined in the treaty. While the word limit will not permit a full exposition of what each element of the rule may entail, it is worth noting aspects of the meaning to be ascribed to 'persons', 'honour' and 'religious convictions' in their application to DPOs.

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[198] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) pp.199-200.
[199] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 87
[200] Art.75(2)(e) AP I

Regarding ‘persons’, the Commentary details that the term should be understood “in the widest sense” and “includes, in particular, the right to physical, moral and intellectual integrity.[201]” Intellectual integrity is said to revolve around the notion of “moral values which form part of man’s heritage” with an aspect of this being that an “[i]ndividual persons' names or photographs, or aspects of their private lives must not be given publicity.[202]”

DPOs involving activity such as doxing, involving the "intentional public release onto the internet of personal information about an individual by a third party, often with the intent to humiliate, threaten, intimidate, or punish the identified individual,[203]" are thus likely to be prohibited due to falling within the protective scope of Art.27 GC IV. Equally, if a party released imagery of protected persons and branded them as ‘traitors’ or ‘enemies of the state’, potentially inviting vigilantism, this would likely fall foul of Art.27’s requirement to ‘respect’ the individuals.

Turning to the meaning of respecting ‘honour’, the Commentary envisages this to involve, “protection against slander, calumny, insults or any other action impugning his honour or affecting his reputation.[204]” ‘Given the high bar set in the case law of the ICTY with regard to what might be considered ‘inhumane treatment’, it is likely that a sufficient, and difficult to define, level of seriousness would need to attach to any slander etc., before Art.27 could be said to have been breached.

One scholar of ‘influence operations’, Pontus Winther, has opined that “it would arguably be a breach of the duty to respect a protected person’s honour if a party to an armed conflict disseminated insulting information about a [protected] person in order to undermine others’

[201] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p201
[202] Ibid
[203] Douglas, D. ‘Doxing: A conceptual analysis’, *Ethics Information Technology,* (Vol.18, 2016) p199
[204] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p202

confidence in them.[205]" While not disagreeing with the point, added to this analysis should be that the insulting information would need to be of significant gravity before the rule is engaged. Insults and slander of a *de minimis* character will not be sufficient. For example, referring to someone by a derogatory term would be unlikely to breach the rule.[206]

With regard to 'religious convictions and practices', the Commentary says that "Protected persons in the territory of a Party to the conflict or in occupied territory must be able to practise their religion freely, without any restrictions other than those necessary for the maintenance of public law and morals.[207]" This accords with various IHRL instruments which contain similar protections for religious thought and expression,[208] and is captured in the military manuals of many states and reflective of customary international law.[209] As such, a DPO which sought to deprive protected persons of these freedoms or assist in the imposition of adherence to new religious practices during circumstances of occupation would contravene Art. 27. This could involve, for example, a DPO which communicated the imposition of a civil penalty for anyone in

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[205] Winther, P., International Humanitarian Law and Influence Operations: The Protection of Civilians from Unlawful Communication Influence Activities during Armed Conflict, (Uppsala: Acta Universitatis Upsaliensis, 2019) 3.2.4.1. p162

[206] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.185

[207] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p203

[208] E.g. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, (1976) Arts.18 & 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Council of Europe Treaty Series, No.5, (4 Nov 1950), Arts. 9 & 10; American Convention on Human Rights, Organization of American States, (22 Nov 1969) Arts.12 & 13.

[209]Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005); Select examples of military manuals include: (France) Manuel de droit des conflits armés, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001, p. 5; (Germany) Humanitarian Law in Armed Conflicts – Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch, August 1992, § 502; (Israel) Rules of Warfare on the Battlefield, Military Advocate-General's Corps Command, IDF School of Military Law, Second Edition, 2006, p. 27; (Netherlands) Humanitair Oorlogsrecht: Handleiding, Voorschift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0116; (Peru) Manual de Derecho Internacional Humanitario para las Fuerzas Armadas, Resolución Ministerial Nº 1394-2004-DE/CCFFAA/CDIH-FFAA, Lima, 1 December 2004, § 32.d; (South Africa) Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 2, pp. 112, 116 and 155–158.

an area under occupation found to be praying on a certain day of the week as was customary prior to the occupation.

In the analysis above, weight has been attached to the Pictet Commentary in the absence of case law. Most of the concepts are common to both the *lex generalis* of IHRL, and the *lex specialis* of the LOAC. The interplay between the LOAC, IHRL and humane treatment is not explored in this paper but the interpretive value that may be derived from IHRL in relation to the protective scope of Art.27 is worth noting here.

Returning to Art.27, but moving away from the first paragraph quoted above, the second paragraph of Art.27 requires parties to especially protect women from 'any attack on their honour'. This concept will be explored in detail in a later section as it applies to DPOs, but in essence, the term means protection from sexual violence. The third paragraph requires parties not to discriminate against protected persons based on various characteristics, such as race, religion, or political opinions. The Commentary characterises the obligations set out in the first three paragraphs of Art.27 as "general and absolute in character,[210]" albeit, as discussed, there are certain qualifications to the 'absolute' nature of the obligations.

Additionally, the obligations are practically qualified by the fourth and final paragraph of Art.27 which permits parties to an IAC to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war." The Commentary observes that the parties have considerable discretion in their choice of means and methodologies but with the caveat that "[w]hat is essential is that the measures of constraint they adopt should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified.[211]" DPOs may fall within the ambit of

[210] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p204
[211]Ibid p207

‘measures of control and security’ seeking, as they do, to effect behavioural or attitudinal change in a target audience.

Indeed, DPOs can form a prominent component of efforts to restore or maintain order in an occupied population centre where the use of violence may inflame rather than improve the security situation. Russian efforts in occupied Ukraine to displace native media sources and create a ‘parallel reality’ through digital and more traditional mediums of propaganda, such as tv and radio, are emblematic of such an approach. For example, in the formerly occupied city of Izium, reporting suggests a deliberate campaign to portray the Russian military as ‘liberators’ and ‘heroes’ was undertaken, with an effort to change public perceptions and opinion to be more sympathetic to the ‘Russian world’ view.[212] The paucity of alternative information to rebut the ‘omnipresent’ Russian narratives and a population fatigued through conflict were identified as reasons why the activity may have met with some success.[213]

Despite this aspect of the Russian occupation of Izium being permissible under the LOAC (leaving to one side serious allegations of ill-treatment of the civilian population, including torture), any measures of control and security as they apply to protected persons, must not displace the overriding duty to treat protected persons humanely, described in the Commentary as, “in truth the 'leitmotiv' of the four Geneva Conventions.[214]”

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[212] Volochene, Elena, ‘Occupied Ukraine: Inside the horror of Russia’s parallel reality’, *France 24*, (2 December, 2022) https://www.france24.com/en/tv-shows/reporters/20221202-occupied-ukraine-inside-the-horror-of-russia-s-parallel-reality; Mannocchi, Francesca, ‘“Save Us From Nazis,” Indoctrination Stamped on Student Letters to Russian Troops’, *La Stampa* (5 November, 2022), https://worldcrunch.com/focus/russian-propaganda-children-schools; Nagorski, Tom, ‘Fighting Russia with a laptop: Meet the women on the front lines of Ukraine’s information war’, *The Messenger*, (10 March, 2022) https://www.grid.news/story/global/2022/10/03/fighting-russia-with-a-laptop-meet-the-women-on-the-front-lines-of-ukraines-information-war/

[213] Volochene, Elena, ‘Occupied Ukraine: Inside the horror of Russia’s parallel reality’, *France 24*, (2 December, 2022) https://www.france24.com/en/tv-shows/reporters/20221202-occupied-ukraine-inside-the-horror-of-russia-s-parallel-reality

[214] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p204

In this regard, an example of a DPO that may be sufficiently severe to breach the obligation to refrain from threats of violence and go beyond what might be considered a permissible measure of control and security comes from the Israeli/Palestine conflict. For illustrative purposes, it will be assumed that the conflict is an IAC.

In early 2022, it was reported that the Israeli intelligence agency, the Shin Bet, had in May 2021 used spyware to track various Palestinian civilians. The agency then sent threatening messages to the civilians' mobile telephones, intending to dissuade them from participating in acts or further acts of civil disobedience in the occupied territory of East Jerusalem. The messages preceded armed clashes between Palestinian groups and Israeli Security Forces which left more than 200 dead.[215]

An example of a message purportedly sent by the Shin Bet read, “Hello! You have been identified to have taken part in violent acts at al-Aqsa Mosque. We will punish you - Israeli intelligence.[216]” Similar versions of this message are reported in other sources, with variations on the ending. These include “we will settle the score[217]" and “we will hold you accountable.[218]” Among the recipients of the messages were Palestinian civilians not suspected of involvement in any disruptive actions, including several journalists.[219]

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[215] Knell, Yolande and Maishman, Elsa, ‘Israel-Gaza: Death toll rises as Israel kills second top militant’, *BBC News*, (7 August, 2022) https://www.bbc.co.uk/news/world-middle-east-62445951

[216] Anonymous author (‘Middle East Eye Staff’), ‘Israel: Shin Bet admits sending threatening texts to Palestinians during May protests’, *Middle East Eye*, (3 February, 2022) https://www.middleeasteye.net/news/israel-palestine-shin-bet-threatening-messages-may-protests; Anonymous author, ‘Palestinians receive threatening texts from Israeli intelligence’, *TRT World Magazine (online)*, (May, 2021) - containing screenshots and pictures of the alleged messages https://www.trtworld.com/magazine/palestinians-receive-threatening-texts-from-israeli-intelligence-46650

[217] Anonymous author, ‘Shin Bet admits to sending threatening messages to ‘48 Palestinians’, *Al Mayadeen* (English), (3 February, 2022) https://english.almayadeen.net/news/politics/shin-bet-admits-to-sending-threatening-messages-to-48-palest

[218] Anonymous author (Associated Press), ‘Israel upholds use of surveillance technology on protestors;, YNet News, (2 February, 2022) https://www.ynetnews.com/article/hj5xmi000f

[219] E.g. ‘Lama Al-Arian’ Twitter Account, picture posted of message reportedly received by a journalist colleague (10 May, 2021) https://twitter.com/lalarian/status/1391850235396304896?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1391852503080243200%7Ctwgr%5Ef35702084432210c05180966b21fae99a19ade37%7Ctwcon%5Es2_&ref_url=https%3A%2F%2Fwww.trtworld.com%2Fmagazine%2Fpalestinians-receive-threatening-texts-from-israeli-

Based on the assumption that the messages were sent intentionally to the various recipients, they almost certainly amount to 'measures of intimidation'. But it is worth considering whether they might also rise to the level of inhumane treatment. From the material publicly available, it is difficult to verify the precise nature of the language used in the messages and how widely they were distributed. But the overall tenor of the communications is threatening and menacing, and targeted down to an individual level, at least in part, based on a precise geographical understanding of where each person had been.

Given the protective scope of Art.27, the actions of the Shin Bet would appear to violate the requirement to treat protected persons humanely, by explicitly or implicitly threatening them with violence. Furthermore, the potential psychological harm and fear generated by the DPO given the invasive methodology employed in identifying the target and affecting the delivery of the DPO to their personal mobile devices serve as aggravating factors. As such, the operation arguably reached the 'serious' level of harm identified in the *Delalic* case and constitutes a breach of the LOAC.

While states have considerable latitude to employ "measures of control and security" with regard to protected persons under Art.27 of GC IV, it would be difficult to argue that the actions in question can reasonably form a measure of control and security. Indeed, commenting on behalf of the Shin Bet, a spokesperson for the Israeli Ministry of Justice after the incident said that the goal was to "thwart illegal activity meant to harm state security," but the intelligence agency made an "error in how the action was executed.[220]" An inference that could be drawn

intelligence-46650; Anonymous author, 'Palestinians receive threatening texts from Israeli intelligence', *TRT World Magazine (online)*, (May, 2021) https://www.trtworld.com/magazine/palestinians-receive-threatening-texts-from-israeli-intelligence-46650

[220] Farkash, Liba, 'Israel: Shin Bet Admits to Sending Threatening Messages to Arab Israelis', *i24NEWS*, (3 February, 2022) https://www.i24news.tv/en/news/israel/defense/1643873070-israel-shin-bet-admits-to-sending-threatening-messages-to-arab-israelis

from the statement is that Israel considered its actions to be appropriate relative to those engaged in violence but not with regard to the civilians taking no part in the protests.

The example highlights the opportunities offered by digital technology to deliver targeted psychological effects designed to elicit an immediate behavioural response from the civilian target audience and how the protections under Art.27 can be implicated.

Article 75 AP I

Supplementing the provisions of Art. 27, Art.75 AP I builds on the protections discussed above and outlines a set of 'Fundamental Guarantees' for those "in the power of a party to the conflict." The 'guarantees' explicitly prohibit various acts and grant certain rights to those who fall within the protective scope. Prominent LOAC scholar Marco Sassòli describes the 'guarantees' as providing "basic human rights-like[221]" protections but, in this regard, it is notable that the protective scope of Art.75 differs from that outlined in Art.27 GC IV. Specifically, the protections afforded apply more broadly to individuals "who do not benefit from more favourable treatment under the Convention or this Protocol…" such as mercenaries or a party's own citizens.

However, the expanded scope is qualified to the extent that the guarantees are probably only applicable to those individuals who are detained or controlled by a party to the conflict.[222] When writing about the LOAC and doxing of enemy soldiers, Jensen and Watts observe that Art.75 "appears to anticipate conditions of physical custody." They highlight that Art.75 is framed as applying to those "in the power" of a party to an armed conflict and is situated in an article that also addresses arrest, detention, and internment, among other matters.[223] This can be contrasted with the applicable safeguards for protected persons which apply when an individual

[221] Sassòli, M., International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, (Edward Elgar Publishing Ltd, 2019) p200
[222] Jensen, Eric, and Watts, Sean, 'Ukraine Symposium - Doxing Enemy Soldiers and the Law of War', *Articles of War*, Lieber Institute (31 October, 2022) https://lieber.westpoint.edu/doxing-enemy-soldiers-law-of-war/
[223] Ibid

is ‘in the hands’ of a party. Accordingly, situations of occupation are not captured, unless an individual is also deprived of their liberty.

The duty to respect the ‘Fundamental Guarantees’ found in Art.75 AP I is confirmed in several national law of war manuals, including those of the UK and US,[224] and considered by the latter to reflect customary international law.[225] The provisions of Art.75 are lengthy and extend to eight paragraphs but many of the provisions have little direct bearing on DPOs, with considerable focus on an individual’s treatment while detained and their due process rights. However, two aspects of the fundamental guarantees are particularly relevant to DPOs directed towards a civilian audience. These concern the depiction of serious breaches of Art.75 as part of a DPO, some of which have gained considerable international attention, and the perpetration of outrages upon personal dignity through the means of a DPO. After highlighting the salient rules under Art.75, both are explored below.

Art.75 confirms that:

> “...persons who are in the power of a Party to the conflict and *who do not benefit from more favourable treatment under the Conventions* or under this Protocol *shall be treated humanely* in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.[226]”

While Art.75(2) goes on to explicitly prohibit certain behaviours:

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[224] UK Ministry of Defence Joint Service Publication 383: The Manual of the Law of Armed Conflict, 2004 para.9.21; United States Department of Defense Law of War Manual (June 2015, Updated Dec 2016) para.10.5.
[225] Clinton, Hilary Rodham, Secretary of State, Press Statement: Reaffirming America's Commitment to Humane Treatment of Detainees, 7 March 2011 https://usnwc.libguides.com/ld.php?content_id=2998432
[226] AP I, Art.75(1)

"The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

a) violence to the life, health, or physical or mental well-being of persons, in particular:

i) murder;

ii) torture of all kinds, whether physical or mental;

iii) corporal punishment; and

iv) mutilation;

b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

c) the taking of hostages;

d) collective punishments; and

e) threats to commit any of the foregoing acts.

Relevant to the next section, Art.75(4) also confirms that:

"No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure…"

Breaching Art.75 and its Depiction

The rules cited set out the protective scope of Art.75 and specific prohibitions relative to those who fall within it and apply 'at any time and in any place whatsoever'. In considering the

application of the rules to DPOs, attention will first turn to the notorious execution of the mercenary Yevgenny Nuzhin, who was summarily killed by the Russian 'Wagner Group' using a sledgehammer in late 2022. Footage of Nuzhin's brutal death formed the core of several DPOs that reached millions and was widely reported and amplified in the most prominent international press outlets.

Nuzhin was reportedly recruited from prison to fight for the Group in July 2022 but was either quickly captured by or surrendered to Ukrainian forces, there are competing accounts. It seems he was later part of a prisoner exchange between the two belligerents, and Nuzhin was passed back to the Wagner Group.[227] His status in the conflict as a combatant, mercenary or civilian directly participating in hostilities is uncertain. But as a Russian national, once in the power of the Wagner Group, he was entitled to protection under Art.75 AP I as an individual not benefitting from other LOAC protections.

The 50,000-strong Wagner Group are a body of mercenaries who form part of the Russian military apparatus.[228] They have a reputation for perpetrating war crimes and egregious human rights abuses in the course of their operations in Ukraine.[229] The Group's treatment of its own members has attracted interest, and is seemingly little better, with reports of field executions for

[227] Tegler, Eric, 'The Graphic Death of Yevgeny Nuzhin Underlines the Risk of Prisoner Exchanges in Ukraine', *Forbes*, (15 November, 2022) https://www.forbes.com/sites/erictegler/2022/11/15/the-graphic-death-of-yevgeny-nuzhin-underlines-the-risk-of-prisoner-exchanges-in-ukraine/

[228] Blinken, Antony J., U.S. Secretary of State, Press Statement, 'Countering the Wagner Group and Degrading Russia's War Effort in Ukraine', *U.S. Department of State*, (26 January, 2023) https://www.state.gov/countering-the-wagner-group-and-degrading-russias-war-efforts-in-ukraine/; Anonymous author, 'Band of Brother: The Wagner Group and the Russian State', *Center for Strategic and International Studies*, (21 September, 2020) https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state

[229] Reevell, Patrick, 'Russian defects from Wagner mercenary group, says it's committing war crimes in Ukraine', *ABC News*, (13 February, 2023) https://abcnews.go.com/International/russian-defects-wagner-mercenary-group-committing-war-crimes/story?id=97043522; Nordstrom, Louise, 'Wagner Group's bloody year in Ukraine: From murder squad to cannon fodder, *France 24*, (22 February, 2023) https://www.france24.com/en/europe/20230222-wagner-group-s-bloody-year-in-ukraine-from-murder-squad-to-cannon-fodder

unauthorised withdrawals from combat and a fighter being castrated by colleagues for attempting to surrender.[230]

Footage of Yevgenny Nuzhin's brutal execution in November 2022 released through the Wagner Group-associated Telegram channel 'Grey Zone',[231] appeared to form part of a DPO intended to glamourise the use of extreme violence by the Group and warn members of the consequences of surrendering or defection. In a video harkening back to the most extreme ISIS propaganda, Nuzhin, speaks to a camera and advises that he is due to be tried by his captors before being struck twice on the head with a sledgehammer. A graphic then appears and reads 'sentenced' in Russian. The footage was released with the title 'hammer of revenge' and the leader of the Wagner Group, Yevgeny Prigozhin, publicly commented on the matter, saying "a dog receives a dog's death.[232]" His remarks suggest that the release of the DPO was authorised and deliberate.

Excerpts of the execution footage were subsequently used across a number of different Wagner Group DPOs, including as part of a set of fourteen short clips uploaded to the social media platform Tiktok, principally glamorising acts of violence perpetrated by the group. The most popular of the fourteen had attracted 900,000 views before being removed by the platform for breaching its terms and conditions of use.[233] Wagner Group-related videos on the Tiktok platform, using the Russian-language hashtags "chvk" ("pmc") or "chvkwagner" ("pmcwagner") surpassed 1 billion views in December 2022,[234] highlighting the potential reach of social media to shape perceptions, attitudes and behaviours.

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[230] Lister, Tim, Pleitgen, Frederick and Butenko, Victoria, 'Deadly and disposable: Wagner's brutal tactics in Ukraine exposed by intelligence report', *CNN*, (26 January, 2023) https://edition.cnn.com/2023/01/23/europe/russia-wagner-tactics-report-ukraine-intl/index.html

[231] Falcounbridge, Guy, 'Video show sledgehammer execution of Russian mercenary', *Reuters*, (13 November, 2022) https://www.reuters.com/world/europe/sledgehammer-execution-russian-mercenary-who-defected-ukraine-shown-video-2022-11-13/

[232] Ibid

[233] Fouché, Alexandra, 'Russian mercenary videos 'top 1bln views' on Tik Tok', *BBC News*, (1 December, 2022) https://www.bbc.co.uk/news/world-europe-63820437

[234] Ibid; Anonymous author, 'Ex-commander of murdered Yevgeny Nuzhin confirms 10 executions of Wagner Group mercenaries', *The Insider,* (16 December, 2022) https://theins.ru/en/news/257929

While the summary execution of Nuzhin violates a series of LOAC rules concerning procedural due process and standards of treatment, the extensive digital reach of the DPOs depicting the same, raises the possibility that other LOAC rules may be engaged. It can be reasonably argued that those in close proximity to Wagner Group fighters or under its occupation, may be intimidated or fearful having viewed the footage of the violence. Given the limited nature of its personal scope, it is not likely that the prohibitions concerning threats of violence to life or similar found in Art.75(2) will be relevant, unless the footage is shown to those who find themselves in circumstances of custody. Instead, the DPOs may breach some of the rules explored earlier in this thesis, such as threats to spread terror among a civilian population, measures of intimidation and of terrorism, or Art. 27 GC IV as an implied threat of violence.

However, each rule is not determinatively engaged. The DPOs may not amount to a threat to spread terror among a civilian population given Nuzhin's Russian nationality, his previous involvement with the Wagner Group, a lack of certainty about the intent behind the DPOs, and their uncertain geographic reach having been distributed online. While rules concerning measures of intimidation and of terrorism, and the threat of violence may also not apply due to the nexus required between the DPO and 'protected persons'. The release of the DPOs on widely used platforms like Telegram[235] and Tiktok[236], with millions of daily users, and subsequent international press coverage, may have created a link between the DPO and 'protected persons' in the hands of Russia, but the matter is factually uncertain.

The lack of certainty in this area represents a lacuna in the LOAC, in the sense that DPOs serve a military purpose and the extant rules struggle in different ways to limit the use of extreme material, including the depiction of war crimes or battlefield abuses, as content. The

[235] Terzin, Rea, 'Telegram Statistics [2023]', *Cybercrew Blog*, (30 March, 2023) https://cybercrew.uk/blog/telegram-statistics/#:~:text=Telegram%20statistics%20show%20the%20app,up%20for%20Telegram%20every%20day. 55.2 million daily users (6 Jan 2023)

[236] Yuen, Meaghan, 'Tik Tok Users World Wide (2020-2025)', *Insider Intelligence*, (24 April, 2023) Estimated over 800 million monthly users in 2023. https://www.insiderintelligence.com/charts/global-tiktok-user-stats/

geographical and territorial restriction on who falls to be a 'protected person', the limited personal scope of Art.75, and a lack of certainty as to when DPOs may be captured by extant rules, are all limiting factors.

In Nuzhin's case, Russian law enforcement has seemingly commenced a preliminary investigation, but it remains to be seen if anything further will occur.[237] Of greater certainty, is the likelihood that violent footage from armed conflict, including the depiction of war crimes, will continue to be glamorised online, particularly by recalcitrant actors, and form part of impactful DPOs. The virality achieved by the DPO portraying Nuzhin's execution, to use only one example of many from the Russia/Ukraine conflict, supports such an assessment.

[237] Anonymous author, 'UK wlll check the video with the murder of a recruited prisoner', *Radio Liberty*, (15 November, 2022) translated from Russian original. https://www.svoboda.org/a/sledovateli-proveryayut-video-s-ubiystvom-zaverbovannogo-zaklyuchennogo/32131650.html; Anonymous author, 'Russia Launches Probe Into Alleged Brutal Killing Linked to Vagner Group', Radio Free Europe, (15 November, 2022) https://www.rferl.org/a/russia-vagner-nuzhin-death-sledghammer-probe-ukraine/32132097.html

Outrages Upon Personal Dignity

An aspect of Art.75(2) to be explored in greater detail that is of wider application to international armed conflict, is the prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault," and the threat thereof. This is set out in Art.75(2)(b) and (e) and affords equivalent protection to those falling within the personal scope of Art.75 to that enjoyed by combatants and those *hors de combat* under GCs I - III, who must also be treated humanely and protected from outrages upon personal dignity.[238] Separately, outrages upon personal dignity were described by the ICTY Trial Chamber in the *Aleksovski* case, as a "species of inhumane treatment,[239]" and constitute a breach of the obligation to treat protected persons humanely under Art.27 GC IV if perpetrated against. Thus protected persons enjoy protection from outrages upon their personal dignity in situations of custody or while under occupation.

In addition to these protections, acts of "[t]orture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment," are identified by the ICRC as being prohibited as a matter of customary international law.[240] Separately, the Rome Statute mimics the language of Art.75 and considers the perpetration of "outrages upon personal dignity, particularly humiliating and degrading treatment" to be a war crime.[241] While various national legislation and military manuals are similarly proscriptive.[242] Accordingly, the personal

[238] GC I, Art.12; GC II, Art.12; GC III, Art.13; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 90.
[239] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.54
[240] Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 90
[241] Rome Statute Art.8(2)(b)(xxi)
[242] See Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 90 footnotes 8 (military manuals) and 9 (legislation). Examples are numerous and diverse, including: the UK, U.S., Australia, Ecuador, China, Morocco, Sweden, Kenya among many others.

protective scope of the rule articulated in Art.75 and elsewhere is multifaceted and broad in character.

Physical acts like ‘enforced prostitution and indecent assault’ are denoted as specific forms of outrages upon personal dignity in the rule under Art.75. These examples indicate that when the rule was drafted, only physical acts of a certain severity were envisaged as causing outrage upon personal dignity, humiliation or degrading treatment. This section explores whether this assessment remains true, unpacking relevant developments in national and international law, particularly the relevant jurisprudence from the ICTY, and various examples. The analysis leads to the conclusion that DPOs now form an increasingly prominent means of causing outrage upon personal dignity. A final segment, discusses the possibility of DPOs causing an independent breach of the prohibition against causing outrages upon personal dignity, for example, involving the actual or implied depiction of harm to a family member.

Firstly, in understanding what the prohibition make encompass with regard to DPOs, it is worth noting that the terms ‘outrages upon personal dignity’ and ‘humiliating and degrading treatment’ are undefined in treaty law. The ICRC’s Commentary to Art.75 describes the substantive scope as “acts which, *without directly causing harm* to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts.” This formulation is useful in supporting the proposition that DPOs can breach the rule noting the ICRC’s explanation of the rule involves acts which do not directly cause harm but can still cause harm to the integrity and mental well-being of a person, humiliate and ridicule them.

However, the Commentary is manifestly incorrect in framing the rule in this way. The treaty itself provides examples of directly harmful acts, including rape and sexual assault, as instances of causing outrage upon personal dignity. Case law involving similar acts, such as the Prosecutor v *Furundzija* before the ICTY, is equally clear on the point. In that matter, the Court observed that

outrages upon personal dignity were linked to "humiliating and debasing the honour, the self-respect or the mental well-being of a person.[243]" The directness of the harm was axiomatic in the case, and the Court had no difficulty in finding the suspect guilty of aiding and abetting a breach of the rule. The AP I Commentary was not referred to in the Court's judgment and was seemingly ignored.

But what can be said for the Commentary is that it provides an indicative source to support the assertion that non-physical acts, such as DPOs, can breach the rule in question, even if the language used is clumsy. This is reflected in the previously cited *Aleksovski* trial judgment, which articulated the substantive scope of the rule in the following terms:

> "An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.[244]"

In addition to confirming that physical harm is not required to breach the rule, the *Aleksovski* trial judgment also highlights that there must be a minimum level of severity to the actions which breach the rule. In this case, described as causing "serious humiliation or degradation to the victim." The judgment goes on to add an objective element, requiring also that the "the humiliation must be so intense that the reasonable person would be outraged.[245]"

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[243] *Prosecutor v Furundzija,* International Criminal Tribunal for the former Yugolsavia, Trial Chamber Judgment, IT-95-17/1, 10 December 1998, para.183

[244] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para. 56; for a wider discussion, see Winther, P., International Humanitarian Law and Influence Operations: The Protection of Civilians from Unlawful Communication Influence Activities during Armed Conflict, (Uppsala: Acta Universitatis Upsaliensis, 2019) p297-300

[245] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para. 56

The *Aleksovski* formulation of the rule was cited with approval in subsequent cases, albeit it was observed in another matter that the definition was not intended to offer an exhaustive representation of what the rule entails.[246] However, the general tenor is reflected in the Rome Statute's Elements of Crimes guidance for the offence of causing outrage upon personal dignity, the *actus reus* of which requires that:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and

2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.[247]

Of particular relevance to DPOs, the *Aleksovski* judgment observes that 'psychological violence' can satisfy the requirements of the offence. Examples in that case involve direct threats, in the form of a prison guard threatening to kill anyone found with military papers, or repetitive ill-treatment, involving the sound of people screaming being played over a loudspeaker at night. Both were found to be sufficiently serious to constitute outrages upon personal dignity,[248] and each form of ill-treatment could be replicated as a DPs direccted towards a civilian population. For instance, through the use of a straightforward tactic like targeted mobile phone messaging or something more technically demanding such as forcing internet traffic through a certain server ('forced tunnelling') with a hosted webpage configured to make a sound said to be prisoners screaming rather than the requested website.[249]

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[246] See *Prosecutor v Kunarc, Kovac and Vukovic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-96-23 & 23-1, 22 February 2001, para.500

[247] 'Elements of Crimes', *The International Criminal Court*, ICC Elements of Crimes, (The Hague, 2001) p27 Footnote 49 ElementsOfCrimesEng.pdf (icc-cpi.int); Rome Statute Art.8(2)(b)(xxi) & Art.8(2)(c)(ii)

[248] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, paras. 185, 226

[249] For an explanation of forced tunnelling see for example Microsoft, 'VPN Gateway documentation: Configure forced tunnelling', *learn.microsoft.com*, (2023) https://learn.microsoft.com/en-us/azure/vpn-gateway/vpn-gateway-forced-tunneling-rm

Contrastingly, as the *Aleksovski* appeal judgment makes clear, a victim must be "not merely inconvenienced or made uncomfortable." In that case, the appellate judges note with regard to the treatment of the victims, "what they what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such.[250]" The repeated use of the derogatory slur 'balija' directed towards detainees of Bosnian decent was found to form part of the ill-treatment in the case but individually, likely lacks the requisite level of seriousness to found an allegation of outraging personal dignity.[251]

In relation to DPOs, falling somewhere on the spectrum of harm between name-calling and serious physical abuse, Jensen and Watts argue that for individuals held in the custody of a party to an armed conflict, "some virulent forms of doxing" may be sufficiently serious to constitute an outrage upon personal dignity but "[p]ublications of identity and anodyne personal information including enlistment in enemy armed forces" are unlikely to do so.[252] Whlie Jensen and Watts do not elaborate on what may constitute 'virulent forms' of doxing, it can be assumed that they have in mind the most sensitive forms of information, such as medical records, journalistic sources, or matters covered by legal privilege, the release of which would be intended to humiliate, degrade, or violate the dignity of the subject.

Turning from the severity of actions captured by the prohibition, separate ICTY judgments have also added additional granular detail to the rule relevant to DPOs. For example, the *Kunarac* judgment, a case concerning torture, rape, and enslavement, confirmed that there was no required minimum longevity or temporal aspect to the perpetration of an outrage against

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[250] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Appeal Chamber Judgment, IT-95-14/1, 24 March 2000, para.37

[251] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.185

[252] Jensen, Eric, and Watts, Sean, 'Ukraine Symposium - Doxing Enemy Soldiers and the Law of War', *Articles of War*, Lieber Institute, (31 October, 2022) https://lieber.westpoint.edu/doxing-enemy-soldiers-law-of-war/

personal dignity.[253] In this regard, the judgment departs from the guidance offered in the *Aleksovski* case, which found that there must be 'real and lasting suffering' as a consequence of the acts, and is likely to be a more accurate reflection of the law. The consequences of an act are a separate matter to the question of whether the act took place. Accordingly, a DPO intending to seriously humiliate someone captured by the protective scope of the rules through the use of imagery which would self-delete after a short period of time, such as a time-bounded live feed, an Instagram 'story'[254] or Snapchat multimedia message,[255] are captured by the substantive scope of the prohibition.

A single act or acts in aggregation can also constitute an outrage on personal dignity if sufficiently serious.[256] Thus, a targeted DPO campaign repeatedly seeking to humiliate or attack the dignity of a target or target audience may be proscribed if the *in cumulo* effect meets the necessary severity threshold and objectively causes outrage. This concept of an accumulated series of behaviours breaching the prohibition is interesting when paired with statements from case law, such as the trial judgment in the *Kvoćka* case, which confirms that words can form the basis of such actions. As the trial judges assert, the "focus of violations on dignity is primarily on acts, omissions, or words that do not necessarily involve long-term physical harm, but which are nevertheless serious offences deserving punishment.[257]"

This raises the possibility that repeatedly targeting an individual with specious allegations impugning their character may breach the provision. For example, the former British Conservative Party Chairman, Lord McAlpine, was targeted by thousands of Twitter users and

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[253] *Prosecutor v Kunarc, Kovac and Vukovic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-96-23 & 23-1, 22 Feb 2001, para.501

[254] 'Stories', *Instagram*, (Meta, 2023) https://about.instagram.com/features/stories (exist for 24 hours only)

[255] 'Explore - messages', *Snapchat*, (Snap Inc., 2023) https://www.snapchat.com/explore/messages (Text can disappear once read, media after 24 hours, message deletes in 30 days if not read)

[256] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.57

[257] *Prosecutor v Kvoćka, Prcać, Kos, Radić and Žigić,* International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-30/1, 2 November, 2001, para.172

falsely accused of being a paedophile linked to a child abuse matter. As his lawyer later advocated, this "caused considerable unnecessary pain and suffering,[258]" and hundreds of Twitter users were successfully sued by McAlpine in a landmark libel case in the UK.[259] While a single or limited number of allegations of this nature ventilated on a social media platform like Twitter is unlikely to meet the threshold of seriousness necessary, a targeted and prolific DPO of a similar nature could potentially breach the rule against outraging personal dignity.

Separately, a victim's sensitivities have also been deemed an appropriate factor to consider,[260] and an aspect of this is their cultural background.[261] In the 1946 case of *Tanaka, Chuichi and Others*, the physical ill-treatment of POWs was aggravated by the persecution of certain Sikhs involving the shaving of their beards and hair, and forcing one to smoke a cigarette, all contrary to their religious practices.[262] DPOs founded on the portrayal of similar cultural abuses, are likely to be considered outrages upon personal dignity.

The cultural background of victims was also a relevant factor during the 2016 trial and subsequent appeal in Sweden of a publicly unnamed former Iraqi government soldier who was convicted of causing outrage upon personal dignity after pictures of him posing with a severed head while surrounded by decapitated bodies were uploaded to Facebook prior to him seeking

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[258] Rozenberg, Joshua, 'Sally Bercow learns the social media rules the hard way in McAlpine case', *The Guardian*, (24 May, 2013) https://www.theguardian.com/law/2013/may/24/sally-bercow-social-media-macalpine

[259] *McAlpine v Bercow* [2013] EWHC 1342 (QB) https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/mcalpine-bercow-judgment-24052013.pdf

[260] *Prosecutor v Kvočka, Prcać, Kos, Radić and Žigić,* International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-98-30/1, 2 November, 2001, para.167; *Prosecutor v Kunarc, Kovac and Vukovic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-96-23 & 23-1, 22 Feb 2001, para.504; *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.56

[261] 'Elements of Crimes', *The International Criminal Court*, ICC Elements of Crimes, (The Hague, 2001) p27 Footnote 49 https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

[262] *Tanaka, Chuichi and Others*, Australian Military Court, Rabaul, 12 July 1946, 11 LRTWC 62, p.140

asylum in Scandinavia.[263] Several cases from other jurisdictions, including Germany[264] and Finland,[265] as well as the ICC Elements of Crimes guidance,[266] confirm that an outrage upon personal dignity can be committed against the deceased. It was observed during the trial by an expert in Islamic theology that desecrating a corpse violates a tenet of Islam regarding human dignity in death, and this was treated as forming both a substantive part of the offence, which mirrored that under the Rome Statute, and an aggravating factor when determining an appropriate sentence.[267]

Although the defendant had argued he had been forced to pose with the head and corpses, he was not believed by the court of first instance or on appeal. Both judicial forums formed the view that his actions were intended to inhumanely treat the individual who's head he was holding, and uploading the pictures to Facebook formed part of an online propaganda effort.[268]

Other national courts have reached similar verdicts to the Swedish Courts when considering analogous examples of abusing the deceased and portraying the acts of social media. Imagery of two separate members of Iraqi security forces holding the decapitated heads of Islamic State

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[263] Ringstrom, Anna, 'Swedish court convicts man of posing with bodies in Syria', *Reuters*, (4 January, 2023) https://www.reuters.com/world/europe/swedish-court-convicts-man-posing-with-bodies-syria-2023-01-04/

[264] Anonymous author, 'Five years in Swedish jail for Syrian torturer', *The Local* (Sweden), (26 Feb, 2015) https://www.thelocal.se/20150226/five-years-in-swedish-prison-for-syrian-torturer; Anonymous author, 'Iraqis convicted in Stuttgart: Probation after photo with severed heads', *Stuttgarter Nachrichten* (German original), (11 January, 2018) Iraker in Stuttgart verurteilt: Bewährungsstrafe nach Foto mit abgetrennten Köpfen (stuttgarter-nachrichten.de) Public Prosecution Service v Ahmad Al-Y., 09/748011-19 (summons I) and 09/748004-21 (summons II), The Hague District Court (Netherlands), 21 April 2021 https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5336

[265] Mizban, Hadi, 'Man found guilty of war crime after posing for phtot with decaptitated head of IS fighter, *The Journal*, (21 March, 2016) http://www.thejournal.ie/decapitated-head-facebook-post-war-crime-2671778-Mar2016/

[266] 'Elements of Crimes', *The International Criminal Court*, ICC Elements of Crimes, (The Hague, 2001) p27 Footnote 49

[267] 'European Netowrk of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (the 'Genocide Network'), 'Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources - Legal framework and developments in the Member States of the European Union', *EUROJUST*, (The Hague, February, 2018) p14/15 https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_EN.pdf

[268] Ibid p14/15

fighters;[269] a jihadi posing for pictures with various heads displayed on poles,[270] and footage showing the removal of ears and noses from decapitated heads which were also subsequently kicked about,[271] were all found to be outrages upon the personal dignity of the deceased.

The prosecution of these cases can be considered groundbreaking in their respective jurisdictions as a means of ensuring respect for the LOAC and seeking to hold to account individuals who had extraterritorially perpetrated outrages upon the deceased before amplifying their actions on social media for propaganda or psychological impact.[272] Indeed, national courts may prove particularly impactful in shaping the development of the LOAC in this area. As captured in the *Aleksovski* trial judgment:

> "It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle.[273]"

Even in circumstances where the victim is no longer identifiable and there is a greater degree of remoteness from concepts like 'the human personality', it is highly likely that outrages upon personal dignity can still be perpetrated as a separate, albeit overlapping matter to LOAC rules

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[269] Anonymous author ('Reuters Staff'), 'Two Iraqis sentenced in Finland for posting severed head images online', *Reuters*, (23 March, 2016) https://www.reuters.com/article/cnews-us-mideast-crisis-finland-iraq-idCAKCN0WP1FZ

[270] Francis, David, 'German Jihadist Gets Gets Two Years In Jail For Posing With Severed Heads', *Foreign Policy*, (12 July, 2016) https://foreignpolicy.com/2016/07/12/german-jihadist-gets-two-years-in-jail-for-posing-with-severed-heads/

[271] Grieshaber, Kristen, '5 Islamic State suspects arrested in Germany', *Associated Press, U.S. News*, (8 November, 2016) https://www.usnews.com/news/world/articles/2016-11-08/5-islamic-state-suspects-arrested-in-germany

[272] 'European Netowrk of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (the 'Genocide Network'), 'Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources - Legal framework and developments in the Member States of the European Union', *EUROJUST*, (The Hague, February, 2018) p15/16

[273] *Prosecutor v Aleksovski*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-95-14/1, 25 June 1999, para.54

protecting bodies from "pillage and ill-treatment[274]" and requiring that the dead "shall be respected.[275]" For example, in the case of *Schmid* from the Second World War, a German medical officer decapitated a US serviceperson and subsequently kept the bleached skull on his desk for several months before sending it to his wife as a souvenir.[276] A military court found that in the process he did "willfully, deliberately, and wrongfully encourage, aid, abet and participate in the maltreatment of a dead unknown member of the United States Army.[277]"

Similarly, in 2022 a Russian mercenary, Igor Mangushev, took to a stage somewhere in Russia and was filmed making various inflammatory comments about Ukrainians and the war between Russia and Ukraine. He carried a bleached skull which he said came from a Ukrainian soldier and declared "we'll make a goblet out of his skull.[278]" The footage was released on social media and quickly went viral before being picked up by various international news outlets.[279] In its depravity, it is similar to the *Schmid* case above and despite the victim's identity being unknown, likely represents an outrage upon the personal dignity of the unknown deceased, assuming the skull was not a prop.

A more challenging example comes from the same conflict but released by a Ukrainian official. In July 2022, Serhiy Haidai, the governor of the Ukrainian Luhansk region, published on his

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[274] First Geneva Convention, Article 15, first paragraph; Second Geneva Convention, Article 18, first paragraph; Fourth Geneva Convention, Article 16, second paragraph; Henckaerts, Jean-Marie, and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules (Cambridge University Press, 2005) Rule 113

[275] AP I, Art. 34(1)

[276] *Trial of Max Schmid* (Case No.82), United States General Military Government Court, Dachau, 19 May 1947, 14 LRTWC 62, p.151 https://www.legal-tools.org/doc/712908/pdf/

[277] Ibid

[278] Kika, Thomas, 'Video Show Russian Fighter With Ukrainian Skull, Says He'll Make a Goblet', *Newsweek*, (28 August, 2022) https://www.newsweek.com/video-shows-russian-fighter-ukrainian-skull-says-hell-make-goblet-1737618; Kirby, Paul, 'Notorious Russian nationalist Igor Mangushev shot dead in Ukraine', *BBC News*, (8 February, 2023) https://www.bbc.co.uk/news/world-europe-64566582

[279] Carr, Stewart and Solomons, Adam, 'Pro-Putin mercenary who waived 'skull of a dead Ukrainian' in front of crowd and called for the killiing of civilians is shot in the head and in 'grave condition' following possible 'warning hit' to Wagner group', *Mail Online*, (5 February, 2023); https://www.dailymail.co.uk/news/article-11715259/Pro-Putin-mercenary-waved-skull-dead-Ukrainian-shot-possible-warning-hit.htm; Kirby, Paul, 'Notorious Russian nationalist Igor Mangushev shot dead in Ukraine', *BBC News*, (8 February, 2023) https://www.bbc.co.uk/news/world-europe-64566582

Telegram channel an image of the head and hands of a Ukrainian soldier impaled on poles with the uniformed corpse at the base.[280] Haidai added to the picture, that "There is nothing human about the Russians. We are at war with non-humans.[281]" The image was geo-located to the Russian-occupied town of Popasna in Luhansk[282] and highlighted the perpetration of horrific abuse by the occupying power. In doing so, Haidai was reporting a factual circumstance, but one likely to negatively impact attitudes towards, and perceptions of, Russia and her armed forces.

Given the manner in which the remains of the deceased were shown, it can be argued that an outrage on their personal dignity has occurred. The picture plus commentary forms part of a DPO by Haidai, albeit one founded in the depraved acts of an adversary. However, like the dichotomy explored further below between journalistic reporting and shielding protected persons from public curiosity, the matter is not conclusive, as there is national and international public interest in understanding events connected to armed conflict and it is unlikely that Haidai intended to degrade or humiliate the victim.

As expressed in a statement by the British delegation to the Organisation for Security and Co-operation in Europe (OSCE) in September 2022 concerning the protection of journalists in Russia and Ukraine, "[i]n times of war, the media's role in providing timely and accurate information is even more important. As Ukraine liberates more territory, journalists expose the

[280] Dawson, Bethany, 'Claims of new Russian atrocity after gruesome image appeaers to show the head of a Ukrainan POW stuck on a pole', *Business Insider, AP*, (6 August, 2022) https://www.businessinsider.com/russian-atrocity-claim-image-appears-to-show-head-of-ukrainian-pow-stuck-on-a-pole-2022-8?r=US&IR=T; Anonymous Author, 'Horrific Footage Sshows Ukrainian Prisoner of War's Head Impaled on a Pole', *MSN*, (8 August, 2022) https://www.msn.com/en-gb/news/world/horrific-footage-shows-ukrainian-prisoner-of-wars-head-impaled-on-pole/ar-AA10rSte

[281] Harding, Luke, 'Footage appears to show fresh atrocity against Ukrainian PoW', *The Guardian*, (6 August, 2022) https://www.theguardian.com/world/2022/aug/06/footage-appears-show-head-ukrainian-pow-stuck-pole

[282] Ibid

atrocities caused by Russia's military aggression.[283]" This chimes with the US military's doctrinal position, which confirms that:

> "The US military has an obligation to communicate with its members and the US public, and it is in the national interest to communicate with international publics. The proactive release of accurate information to domestic and international audiences puts joint operations in context, facilitates informed perceptions about military operations, undermines adversarial propaganda, and helps achieve national, strategic, and operational objectives.[284]"

Accordingly, Haidai's actions are understandable and likely excusable as they appear to try and provide accurate reporting of the conflict to a national and international audience of an atrocity perpetrated by the opposition party, and lack any intention to degrade or humiliate the subject. Rather the politician is expressing shock and disgust at the individual's treatment.

Outrages Upon Personal Dignity Beyond Physical Custody?

Finally, in this section, it is worth noting that the examples and case law cited above derive from different situations of physical custody, whether the victim is alive or deceased. In these scenarios, the underlying act has a victim sustaining some form of harm which informs the assessment that there is an outrage upon personal dignity. That the act, acts, or consequences, are used as part of a DPO can be treated as forming part of the outrage or potentially serving to aggravate the commission of a criminal offence.

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[283] Vincent-Neal, Saffiene, and Foreign, Commonwealth and Development Office, 'UK strongly condemns all attacks on journalists and media workers: UK statement to the OSCE', Speech transcript, (Warsaw, 30 September, 2022) https://www.gov.uk/government/speeches/uk-strongly-condemns-all-attacks-on-journalists-and-media-workers-uk-statement-to-the-osce

[284] Joint Publication 3-61, 'Public Affairs', (Nov. 17, 2015) I-1.b. jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_61.pdf

Certain LOAC scholars[285] have argued, or at least left open the possibility, that in a narrow set of circumstances exposing certain categories of individuals to a DPO can cause an outrage upon their personal dignity, independent of the behaviour portrayed in the DPO. While there are no examples of this found in international criminal law, examples by analogy are highlighted from certain adjudicative forums overseeing the application and interpretation of international human rights law which could support such an interpretation of the LOAC prohibition.

For example, Pontus Winter highlights the interpretive role that IHRL can play in understanding the scope of IHL provisions, and cites three cases supporting the proposition in the paragraph above; one from the Inter-American Court of Human Rights and two from the European Court of Human Rights. All three cases concern the depiction of harm, or implied harm, to family members. In the first case, Mexico was found to have violated Article 5 of the American Convention on Human Rights concerning humane treatment, which guarantees a "right to have his physical, mental, and moral integrity respected.[286]"

The substance of the case involved the Judicial Police of the State of Guererro stopping two trucks containing around sixty suspected members of the political movement Organización Campesina de la Sierra del Sur in or around June 1995. The individuals were required to alight from the vehicles and lie on the ground before the police indiscriminately fired at them. Seventeen were killed and several others wounded.[287] The families of the victims were seemingly not informed of the events leading to the death of their relatives. Around eight months later, unedited footage of the attack was shown on Mexican television. In finding a breach of Article 5, the Court in its judgment found that:

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[285] See for example Winther, P., International Humanitarian Law and Influence Operations: The Protection of Civilians from Unlawful Communication Influence Activities during Armed Conflict, (Uppsala: Acta Universitatis Upsaliensis, 2019) p327-330

[286] Organisation of American States, American Convention on Human Rights, Art.5(1) https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf

[287] *Tomas Porfirio Rondin v. Mexico*, Case 11.520, Report № 49/97, Inter-American Court of Human Rights, OEA/Ser.L/V/II.95 Doc. 7 rev. at 662 (1997) para.1 http://hrlibrary.umn.edu/cases/1997/mexico49-97.html

> "With respect to the family members of the dead, the Commission considers that the murder of a loved one is always cause for serious moral damage, but this is even more the case when the survivors find out how the events occurred through a videotape.[288]"

Similarly, in the cases of Bazorkina v Russia[289] and Baysayeva v Russia,[290] video footage of the last moments of relatives being held in custody before 'disappearing' are shown to close relatives - a mother and wife respectively. However, in each case, the video footage formed only a part of a series of acts that contributed to the European Court of Human Rights finding a violation of Article 3 of the ECHR concerning the prohibition against torture, inhumane, degrading treatment or punishment. In both matters, the Court made the same observation:

> "...whether a family member of a 'disappeared person' is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension or character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation.[291]"

The Court went on to mentioned certain 'special factors' which included the proximity of the family tie, the nature of the relationship, the extent to which the family member observed what happened, if they were involved in finding out information about what occurred, and how the state authorities responded to the alleged disappearance.[292]

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[288] Ibid para.76

[289] *Bazorkina v. Russia*, 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006 https://www.refworld.org/cases,ECHR,44cdf4ef4.html

[290] *Baysayeva v Russia,* 74237/01, Council of Europe: European Court of Human Rights, 5 April 2007 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-80025%22

[291] Bazorkina v. Russia, 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006 para. 139; Baysayeva v Russia, 74237/01, Council of Europe: European Court of Human Rights, 5 April 2007 para.140; Discussed in Winther, P., International Humanitarian Law and Influence Operations: The Protection of Civilians from Unlawful Communication Influence Activities during Armed Conflict, (Uppsala: Acta Universitatis Upsaliensis, 2019) p329-331

[292] Ibid

In the three cases above, there was a time delay in the victim observing the harm suffered by family members. But similar footage can now be streamed live using different social media platforms, websites, and apps,[293] or delivered in a more targeted manner to a victim using different digital means, arguably creating a more aggravated and harmful set of circumstances than those already discussed. And as various researchers have observed, the instances of serious criminality being live streamed is increasing.[294] However, there remains a paucity of case law across the LOAC and IHRL to support an assertion that the *lex lata* of causing an outrage upon personal dignity can extend to the depiction of harm to a relative. The case law cited, suggests the LOAC *could* develop in such a direction, but even if certain 'special factors' were present, demonstrating that a DPO reached the threshold of causing "serious humiliation or degradation to the victim," is a high threshold to reach.

To use a relatively extreme example, in the context of violent clashes between Azerbaijan and Armenia in 2022 which have intermittently occurred subsequent to the 2020 Second Nagarno-Karabakh War, footage was released on Telegram showing Azeri soldiers laughing and joking around the corpse of a deceased female Armenian soldier, understood to be Anush Apetyan. The video portrays Apetyan naked, with her legs and a finger cut off, and a stone occupying the position an eye should be. The term 'YAŞMA' is written across her chest. 'YAŞMA' is a colloquial term for Azeri Special Forces.[295]

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[293] See for example Macklin, Graham, 'The Christchurch Attacks: Livestream Terror in the Viral Video Age', *Combating Terrorism Center Sentinel*, (Vol.12, Issue 6, July 2019) https://ctc.westpoint.edu/christchurch-attacks-livestream-terror-viral-video-age/; Mortensen, M. 'Perpetrator witnessing: Testing the norms and forms of witnessing through livestreaming terror attacks', *Journalism*, (Vol. 23, Issue 3, 23 Dec 2021),pp. 690–707 https://doi.org/10.1177/14648849211060631

[294] Peskosky, Ellie & Hernon, Jamie & Lynch, Sierra & Jacquin, Kristine & Dill-Shackleford, Karen, 'Live-Streaming Crimes: Who Does It, Who Watches, and Directions for Research', *American Psychological Association*, Paper, (August, 2020)

[295] Anonymous author, 'Armenia MP addresses at PACE, reflects on terrible cases of Azerbaijani violence against Armenian servicewomen', *News AM (Armenia)*, (25 January, 2023) https://news.am/eng/news/741202.html; Anonymous Author, 'Ex-ombudsman: Footage spread by Azeris shows mutilated body of another female Armenian soldier', *Panorama (Armenia)*, (17 September, 2022) https://www.panorama.am/en/news/2022/09/17/Azeri-war-crimes/2731207; Anonymous authoer (Asbarez Staff), 'Azerbaijani Atrocities, Including Mutilation of Female Soldier, Detailed to Foreign Diplomats', *Asbarez (Armenia)*,

In an address to the Parliamentary Assembly of the Council of Europe (PACE), an Armenian politician stated that Apetyan's body had not been returned and her three children had viewed the video. For the children, the footage is likely to have been harrowing, and leaving to one-side suggestions of torture or ill-treatment made by the politician, the depiction of her brutalised remains in a DPO represents an outrage upon personal dignity for the victim. However, the circumstances do not *prima facie* suggest that the children have been seriously humiliated or degraded by the DPO. Accordingly, even in circumstances where parties have a duty to extend "special protection" to children under AP I,[296] it is submitted that it is highly unlikely that a DPO can cause an outrage upon their personal dignity when unconnected to an underlying act. This likely represents *lex ferenda* under the LOAC.

Using the prohibition found under Art.75 AP I as a spring board, this section has considered the personal and substantive scope of the rule prohibiting outrages upon personal dignity, a specie of inhumane treatment, and used a range of different examples to highlight its application, or possible application, to DPOs. The next section considers the obligation on parties to an IAC to shield certain categories of people from 'insults and public curiosity'.

(16 September, 2022)
https://asbarez.com/azerbaijani-atrocities-including-mutilation-of-female-soldier-detailed-to-foreign-diplomats/

[296] AP I, Art.77(1)

‘Insults and Public Curiosity’

Art.27 GC IV requires parties to an IAC to shield protected persons from “insults and public curiosity” as part of the obligation to treat such people humanely. The provision is analogous to Art.13 of GC III[297] which extends protection from such acts, among others, to prisoners of war. The coterminous prohibitions found in Art.27 GC IV and Art.13 GC III will be considered together in this section, given their personal scope, and that the rule ordinarily applies in circumstances of detention. As observed in the *Delalic* case, protection from public curiosity forms part of a positive obligation flowing from the requirement to treat protected persons and POWs humanely, which "extends to moral values, such as the independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity).[298]" In line with this quotation, the rules will most commonly manifest in circumstances where an individual is detained by an opposing armed force or occupier but perhaps not exclusively so, as will be explored further below. This section will set out the background to the rule before considering its scope and application to DPOs. Attention will then turn to exceptions to the general rule.

As noted in the ICRC’s 2020 Commentary to Art.13, historically, exposing prisoners of war or captured persons to insults and public curiosity was often a tool of propaganda, and a methodology which can be traced back to ancient Roman practices.[299] As a matter of international law, the 1929 Geneva Prisoners of War Convention introduced a requirement for

[297] GC III, Art.13

[298] *Prosecutor v Delalić, Mucić, Delić and Landžo*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para.528 quoting with approval Pictet, Jean (with the participation of Siordet, Frédéric; Pilloud, Claude, Schoenholzer, Jean-Pierre, René-Jean, Wilhelm & Uhler, Oscar) International Committee of the Red Cross, Commentary to Convention III relative to the Treatment of Prisoners of War, 12 August 1949 (1960) Art.13, p.141

[299] International Committee of the Red Cross, Commentary to Convention (III) relative to the Treatment of Prisoners of War, 2nd ed., (2020), Art.13, para. 1621

prisoners of war to "at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity.[300]"

The UK's Manual of the Law of Armed Conflict, notes that the rule gained attention in World War Two following the treatment of certain POWs by their German and Japanese captors. The prisoners were forced to march through the streets of population centres, exposing them to insults and, at times, violence.[301] Certain commanders were successfully prosecuted in the Nuremburg and Tokyo trials for directing or tolerating such actions.[302] Consequently, with regard to POWs, the UK Manual explicitly prohibits the invitation of public curiosity, with specific proscriptions relating to the exposure of POWs to public violence and displaying those entitled to protection "in a humiliating fashion on television.[303]" While only 'television' is mentioned, this would apply equally to the release of media through the internet or other digital means, and captures protected persons in addition to POWs.

In US policy, which prefers to use the terminology of 'detainees' rather than making a separate distinction for POWs and protected persons, the DOD Law of War Manual mentions that the US has a policy of generally not allowing photographs of detainees as a means of preventing public curiosity.[304] The US Joint Publication covering 'Public Affairs' goes even further, stating that "[d]etainees *will* be protected from public curiosity *at all times*. Strict compliance with this requirement is essential. There is no distinction between international and domestic media with regard to this obligation.[305]" In addition, the Office of the Secretary of Defense is asserted to be

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[300] Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art.2, para.2
[301] UK Ministry of Defence Joint Service Publication 383: The Manual of the Law of Armed Conflict, 2004 para.8.29.d. & footnote 102; *Trial of General Von MacKensen and General Maelzer* (Case No. 43), United Kingdom v. MacKensen, Judgment, (U.K. Mil. Ct. (Rome), Nov. 30, 1945)
[302] Ibid
[303] UK Ministry of Defence Joint Service Publication 383: The Manual of the Law of Armed Conflict, 2004 para.8.29.d.
[304] United States Department of Defense, Law of War Manual (June 2015, Updated Dec 2016) para.8.2.2.3
[305] Joint Publication 3-61, Public Affairs, (Nov. 17, 2015) C-4 (13) https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_61.pdf (emphasis added)

the sole release authority if imagery of detainees is to be published,[306] emphasising the weight of importance attached to the rule by the United States.

However, a notable breach of the Art.13 provision to protect a POW from public curiosity stems from the release of images through digital and print media in 2005 depicting former Iraqi President Saddam Hussein in his underwear while in detention following capture by US forces.[307] Various images of the dictator were published online and in the international press in circumstances that seemed calculated to embarrass and humiliate the subject. While the release was likely not authorised by any US Chain of Command, the imagery gained global attention, and prompted the Red Cross to call for the Convention rules relating to public curiosity to be respected.[308]

In relation to the scope of the rules, 'insults' and 'public curiosity' are undefined in the LOAC. Applying the dictionary definition, 'insults' means "an offensive remark or action[309]"; 'public' involves "people in general, rather than being limited to a particular group,[310]" and curiosity concerns an eagerness to "know or learn about something.[311]" *In abstracto*, little controversy attaches to the ordinary meaning of the terms, although it could be observed that whether something is 'insulting' is often subjective and contextual.

With regard to the concepts of 'insults' and 'public curiosity', the obligation manifests in two ways. Firstly, the rule requires a party to an IAC to refrain from insulting protected persons and

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[306] Ibid

[307] Anonymous Author, 'Saddam underwear photo angers US', *BBC News*, (20 May, 2005) http://news.bbc.co.uk/1/hi/world/middle_east/4565505.stm; Verkaik, Robert, ''Sun' under attack over photos of Saddam in underwear', *The Independent*, (21 May, 2005) https://www.independent.co.uk/news/media/sun-under-attack-over-photos-of-saddam-in-underwear-222528.html

[308] Sector, Charlotte, 'Scantily Clad Saddam: Geneva Conventions Violation', *ABC News*, (20 May, 2005) https://abcnews.go.com/International/story?id=775609&page=1; Sanger, David E., and Cowell, Alan, 'U.S. wants to know how Saddam photos got out', *The New York Times*, (23 May, 2005) https://www.nytimes.com/2005/05/23/world/americas/us-wants-to-know-how-saddam-photos-got-out.html

[309] https://dictionary.cambridge.org/dictionary/english/insult (Cambridge Dictionary, 2023)

[310] https://dictionary.cambridge.org/dictionary/english/public (Cambridge Dictionary, 2023)

[311] https://dictionary.cambridge.org/dictionary/english/curiosity (Cambridge Dictionary, 2023)

POWs by being offensive, disrespectful, rude or abusive,[312] and prevent them from being exposed to the public, either in person or depicted in some other way. An interesting example of a DPO arguably failing to meet this standard stems from the Israel/Palestinian conflict.

In 2017, video footage was publicly released by the Israeli Prison Service online and via television channels depicting a detained prominent Palestinian leader reported to be engaging in a hunger strike while in Israeli custody as a means to improve the circumstances of his detention.[313] Having provided this context, the video footage portrayed Marwan Barghouti eating a cookie and other confectionery in his cell, which had been left by his guards. The footage, obtained as part of a deliberate operation to undermine a wider hunger strike by detained Palestinians,[314] was likely intended to humiliate the detainee and undermine the credibility of his efforts. Whether the DPO is sufficiently insulting to breach the rule is debatable. However, the footage did invite public curiosity as part of Israeli efforts to end the hunger strikes. Accordingly, the DPO likely falls foul of Israel's obligations to shield the individual from public curiosity and treat them humanely under Art.27 GC IV.

Beyond the negative obligation to refrain from insults and inviting public curiosity, the second way in which the concepts manifest is the positive obligation on parties to an IAC to safeguard protected persons and POWs from such behaviour actively. This is reflected in the drafters' use of the word 'protected' in the elucidation of Art.27 GC IV. In terms of what this positive obligation may require, the 1958 Commentary to GC IV simply says that parties must "take all the

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[312] To extract the key terms from different dictionary definitions:
https://dictionary.cambridge.org/dictionary/english/insult (Cambridge Dictionary, 2023);
https://www.merriam-webster.com/dictionary/insult (Merriam Webster Dictionary, 2023);

[313] Beaumont, Peter, 'Israel video appears to show Palestinian hunger striker eating in prison', *The Guardian*, (8 May, 2017)
https://www.theguardian.com/world/2017/may/08/israeli-video-appears-to-show-palestinian-hunger-striker-eating-in-prison

[314] Kamisher, Eliyahu, 'Israel Minister: Palestinian hunger strike leader 'exploiting' prisoners', *The Jerusalem Post*, (8 May, 2017)
https://www.jpost.com/arab-israeli-conflict/palestinian-hunger-strikers-are-being-cynically-exploited-says-israeli-minister-490096; Fulbright, Alexander, 'Prison service snared hunger strike leader Barghouti - report', *The Times of Israel*, (8 May, 2017) https://www.timesofisrael.com/prison-service-set-up-palestinian-hunger-strike-leader-report/

precautions and measures in their power to prevent such acts and to assist the victims in case of need.[315]" This implies that parties must take reasonable and practicable steps to comply with the obligation.

For example, the 2020 ICRC Commentary to Art.13 GC III suggests that the obligation to 'protect' could require a party to shield POWs from any congregated crowd near a POW camp who may direct insults towards those who are deprived of their liberty and expose them to wider public curiosity by sharing pictures and video on social media.[316] The example could apply equally to protected persons who are detained or interned and be expanded to include shielding the occupants of a camp from the use of an unmanned aerial system ('drone') to overfly the area and live stream footage or take pictures of those below as part of a DPO. It can be inferred from the terms of Art.27 that active steps to shield those housed in the camp would be required in such circumstances.

Indeed, the iterative and occasionally revolutionary role technology plays in repurposing LOAC rules can be observed in the context of the rules under present consideration. As with the drone example above, the 2020 ICRC Commentary notes that technological innovation has generated new means by which an individual may be exposed to 'public curiosity', and different facets of an individual's life may now fall within the protective scope of the provision, which hitherto had not. While the rule may stem from humiliating public parades, "the disclosure of photographic and video images, recordings of interrogations or private conversations or personal correspondence or any other private data, irrespective of which public communication channel is used, including the internet,[317]" may be as humiliating, depending on the content and context.

[315] Pictet et al., International Committee of the Red Cross, Commentary to Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (1958) p204
[316] International Committee of the Red Cross, Commentary to Convention (III) relative to the Treatment of Prisoners of War, 2nd ed., (2020), Art.13, para.1623 - 1624
[317] Ibid para.1624

A hypothetical example of the activity described above relates to the requirement under Art.71 of GC III that POWs "shall be allowed to send and receive letters and cards.[318]" Noting the vintage of the treaty, this obligation could now be fulfilled using email or messaging apps through the provision of 'welfare' computers or mobile phones. In this regard, although there is no right to private correspondence extended to POWs in GC III, it is likely that the disclosure of any digital correspondence by the detaining power in circumstances intended to insult or humiliate the subject would be prohibited by Art.13 GC III and Art.27 GC IV. Indeed, there may be a positive obligation flowing from those Articles requiring the detaining power to take positive steps to ensure that any digital correspondence is securely transmitted to the intended recipient and not easily intercepted. As Art.71 concludes, "[s]acks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.[319]"

While the analysis above centres on circumstances of detention, it is also worth highlighting that the obligation under Art.27 GC IV concerning protected persons is more expansive and can extend beyond custody. The Ukraine conflict, for instance, demonstrates how the Russian occupiers breached the rule in furtherance of their own domestic propaganda narratives. Specifically, imagery of Ukrainians queueing to enter 'filtration camps' pending their forcible transfer to Russia from occupied areas was styled as a 'humanitarian evacuation' from the Ukrainian 'Nazi' regime and broadcast on television and released online.[320] That the transfer of

[318] GC III, Art.71
[319] Ibid
[320] See variously, Organisation for Economic Co-operation and Development, 'Disinformation and Russia's war of aggression against Ukraine: Threats and Governance Responses', (3 Novemeber, 2022) https://www.oecd.org/ukraine-hub/policy-responses/disinformation-and-russia-s-war-of-aggression-against-ukraine-37186bde/; Coynash, Halya, 'Horrific conditions and torture in Russian filtration camp 'ghetto' for Mariupol residents', *Human Rights in Ukraine - The Information Portal of the Kharkiv Human Rights Protection Group*, (11 May, 2022) https://khpg.org/en/1608810538; Speri, Alice, '"We Felt Like Hostages": Ukrainians Describe Forcible Transfers And Filtration By Russian Forces', *The Intercept*, (1 September, 2022) https://theintercept.com/2022/09/01/ukraine-russia-war-forced-deportations/; Ferris, Emily, 'How Russia's Narratives on Ukraine Reflect its Existential Crisis', 'Commentary', *The Royal United Services Institute for Defence and Security Studies*, (27 July, 2022) https://rusi.org/explore-our-research/publications/commentary/how-russias-narratives-ukraine-reflect-its-existenti

protected persons from occupied Ukraine to Russia could be construed as forming part of humanitarian relief mission has been widely debased and discredited.[321] Instead, such actions are reflective of egregious breaches of the LOAC, the lowest end of which is the duty to shield those depicted in the propaganda from public curiosity.

Having explored aspects of the rule against inviting public curiosity in the context of DPOs, and previously noting that little controversy attaches to the protections *in abstracto*, attention now turns to the rules' exceptions. These generally concern the deliberate release of information about a POW or protected person for a specific purpose, and the correct balance to be struck between public reporting of an armed conflict and the obligation to shield POWs and protected persons from public curiosity. As will be discussed, the extent of the exceptions remains unsettled and technological advancement enabling DPOs has added additional interpretive complexities.

Exceptions

In general terms, releasing imagery and other materials through a DPO depicting individual POWs or protected persons will engage the respective treaty law provision to shield them from public curiosity. This reflects the phraseology used in Art.13 GC III and Art.27 GC IV to 'especially' and 'particularly' protect against 'public curiosity'.

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al-crisis; Shekhovtsov, Anton, 'Four towers of Kremlin propaganda: Russia, Ukraine, South, West', *Euromaidan Press*, (6 January, 2023) https://euromaidanpress.com/2023/01/06/russian-propaganda-war-related-strategic-and-tactical-narratives-and-their-audiences/; Hinnant, Lori, ''The mouth of a bear': Ukrainian refugees sent to Russia', *AP News*, (20 July, 2022) https://apnews.com/article/Ukraine-Russia-refugees-Mariupol-war-investigation-31880d51ae29818b6c3b04156aae38d5; Bisset, Alison, 'Ukraine Symposium - Russia's Forcible Transfer of Children', *Articles of War,* (5 October, 2022) https://lieber.westpoint.edu/russias-forcible-transfer-children/; Human Rights Watch, '"We Had No Choice": "Filtration" and the Crime of Forcibly Transferring Ukrainian Civilians to Russia', Report and Recommendations, (1 September, 2022) https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians

[321] E.g. Wilmshurst, Elizabeth, 'Ukraine: Debunking Russia's legal justifications', *Chatham House*, (24 February, 2022) https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications

However, certain states,[322] and scholars argue that the 'public curiosity' provision is not absolute in character and identifying POWs and protected persons are permissible in certain circumstances to the extent that they are treated humanely. Such an approach does not necessarily rely on the assignation of 'ordinary meaning' to the terms used in the provisions. Rather, this interpretation rests largely on the existence of a specific set of circumstances, a benign intention or allowing press reporting when in the public interest. All may permit the invitation of public curiosity.

For example, Colonel Gordon Risius, later the Director of the British Army's Legal Services, and Michael Meyer, the Head of International Law at the British Red Cross, writing in the early 1990s argued in a seminal article on the topic that "few people would consider all photographs of prisoners of war to be objectionable as a matter of principle," but "Article 13 of the Convention does not draw a clear dividing line between what is acceptable and what is a breach of its provisions.[323]"

The pair observed that releasing pictures of a POW wearing an enemy uniform would be a clear breach. But they question whether a picture of a POW reading a book would do so. They go on to note that imagery showing that a POW is alive may attract attention and invite better treatment by the captor and perhaps be permissible.[324] But equally, such imagery may lead to reprisals. For example, during the Gulf War, Saddam Hussein ordered the arrest of family

[322] Such as the UK and New Zealand: Foreign and Commonwealth Office an the British Red Cross, ''Public Curiosity' in the 1949 Geneva Conventions: UK government and British Red Cross interpretation', Statement, (31 December, 2007) https://www.gov.uk/government/publications/public-curiosity-in-the-1949-geneva-conventions-uk-government-and-british-red-cross-interpretation/public-curiosity-in-the-1949-geneva-conventions-the-interpretation-developed-by-the-government-of-the-united-kingdom-of-great-britain-and-northern; New Zealnd Defence Force Manual of Armed Forces Law (Law of Armed Conflict) Vol.4 2019 para.12.3.3 https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf

[323] Risius, G., & Meyer, M., 'The Protection of Prisoners of War Against Insults and Public Curiosity', *International Review of the Red Cross,* 1991, p292

[324] Ibid

members of anyone thought to have deserted.[325] And while the deliberate portrayal of POWs in conditions of squalor by the detaining power will engage the rule, such conditions will also be of public interest and possibly merit illumination as part of an effort to improve conditions. Addressing the lack of interpretive clarity, the authors state "[t]he fact that it is not possible to say with any degree of certainty which, if any, of these considerations is relevant or decisive when considering a possible breach of Art. 13 GC III demonstrates the unsatisfactory state of international humanitarian law on this subject.[326]"

As they draw their analysis to a close, Risius and Meyer speculate whether the underlying intention of inviting public curiosity serves as a good indicator of whether the rule is likely to be breached. However, while such an approach may have some merit in providing indicative guidance, it will likely not be conclusive, as they highlight using examples from the Gulf War. In particular, they focus on the rebroadcasting on national television in the UK and US of interviews of captured coalition aircrew conducted by Iraqi authorities. As the authors note, when considering the underlying intention, on one view, rebroadcasting content of this nature is permissible as it highlights the unlawful actions of the adversary. But on another view, such an action constitutes a separate and distinct breach of Art.13 GC III. The latter interpretation was that adopted by leading IHRL and LOAC scholar Francoise Hampson.[327]

Separately, assessing the intention behind the release of media is a more straightforward and bounded activity when the technological means for release are narrower (TV, newspapers, leaflets etc.), as was the case in the Gulf War. Attempting to do the same across the range of delivery methods for DPOs, including anonymous social media accounts and self-deleting live

[325] Ibid p293; The Times 13 February 1991.
[326] Risius, G., & Meyer, M., 'The Protection of Prisoners of War Against Insults and Public Curiosity', *International Review of the Red Cross*, 1991, p294
[327] Ibid p293; Hampson, F., "Liability of War Crimes" in Rowe, Peter (ed.), The Gulf War 1990-91 in International and English Law, (Routledge, 1993)

streams, is more challenging. The authors conclude their article by arguing for the adoption of an interpretive model which protects individual POWs, and by extension, protected persons. In this regard, they propose a simple test whereby footage of POWs may be released as long as individuals cannot be identified and invite further diplomatic and legal work to establish this as common practice. As will be highlighted below, this approach has informed national-level policy and strikes a balance between protecting the honour and privacy of a POW with the public interest in having access to information about a conflict through journalism.

More recently, Major General (Retired) Charles J. Dunlap, formerly of the US Airforce, and other American scholars including Professor Gary Solis and Professor Rachel Van Landingham[328] have gone further than Risius and Meyer and opined that context and the underlying intention are the determining factors when assessing legality under Art.13 GC III and Art.27 GC IV. Dunlap, for instance, cites with approval Pakistan's release of footage via Twitter of an Indian fighter pilot who was shot down in Pakistani air space during the 2019 Kashmir border conflict.

Two videos were initially released online of the pilot; the first, which was quickly withdrawn, showed him in Pakistani custody looking bloodied and dishevelled. In the second, he was patched up and drinking tea while reporting to the camera that he was being treated in a professional manner by his captors. Dunlap contests that the footage did not humiliate the subject, instead it drew the "admiration of friend and foe alike" and "contributed to the easing of

[328] Horton, Alex, 'Pakistan violated Geneva Conventions by tweeting video of captured Indian pilot, experts say', *The Washington Post*, (28 February, 2019) https://www.washingtonpost.com/world/2019/02/27/pakistan-violated-geneva-conventions-by-tweeting-video-captured-indian-pilot-expert-says/

tensions.[329]" Consequently, noting the practical effect of Pakistan's DPO, he does not consider Art.13 to have been breached.

Similarly, he argues that the release of imagery and video of Russian POWs by Ukraine to counteract Russian disinformation does not necessarily violate the provision, so long as the intention isn't to humiliate them.[330] But, as he expresses, "the bottom line is that prisoners of war should not be propaganda tools.[331]"

However, in advancing such arguments, little supporting evidence of state practice is offered, and assessing the legality of DPOs depicting images of POWs and protected persons by reference to the underlying purpose of the activity arguably leave the rule open to subjectivity and possible abuse. As Risius and Meyer caution, "the use of a "humiliation" test is a subjective one, and thus unlikely to lead to consistent and uniform interpretation.[332]" As a consequence, the views offered by Dunlap likely constitute a minority view.

At the state level, in a statement released jointly with the British Red Cross in 2007, the UK offered its national interpretive insight to Art.13 GC III and Art.27 GC IV. In light of significant technological change since the drafting of the provisions, the statement said that the rules must be subject to "practical interpretation", permitting informed press coverage of an armed conflict

[329] Dunlap, Charles, 'Did Pakistan's photos/videos violate the Geneva Conventions…or ease a crisis?' *Lawfire*, Duke University, (5 March, 2019) https://sites.duke.edu/lawfire/2019/03/05/did-pakistans-photos-videos-violate-the-geneva-conventions-or-ease-a-crisis/

[330] Dunlap, Charles, 'The Ukraine crisis and the international law of armed conflict (LOAC): some Q and A', *Lawfire*, Duke University, (27 February, 2022) https://sites.duke.edu/lawfire/2022/02/27/the-ukraine-crisis-and-the-international-law-of-armed-conflict-loac-some-q-a/

[331] Ibid

[332] Risius, G., & Meyer, M., 'The Protection of Prisoners of War Against Insults and Public Curiosity', *International Review of the Red Cross*, 1991, p295

which, in turn, can promote adherence to the LOAC by parties.[333] As part of this 'practical interpretation', two possible exceptions to the obligations on parties to protect POWs and protected persons from public curiosity were expressed:

> "1. Any image of a POW as an identifiable individual should normally be regarded as subjecting such individuals to public curiosity and should not be transmitted, published or broadcast, unless specific circumstances exist and it is in the public interest to reveal their identity. But care must be taken to preserve their human dignity; and,
>
> 2. Images of POWs individually or in groups in circumstances which undermine their public dignity, should not normally be transmitted, published or broadcast unless exceptional circumstances exist, such as bringing to the public's attention serious violations of the LOAC. Even in this event, individual identities must be protected.[334]

The first exception seeks to reserve to parties a degree of discretion in releasing information identifying captured individuals when there is a public interest in knowing that the individual has been deprived of their liberty and the release will not undermine the individual's human dignity. An example of this could be a suspected war criminal or senior enemy leader, such as Saddam Hussein following his capture by US forces in 2003.[335] The second exception similarly grants parties some discretion but in circumstances where the material released may undermine the public dignity of the respective individuals. In this eventuality, exceptional circumstances must

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[333] Foreign and Commonwealth Office an the British Red Cross, ''Public Curiosity' in the 1949 Geneva Conventions: UK government and British Red Cross interpretation', Statement, (31 December, 2007) https://www.gov.uk/government/publications/public-curiosity-in-the-1949-geneva-conventions-uk-government-and-british-red-cross-interpretation/public-curiosity-in-the-1949-geneva-conventions-the-interpretation-developed-by-the-government-of-the-united-kingdom-of-great-britain-and-northern

[334] Paraphrased from Foreign and Commonwealth Office an the British Red Cross, ''Public Curiosity' in the 1949 Geneva Conventions: UK government and British Red Cross interpretation', Statement, (31 December, 2007)

[335] This example is highlighted by Maj Gen (Retd.) Dunlap in his analysis. Dunlap, Charles, 'Did Pakistan's photos/videos violate the Geneva Conventions…or ease a crisis?' *Lawfire*, Duke University, (5 March, 2019) https://sites.duke.edu/lawfire/2019/03/05/did-pakistans-photos-videos-violate-the-geneva-conventions-or-ease-a-crisis/

exist meriting the otherwise unlawful act, and individual identities must be guarded by the party seeking to release the imagery.

An example of the type of behaviour captured by the second exception could be a video released in 2009 during a public inquiry into allegations of British Armed Forces personnel abusing detainees while occupying southern Iraq in 2003.[336] The video depicted then Cpl Donald Payne verbally and physically abusing civilian detainees at a detention facility. The footage was used in evidence against him during a Court Martial in 2006 but was not publicly released until 2009 due to judicial fears that it could incite a violent response in Iraq. Payne pleaded guilty to committing war crimes related to his ill-treatment of protected persons.

Had footage of this nature fallen into the hands of the opposing side of the IAC, its release could have been a powerful tool to shape perceptions, attitudes, and behaviours of Iraqis in British-occupied areas and beyond. In doing so, the invitation of public curiosity towards the protected persons could be justified under the UK's interpretation as an exceptional circumstance meriting the public's attention. This flows from the significant breach of the LOAC depicted in the footage by a member of the occupying force.

The ICRC's 2020 Commentary to the GC III broadly agrees with the exceptions proffered by the British Government. In addition to noting the public good in releasing photographic and other visual evidence to support war crimes prosecutions, promote accountability and raise public awareness of abuses, the Commentary asserts:

> "If there is a compelling public interest in revealing the identity of a prisoner (for instance, owing to their seniority or because they are wanted by justice) or if it is in the prisoner's vital interest to do so (for example, when they go missing), then the materials may exceptionally be released, but only insofar as they respect the prisoner's dignity. In

[336] Anonymous Author, 'Iraqi inquiry sees video of abuse', *BBC News*, (13 July, 2009) http://news.bbc.co.uk/1/hi/uk/8146614.stm

addition, images of prisoners in humiliating or degrading situations may not be transmitted, published or broadcast unless there is a compelling reason of public interest to do so (for instance, to bring serious violations of humanitarian law to public attention) and the images do not disclose the identities of the individuals concerned.[337]"

However, neither the Commentary nor the British Government's position addresses the legal basis for 'reading in' the exception to the treaty provisions. For example, it is not suggested that the exceptions are extrapolated from general state practice and have crystalised as rules of customary international law. The drafters of the Commentary tender that it is "necessary to strike a reasonable balance in the implementation of this provision between the benefit derived from making information regarding prisoners of war public…and the possible humiliation and even physical harm they may cause to those who appear in them." But the only supporting evidence cited for this supposition is the British Government's position discussed above, and the summary judgment and appeal cases in the matter of *American Civil Liberties Union v. US Department of Defense* from 2005 and 2008 respectively.

The case involved a request for disclosure under US federal freedom of information legislation of images depicting the ill-treatment of detainees in Abu Ghraib Prison in Iraq, and elsewhere, as well as other materials relating to the ill-treatment and rendition of individuals in US custody. The matter largely turned on whether the DoD (and CIA) could rely on a statutory 'exemption against production' for the material requested.[338] The primary focus was whether the personal privacy interest of the subject of the request outweighed the public interest in disclosure. An aspect of the DoD's arguments against disclosure of twenty-one images depicting detainee abuse, were the US obligations to protect POWs and protected persons from 'public curiosity'. It was argued that even if individual identities were anonymised as part of any disclosure, the

[337] International Committee of the Red Cross, Commentary to Convention (III) relative to the Treatment of Prisoners of War, 2nd ed., (2020), Art.13, para.1627

[338] *American Civil Liberties Union v. U.S. Department of Defense*, 389 F. Supp. 2d 547 (2005) p.550 https://cite.case.law/f-supp-2d/389/547/

subject “could suffer humiliation and indignity against which the Geneva Conventions were intended to protect.[339]”

When finding in favour of anonymised disclosure of the images, the judge sidestepped the question of international law and noted the “substantial public interest in these pictures” and that “[p]roduction of these images coheres with the central purpose of the Freedom Of Information Act, to “promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed.”[340]”

A separate exemption was argued by the DoD that disclosure could endanger coalition forces and civilians in Iraq, but this was not accepted at first instance. On appeal, the Second Circuit Court of Appeals upheld the findings at first instance. Accordingly, as a source to support the assertion that there exist certain exceptions to the treaty-based protections afforded to POWs and protected persons, it is limited. The cases address discreet issues of US law and in doing so, does not engage meaningfully with the international legal argument submitted by the defendant. As such, the case, at its height, is only tangentially relevant to understanding the *lex lata* of the obligations in question.

Consequently, while the exceptions suggested by the British Government and adopted in the ICRC’s Commentary have clear practical and utilitarian value, they may reflect *lex ferenda*, an indication of where the law may develop rather than its generally accepted current form. For example, the US takes a more conservative approach. As the DoD Law of War Manual stresses, members of the media are only permitted access to military operations to the extent this is consistent with LOAC obligations, including the protection of POWs and protected persons from public curiosity.[341] In addition, as a matter of policy, the US apply a general

[339] Ibid p.574
[340] Ibid p574
[341] United States Department of Defense Law of War Manual (June 2015, Updated Dec 2016) para.4.24.2.2

prohibition on taking pictures of any detainee.[342] The exceptions highlighted in the UK statement are absent from the US Manual.

In the current Ukraine conflict, the question of interpretation has moved in a novel direction with Twitter becoming a quasi-enforcer of the LOAC.[343] On 5 April 2022, Twitter updated its content moderation policies preventing states from releasing media which, according to the company's interpretation, breaches Art.13 GC III.[344] This followed the release of various images of Russian POWs by accounts associated with the Ukrainian government, including individuals being paraded on live-streamed press conferences and during interrogation.[345] In the early stages of the conflict, these DPOs could attract hundreds of thousands of likes on Twitter and other social media platforms, and was "representative of the two countries' battle over information.[346]"

In a blog post contextualising the update, the company said:

> "In the development and enforcement of our rules, we remain focused on enabling public conversation, and protecting the safety of people both online and offline. We are guided by international humanitarian law, specifically Article 13 of Geneva Convention III (on protecting prisoners of war (PoWs) from any physical or psychological abuse or threat thereof, and encompasses a prohibition on humiliating them) and do not want Twitter to be used by state actors to infringe this law."

Consequently, any material on a state or government-affiliated account thought to offend Art.13 will result in Twitter requesting its removal. Or, to the extent there is a "compelling public interest", Twitter will add warning interstitial to media displayed on such accounts. And as a

[342] United States Department of Defense Law of War Manual (June 2015, Updated Dec 2016) para. 8.2.2.3
[343] Milanovic, Marko, 'Twitter as Enforcer of the Geneva Conventions', *EJIL: Talk!,* (6 April, 2022) https://www.ejiltalk.org/twitter-as-enforcer-of-the-geneva-conventions/
[344] McSweeney, Sinead, 'Our ongoing approach to the war in Ukraine', *Twitter Company Blog*, (16 March, 2022) https://blog.twitter.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine
[345] Kurshudyan, Isabelle and Westfall, Sammy, 'Ukraine puts captured Russian on stage. It's a powerful propaganda tool, but is it a violation of PoW rights?', *The Washington Post*, (9 March, 2022) https://www.washingtonpost.com/world/2022/03/09/ukraine-russia-prisoners-pows/
[346] Ibid

more holistic measure, posts from any account, not just those with a state affiliation, demonstrating "abusive intent" towards POW content, will be removed.[347]

As a company, Twitter is not bound directly by the LOAC. But as a prominent vector for the delivery of DPOs in the Ukraine conflict and sharing of media generally, it is significant that the company has taken steps to mitigate and regulate the behaviour of the belligerents. In doing so, it seeks to strike its own balance between the protection POWs enjoy from public curiosity with the freedom of information, offering its own interpretation of Art.13 GC III as it applies to social media. This decision has the potential to be further reaching than tweaks made to national policies as states shape their usage of the platform around its content requirements.

Writing in June, 2022, senior ICRC lawyer Rahmin Mahnad concluded that the role of the social media content moderator was now "critical" to ensuring the protections under Art.13 GC III.[348] In a similar vein, Milanovic points out that "it will be particularly interesting to observe how Twitter manages any exceptional deviations from the policy on matters of public interest." Aside from managing such deviations, the factors informing the calculus of whether to depart from the policy will also be worthy of note from an interpretive perspective. Again, such insights may be particularly persuasive in establishing precedents for the public release of contentious material involving POWs and protected persons and help solidify the contours of the exceptions to the general rule.

In conclusion, this section has addressed the interplay between DPOs and the rules concerning insults and public curiosity found in Art.13 GC III and Art.27 GC IV. Various examples highlight the significance of the rules to the delivery of DPOs, particularly the obligation to protect POWs and protected persons from public curiosity. The unsettled extent of the exceptions to the rule

[347] McSweeney, Sinead, 'Our ongoing approach to the war in Ukraine', *Twitter Company Blog*, (16 March, 2022) https://blog.twitter.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine

[348] Mahnad, Ramin, 'Shielding prisoners of war from public curiosity', International Committee of the Red Cross, *Humanitarian Law and Policy Blog*, (28 June, 2022) https://blogs.icrc.org/law-and-policy/2022/06/28/shielding-prisoners-of-war-from-public-curiosity/

concerning public curiosity was explored and the role that social media platforms like Twitter might play in shaping the enforcement or development of the law noted.

Conclusion

As noted at the outset, the use of operations in armed conflict that aim to shape a target audience's perceptions, attitudes, and behaviours is not new to the theory or practice of warfare. But digital technology has revolutionised the speed, scope, and scale at which such operations can be delivered and permit the creation of tailored psychological effects down to an individual level.

This paper has explored how a number of LOAC rules that regulate the various uses of DPOs in an IAC and the protections afforded to the non-combatants from the more harmful applications of such tools and techniques. The discussion was wide-ranging in scope, starting with DPOs which might reach the threshold of ‘attack’ and ending with an exposition of the obligation to shield protected persons from ‘insults and public curiosity’. Each section reached particular conclusions regarding the interplay between the respective rule and DPOs in an IAC, and a plethora of examples have guided the overall discussion.

Prohibitions such as those concerning ‘outrages upon personal dignity’ and ‘insults and curiosity’ are already evolving to safeguard protected persons from DPOs and the substantive scope of others is beginning to be challenged. The discussions concerning DPOs directly causing harm in the context of ‘attack’ and the remit of the rule relating to measures of intimidation or terrorism are cases in point.

Overall, the rules contemplated in this paper appear fit for purpose in general terms but suffer from a lack of authoritative interpretive guidance. The lack of insight is particularly pronounced as typical sources of interpretation, such as case law and treaty commentaries, generally pre-date the invention of digital technology enabling DPOs. Ambiguities found in the rules only become more challenging to interpret as the operating environment and methods of psychological warfare continue to evolve.

An updated Commentary to the Fourth Geneva Convention is expected in the near future, which may go some way to fill the interpretive gap relative to the protections afforded to civilians. But as discussed in the final section, it may be that the most persuasive legal insights relevant to DPOs are generated by the policy decisions of companies particularly affected, such as Twitter, as they seek to limit the excessive digital ambitions of states in armed conflict.

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