

Médecins Sans Frontières (MSF)

“As we all know, the principle of proportionality in the conduct of hostilities requires a balancing of the expected military advantage anticipated from the attack with the reasonable foreseen collateral damage. **Attacks which are expected to cause loss of civilian life, injuries to civilians and damage to civilian infrastructure which are excessive in relation to the concrete and military advantage anticipated are considered as ‘disproportionate attacks’.**”

This assessment of proportionality and related precaution is based on what a reasonable commander knew, or should have known, at the time of launching the attack and must consider not only the immediate ‘collateral damage’ expected to result from the attack – which is easily considered as a direct consequence – but also the foreseeable harm which would directly follow; the so-called ‘reverberating impact’ on the civilian population which should be considered as constituting both a direct and indirect consequence of this military operation.

The best dramatic illustration of this reality currently takes place in the Gaza Strip, a situation which MSF teams are witnessing from the ground with despair. The attacks on health care unfolding in Gaza appear to be disproportionate, due to the excessive harm caused not only to civilians but to the whole health system in general. At a moment where humanitarian needs are escalating, with over 75,000 injured, over 1,7 million displaced into dire conditions and the population on the brink of famine, attacks on health care facilities have a colossal impact on the civilian population. When a military operation leaves a 700-bed hospital ‘non-functional’, thousands of civilians are deprived of access to life-saving medical care. These data are easy to collect for those who want to.

Beyond the patients killed in attacks on health care, hundreds of thousands of men, women and children no longer have access to medical care, more than probably for years in some parts of the Strip. We can expect thousands of lives will be lost as trauma injuries go untreated, diseases undiagnosed and care for chronic conditions discontinued.

Considering the incredible level of harm directly and indirectly inflicted upon the civilian population through the destruction of medical structures, it should be agreed that these attacks are disproportionate. The immediate and long-term consequences of this destruction that the population will suffer for a long time were predictable when these many attacks were launched on hospitals – one after the other. This is regardless of whether these medical structures be rightly or wrongly considered as legitimate military targets at that time, proportionality should still be applied.

The principles of precaution and proportionality are the ultimate protection IHL provides to civilian victims of armed conflict notably when such conflict takes place in populated areas. This assessment is entrusted by IHL to military commanders, and it forms the central part of their legal duties.

However, beyond the consensus on both these crucial principles, there is no balance in military and humanitarian understanding of these rules. When it comes to their practical implementation in the battlefield, it is extremely difficult to challenge the military rationale. There is no consolidated jurisprudence from international tribunals on this topic that could create an effective framework of accountability for the protection of civilians. And this is particularly true when it comes to analyzing and being held accountable for the long-term consequences of destruction on vital civilian infrastructures.

International tribunals know that they cannot reach the high threshold of proof required by criminal law to establish criminal responsibility beyond reasonable doubt without accessing restricted military information.

For these reasons, it is ineffective and hypocritical to rely on criminal justice or on the individual responsibility of commander to define and implement the proportionality test related to the protection of civilians. It is first and foremost the responsibility of States to define, share and adopt dedicated political, military doctrine and best practices to effectively limit civilian harm in conflict.

May EWIPA Declaration help them in doing so. Thank you.”