

**RCAC Legal Team Briefing – December 2010**

## **FORTHCOMING ARTICLE: OBLIGATIONS TO RECORD CIVILIAN CASUALTIES**

Dr Susan Breau and Rachel Joyce

*Until now, too little attention has been devoted to the issue of the obligations to record civilian casualties existing within the international humanitarian and human rights legal frameworks. The academic community, for the purposes of legal argument in support of this practice, has been notably silent.*

*To remedy this, the legal team of Oxford Research Group's (ORG) Recording Casualties of Armed Conflict (RCAC) Programme has recently submitted an article, entitled '**Identifying and Recording Every Casualty of Armed Conflict**', to the Journal of Contemporary Iraqi Studies, for publication in 2011.*

*This Briefing summarises the article's key arguments that the recording of civilian casualties is covered by international law; all individuals – military or civilian - killed in conflict should be equals in the manner in which their deaths are recorded.*

ORG believes that the governmental duty to record all casualties of armed conflict, including civilians, is inherently included within the international legal framework. We argue for a dual approach to the issue of recording casualties, positing that the obligations of governments under international humanitarian law and supported by existing customary law are mirrored by the obligations created by the rights of victims under the international human rights framework. The examples of Iraq and Sri Lanka illustrate the pressing importance of this proposal.

The primary omission in international law is that **no actual legal obligation** exists in either framework for parties to a conflict to record the identity of dead or missing civilians, as opposed to the rigorous process by which the details of combatants are recorded. This is surprising in that one of the primary obligations within international humanitarian law is to distinguish between civilian and combatant and to assess proportionality when civilian life is at risk. The loss of life of the civilian population must be in direct proportion to the military advantage expected. This balancing exercise can obviously have no credible function without any accurate recording of civilian casualties.

### **The International Humanitarian Framework**

Within international humanitarian law, also known as the *jus in bello*, there are extensive obligations to account for military casualties in armed conflict. The *Geneva Conventions* of 1949 are now universally ratified, and therefore, it is arguable that the provisions respecting the dead are customary international law binding, not only on states but on non-state actors. These provisions include the obligation to search for and collect the wounded and dead, to record their details and transfer information to the other party when appropriate.

Within Article 16 of *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, there is a relevant provision, but it contains an important limitation - that searching for civilian persons can only be conducted as far as military conditions allow. The omissions are evident. There is no obligation to arrange for a cease-fire to collect civilian casualties and there is no obligation to record these casualties. Within Additional Protocol 1, of which some key countries involved in conflict, including Iraq, the United States and Sri Lanka, are not party, there are detailed rules concerning provisions for missing persons, which involve the recording of information. The provisions begin with a general

statement of the 'right of families to know the fate of their relatives', a foundational idea within international human rights law.

These provisions have been converted into practical guidelines in the United Kingdom. The Manual of the Law of Armed Conflict of the Ministry of Defence specifies that each party must search for persons reported missing by an adverse party and also facilitate such searches by providing relevant information. It also specifies that Additional Protocol I encourages the parties to try to make arrangements for joint teams from both sides to search for, identify, and recover the dead from battlefield areas; such teams to be respected and protected while carrying out their duties. The Manual's approach is impressive and its provisions extensive, but its application is limited to international conflicts within which the UK forces are active. It does serve to build upon existing customary law, however, which is the next focus within the article.

The comprehensive global survey produced by the International Committee of the Red Cross, the Customary International Humanitarian Law Study, examined the military practices of governments globally. Chapter 35, 'The Dead', and Chapter 36, 'The Missing', argue for the customary status of the essence of the extensive treaty provisions in Additional Protocol I and propose that the application of the provisions is relevant to non-international armed conflict.

In our forthcoming article, we have outlined and examined the rules as set down in the Study and analysed the robustness and practical effectiveness of these rules in relation to their place within international law. The obligations to search for the dead and the missing, as well as provide adequate services for the dead and wounded, are seen by the ICRC as obligations of means. States must use all facilities at their disposal to carry out searches and recording to the highest standard possible. Publication of information recorded, however, is at the discretion of the government involved.

### **International Human Rights Law**

A further consideration has been the growing recognition within human rights law of the right to have one's death recorded. By reviewing the various human rights treaties in place, it becomes obvious that the right to life and the right to freedom from torture, cruel, degrading and inhuman treatment are universally accepted.

The *Universal Declaration of Human Rights* (UDHR) is the basis from which all other Treaties are formed and at its core ensures the protection of these essential rights. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (ECHR), the *International Covenant of Civil and Political Rights* 1966 (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR), and the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 (CAT) are the mechanisms of enforceability within the system and give traction to the principles enshrined in the UDHR. All these treaties recognise the sanctity of human life and the significance of the family unit as the cornerstone of society.

Our review of the case law of the European Court of Human Rights (ECHR) has revealed that the Court has recently granted standing to individual applicants seeking to apply human rights law to cases arising from situations of armed conflict. Civilians affected by warfare have taken successful claims against governments using human rights machinery, where traditionally they would have had no individual standing, as the laws of war were discussed only within the framework of international humanitarian law. This illustrates a shift towards protecting individual rights and providing avenues of redress to civilians which did not previously exist, as it was assumed that 'collateral damage' was a logical outcome of war.

ORG advocates strongly for this positive development in the law. We propose that each and every member of every society has the right to have the loss of one's life recorded, investigated and, if

appropriate, prosecuted. Each family member has the right not to suffer inhuman or torturous treatment in the absence of information about the fate of a loved one, where the state fails to provide a proper investigation which would remove the agony of uncertainty. These are basic human rights granted by the statute of the ECHR, in coherence with the various instruments of international human rights law, and to be upheld by procedures of the state. The ECHR has accepted this thread of jurisprudence in relation to internal conflicts only, therefore avoiding clashes with IHL and plugging the gap in IHL, which allows victims in internal conflicts no redress against the aggressor state.

The outcome of the cases scrutinised for the article also opens the door for a critical appraisal of military practices within a country's borders by the ECHR, which could lead to positive reform. The major focus is on caution demonstrated and proper application of the principles of distinction and proportionality in conducting military strikes where civilians are at risk of death or injury. Concern for civilian life must be evident in the manner in which the operation is conducted, as well as a legitimate justification for the actual strike itself.

We propose that machinery within the state to systematically record all casualties of armed conflict would avoid the violations of the rights of victims on both counts. The state could thereby avoid the infringement of its citizens' human rights, which ought to be a priority, given the ratification of the various human rights treaties.

### **Iraq and Sri Lanka**

In discussion of the situation in Iraq, we draw attention to the fact that civil society organisations have been forced to undertake the task of recording civilian deaths, where coalition forces have failed to do so. Iraq Body Count (IBC)'s count of publicly recorded civilian deaths (representing a verifiable minimum number of civilian deaths in Iraq) stood at 106,060 at the date of the article's submission. (The figure has been since revised to 122,000 on the basis of the additional information given in the US official Iraq War Logs released by Wikileaks in October 2010.) This situation is unacceptable, given the obligations of the governments involved in the conflict under international law.

In Sri Lanka, the 'politics of numbers' has been employed by both sides of the civil conflict for decades. Both the government and the LTTE (rebel Tamil Tigers) have denied responsibility and blamed each other for civilian deaths. The government, in the last months of the war, denied that the deaths in fact occurred at all. The lack of a recording mechanism for identifying those killed in the conflict enabled this situation to occur. Crucially, the government has avoided any external investigation into its military conduct, by informing the UN Security Council that no civilians were killed by the Sri Lankan armed forces, despite an abundance of reports to the contrary from the ground.

### **Conclusions**

The major lacuna in the existing treaty law is that there is no legal obligation to record missing or dead civilians. This information is essential to enable the international community to assess the cost to humanity of an existing armed conflict, to decide whether investigations and prosecutions are appropriate, and to ensure that victims and their families are in receipt of their full human rights.

We argue that limiting measures within the international humanitarian framework such as using "effective measures" to search for and record civilian casualties, "as soon as military conditions allow", are under-developed and in need of clear specification. The publication of a guide of best practice in these circumstances, including efforts to record casualties and to organise pauses in hostilities to collect the wounded and dead, would help to define and defend the rights of victims.

The missing civilians in circumstances of conflict must not be an after-thought. Their human rights, and the rights of their concerned family members, demand that they be searched for, and that their

disappearances be investigated, by the state. Civilians ought not to be recorded in a more lax manner than combatants. There is no justificatory reason for the existence of this situation.

ORG champions the movement towards re-balancing the international framework to treat all individuals killed in conflict as equals in the manner in which their deaths are recorded. Although civil society organisations such as, IBC and other members of the practitioner network, convened by ORG, are engaged in this work, it does not mitigate the responsibility of governments. An independent organisation must be funded by states in circumstances of conflict to carry out the recording of civilian casualties.

The establishment of a casualty-recording mechanism could actively tackle impunity, recognise and ease the suffering of family members, restore dignity to the deceased and promote the protection of human rights. Some obligations exist within the humanitarian and human rights legal frameworks, but the far more detailed obligations for combatants and those in detention should be applied across the board. The application of human rights-based legal instruments to situations of armed conflict, parallel with IHL instruments, is a sensible and pragmatic approach, which is gathering momentum. ORG's RCAC team are proud to be advocates of this development.

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*Rachel Joyce is studying for an MPhil/PhD at King's College London and is a consultant researcher for the RCAC Programme's legal project.*

*Susan Breau is Professor of International Law at Flinders University and legal consultant to the RCAC Programme.*

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