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van den Boogaard, J.C.

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UNIVERSITY OF AMSTERDAM

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Jeroen van den Boogaard

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[Amsterdam Center for International Law](https://www.amcilonline.nl/), University of Amsterdam

Abstract:

This article aims to address the practice of using a ‘knock on the roof’ as a warning before air-strikes are launched in order to mitigate civilian casualties during armed conflict. It involves the dropping of non-explosive or low-impact type of munitions on the intended target. This ‘knock’ is reportedly accompanied by other specific warnings, such as telephone calls and text-messages, indicating that the attack on the building is imminent. The knock is intended to be used on a legitimate military objective, leaving no doubt that the attack is in fact about to happen, and urging civilians to relocate to a safer place. This article aims to analyse whether, and if so, under which circumstances, the knock on the roof practice may be used within the boundaries of IHL, both as a warning and as a method of warfare.

Keywords:

conduct of hostilities, targeting, precautionary measures, methods of warfare, warning

(unnumbered footnote: Jeroen C. van den Boogaard works as an assistant professor of military law at the Netherlands Defence Academy and as a lecturer and researcher at the University of Amsterdam. The author wishes to thank Arjen Vermeer, Sandra Krähenmann, Rogier Bartels and Sigrid Redse Johansen as well as the anonymous reviewers for their valuable comments on an earlier draft. Further comments are welcome on j.c.vandenboogaard@uva.nl. All usual caveats apply.)

1. Introduction

Warfare in densely populated areas is difficult and dangerous, especially when waged against a non-state armed group hiding among the civilian population in order to gain a tactical advantage against a military superior opponent. Commanders are obliged to take feasible precautionary measures in order to mitigate damage to civilian objects¹, and minimise civilian casualties.¹ One of these precautions is the obligation to warn the civilian population, as required by Article 57 (2) (c) AP I.

¹ Article 57, Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, <http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>. The duty to take precautionary measures applies for the most part equally to both international and non-international armed conflicts as a matter of customary international humanitarian law. See Henckaerts and Doswald-Beck 2005, Rules 15-21, pp 55-67. Note however that according to the ICRC, Rule 21, which is the equivalent to article 57 (3) AP I (When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects) only *arguably* applies to non-international armed conflicts (emphasis added).

In recent years, the practice of the knock on the roof has been used as a warning with the purpose of mitigating civilian casualties. It consists of using so-called knock on the roof munitions before air-strikes are launched. This involves the dropping of non-explosive or low-impact types of munitions on the intended target to provide notice to civilians of the imminence of a subsequent attack and thereby encourage them to evacuate the area.² The practice has been used by the Israeli Defense Forces (IDF) during the armed conflicts in Gaza in 2008, 2012 and 2014³ and by the United States Air Force during an aerial attack on a Daesh target in Mosul in Iraq in April 2016.⁴ The knock is reportedly often accompanied by specific warnings, such as telephone calls and text-messages, indicating that the attack on the building is imminent. The knock is intended to be used on a legitimate military objective, leaving no doubt that the attack is in fact about to happen, and “to signal the impending danger and give civilians in or near the target a last opportunity to seek safety before an attack”⁵.

At least one State⁶ and a number of authors have accepted the legality of the knock on the roof practice,⁷ but the practice of the knock on the roof has not been welcomed without criticism. The first type of criticism is that a warning using the knock on the roof practice is not effective, because civilians have no means to distinguish the knock from an actual attack⁸ and an attack using projectiles, even when only a small explosive charge is used, can not

² See for example <http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/>. Accessed 23 December 2016. According to US Air Force major General Peter Gersten, a hellfire missile was used by US forces in an attack against Daesh in a manner that “it wouldn’t destroy the building, simply knock on the roof to ensure that [civilians] were out of the building”. See also www.reuters.com/article/us-mideast-crisis-usa-airstrike-idUSKCN0XN2NK. Accessed 23 December 2016.

³ See for example <http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/> and <http://www.haaretz.com/news/diplomacy-%C2%AD%E2%80%90defense/1.604511>. Accessed 23 December 2016. See also <http://www.independent.co.uk/news/world/middle-east/israel-gaza-conflict-israeli-knock-on-roof-missile-warning-technique-revealed-in-stunning-video-9603179.html>. Accessed 23 December 2016.

⁴ See for example Reuters, 26 April 2016, available on www.reuters.com/article/us-mideast-crisis-usa-airstrike-idUSKCN0XN2NK. Accessed 23 December 2016.

⁵ Israeli Report on the 2014 Gaza War, available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> (Israel 2014 Gaza War Report), p 180. Accessed 23 December 2016.

⁶ The Netherlands does not use the knock on the roof procedure, but the Minister of Foreign Affairs of the Kingdom of the Netherlands wrote to the Parliament of the Netherlands on 4 July 2016 that “the ‘knock on the roof’ method is in accordance with IHL when it complies with the requirements of precautionary measures and its use poses no danger to the civilian population. Whether a specific use of the method complies with IHL needs to be determined on the basis of the specific circumstances ruling at the time and the way it is used. It is therefore impossible to provide a definite assessment of the legality of the use of this method.” See Letter to the Parliament, Minister of Foreign Affairs, no. DVB/CV-106/16.

⁷ Schmitt 2010, p. 829, arguing that any type of attacks, including the knock, on military objectives is permitted under IHL. In their elaborate analysis of the warning obligations during armed conflict, Baruch and Neuman conclude that the knock on the roof warnings are legitimate as warning shots and “it is incorrect to view them as an attack ‘against civilians’, because they are not fired at civilians, since the objective of their use is to avoid harm to civilians.” See Baruch and Neuman 2011, p 388.

⁸ See for example Mahmoud Abu Rahma of the Gaza based Al Mezan Center for Human Rights: “Imagine you are in Gaza and there are airstrikes everywhere, and many families are in the bottom floor of their home [...] Families miss the sound of the ‘warning’ missile because it sounds like just another explosion.”” Lister T and Abdelaziz S (2014) Israeli military’s ‘knock on roof’ warnings criticized by rights groups <http://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/>. Accessed 23 December 2016.

reasonably be understood as a warning.⁹ Secondly, the practice has been criticised because it would be contrary to the prohibition against launching an attack for the primary purpose of spreading terror among the civilian population.¹⁰ A third type of criticism is the claim that the knock is prohibited because it is in essence a direct attack on civilians, or, as far as objects are concerned, an attack on a civilian object.¹¹

Armed forces that wish to start, or continue to use the knock on the roof need to know whether, and if so, under which circumstances, the knock on the roof practice may be used within the boundaries of IHL, both as a warning and as a method of warfare. This article therefore first provides an analysis of the rules with regard to warnings under IHL in Section 2. Subsequently, Section 3 deals with the question of whether the knock on the roof may qualify as a legitimate warning under IHL and will address the three types of criticism. In Section 4, a further analysis will follow to assess the legality of the practice as a method of warfare, analysing the definition of an attack under IHL in relation to the knock on the roof practice. Section 4 will furthermore analyse the collision of norms that presents itself when the knock on the roof practice is used against a civilian object, which are immune from direct attack and explore a number of avenues to solve this collision. This article will conclude by proposing circumstances that would presumptively justify the knock on the roof as a legitimate precautionary measure to enhance the protection of the civilian population during armed conflict.

2. Warnings under IHL

The conduct of hostilities is governed by IHL treaty and customary rules, among which the rules of distinction, precautionary measures and proportionality are crucial. These rules apply both in situations where an armed group uses deadly force in a chaotic gunfight in an urban area as in situations where a deliberate airstrike is preceded by an elaborate and detailed targeting procedure.¹² Military commanders will need to assess the possibility of collateral damage resulting from a planned attack. In case collateral damage is anticipated, the commander is obliged to take feasible precautionary measures in order to mitigate, or in any event minimise the expected collateral civilian casualties and damage to civilian objects.¹³ The rules pertaining to warnings are part of these precautionary measures. The precautionary measures implement the more general obligations of parties to any armed conflict to, first,

⁹ United Nations General Assembly, A/HRC/12/48, 25 September 2009, (hereinafter: the Goldstone Report) [<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>]

¹⁰ The Goldstone report, para 533, see also Dill: See <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. Accessed 23 December 2016.

¹¹ Amnesty International stated that it has “documented cases of civilians killed or injured by such missiles [used for knocking on the roof] in previous Israeli military operations on the Gaza Strip”. Amnesty International UK: “Israel/Gaza: UN must impose arms embargo as civilian death toll rises”, 11 July 2014 <https://www.amnesty.org.uk/press-releases/israelgaza-un-must-impose-arms-embargo-civilian-death-toll-rises>. Accessed 23 December 2016.

¹² See for example Pratzner 2016 for a description of a targeting procedure, pp 77-97.

¹³ See generally Quéguiner 2006, Baruch and Neuman 2011, Corn 2015, Sassòli and Quintin 2014 and Henderson 2009, pp 157-196.

distinguish between the civilian population and military objectives¹⁴ and, second, to take constant care to spare the civilian population, civilians and civilian objects in conducting their military operations.¹⁵ This includes the obligation for the specific situation of an attack, to take all feasible precautions to avoid, and in any event to minimise incidental loss of civilian life, injury to civilians and damage to civilian objects. The IHL proportionality rule applies both as a precautionary measure in itself and as a specific rule prohibiting as a final check those attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁶

The obligation to warn the civilian population is one of the precautionary measures that need to be taken by those who plan or decide upon an attack. Article 57(2)(c) AP I states that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”¹⁷ The last part of the provision indicates that it is highly situational whether the circumstances permit the parties to the conflict to give an advance warning in case an attack is expected to affect the civilian population. However, attackers can choose from a wide range of different options to convey the warning. These options include general messages to the civil or military authorities of the opponent, radio broadcasts, messages conveyed through loudspeakers, general or specific warning leaflets,¹⁸ ‘fly-by’ manoeuvres, telephone calls or sms-messages, warning shots or even simple hand gestures to signal civilians in a certain safe direction.

It is imperative for any discussion on precautionary obligations of the attacking side to recall that the opponent has its own obligation to take feasible precautions against the effects of attacks, also known as ‘passive precautions’.¹⁹ These include the obligation to protect the civilian population under the control of the defending party against the effects of attacks by, to the extent feasible, avoiding locating military objectives within or near densely populated areas and by removing civilians and civilian objects from the vicinity of military objectives. The passive precautionary obligations are however worded less absolute, and as a result, “these obligations are weaker than those of an attacker”.²⁰ Furthermore, there is a number of other specific provisions found in IHL where providing warnings needs to be considered, but

¹⁴ Article 48 AP I and Customary IHL Rule 1, Henckaerts and Doswald-Beck 2005, pp 3-8.

¹⁵ Article 57 (1) AP I and Customary IHL Rule 15. See Henckaerts and Doswald-Beck 2005, pp 51-55.

¹⁶ Article 51 (5)(b); 57 (2)(a)(iii) and 57 (2)(b) AP I and Customary IHL Rule 14, Henckaerts and Doswald-Beck 2005, pp 46-50. See also generally Watkin 2005. A thorough analysis of the IHL proportionality rule is outside the scope of this article.

¹⁷ Customary IHL Rule 20 states similarly that “Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.” See Henckaerts and Doswald-Beck 2005, pp 62-65.

¹⁸ Gaughan 2015 notes: “Prior to D-Day, Allied planes dropped leaflets to warn French civilians to move at least two kilometres away from the railway centers that the American and British bombers targeted. One leaflet specifically advised: “Move away as much as possible from ironworks, railway stations, junctions, train depots, repair shops. ”” See Gaughan, p 269 (footnotes omitted).

¹⁹ Article 58 AP I and Customary IHL Rules 22-24, Henckaerts and Doswald-Beck 2005, pp 68-76, see also Sassòli and Quintin 2014, pp 112-122, and Jensen, pp. 147-175.

²⁰ Sassòli and Quintin 2014, p 117.

these warnings concern specifically protected objects and persons, not the general protection of the civilian population.²¹

The objective of warning the civilian population is “to give civilians the chance to protect themselves”²² in situations where an impending attack may put them into danger. Therefore, the obligation extends to situations where it is uncertain whether civilians will be affected by the attack and where the attack is expected to result in more than “mere inconveniences to civilians”.²³ To achieve that objective, it is essential that the duty to give warning is taken into account throughout the different stages of a targeting process, even in situations where there is only little time for taking precautionary measures before an attack is launched. The options for warning civilians must thus continuously be addressed as an inherently relevant factor in the process of choosing between the available options of attack. Warnings are potentially most effective during operations against targets that are situated in populated areas. This however does not relieve attackers from their duty to warn before attacking a military objective where a small number of civilians is expected to be present, nor does giving a warning relieve an attacker of the obligation of taking other feasible precautionary measures.

Effectiveness of the warning is the crucial constituent element of the duty to warn civilians. ‘Effective means that it enables “civilians to take shelter or leave the area and ... civil defence authorities to take appropriate measures.”²⁴ The situation on the location where the attack is planned is decisive to evaluate the effectiveness of the warning, and thus its legality. In some cases general warnings will be sufficient to fulfil the obligation to warn effectively, whereas in other situations general warnings may not be sufficient if these may not be expected to be effective. In those latter situations, the warning must be more specific, as far as circumstances permit. The difference between a general warning and a specific warning is the extent to which the instructions to the civilian population indicate clearly and timely in which way the civilian population can avoid the danger the impending attack will pose to them. In some cases, this may mean that a previous warning must be updated, possibly including the instruction that the attack has been postponed or called off and indications of the areas where the civilian population may seek refuge. The warning is ineffective if its meaning is unclear from the perspective of the civilian population and no indication is provided how they may take action in order to enhance their safety against the danger of a planned attack.²⁵ Some States maintain that as soon as an effective warning has been given, no further warnings are

²¹ For example: military (article 21 GC I) and civilian (article 19 GC IV and 13(1) AP I) medical establishments and units if these are used to commit, outside their humanitarian duties, acts harmful to the enemy and civil defence facilities and personnel (article 65(1) AP I).

²² ICRC Commentary on AP I, para 2225, p 687.

²³ AMW Commentary, p 133. See also Baruch and Neuman 2011, p 374-375 and Israel 2014 Gaza War Report, p 170.

²⁴ UK Ministry of Defence 2004, p 84.

²⁵ UK Ministry of Defence 2004, p 84: “[t]o be effective the warning must be in time and sufficiently specific and comprehensible”.

required by the rules of IHL.²⁶ However, if it becomes clear to an attacker that additional warnings would further increase the protection of the civilian population and the circumstances ruling at the time permit, it would seem that the obligation to avoid or in any event minimise civilian damage would compel that further warnings are given.²⁷

To issue a warning to the civilian population is a legal obligation for military commanders, although it may also, for good reasons, be motivated by policy, political, operational or ethical considerations. Depending on the circumstances, whenever civilians may be affected by an attack and the attackers are in a position to warn the civilian population, the obligation to warn is “unequivocal”²⁸. However, in a situation in which the accomplishment of the mission depends on the element of surprise, circumstances ‘do not permit’ the attacker to warn the civilian population. An example is the attack on a military commander of the enemy who is located in a populated area: if a warning is given, this may be expected to also reach the targeted commander and thus issuing a warning would nullify the possibility to successfully accomplish the mission. As a result, the duty to warn is more likely to present itself in situations where objects that qualify as military objectives are targeted, as opposed to situations where individuals are the target of an attack, because objects are generally less easily relocated.

A second situation in which a warning is not required by law is when the warning would bring the safety of the attacking forces into a more dangerous position. An example in point is the operation ‘Linebacker II’ that consisted of extensive air attacks by the US Air and Naval air assets against targets in North Vietnam in 1972. Carnahan notes that “[g]iven the extremely heavy air defenses surrounding Hanoi during the campaign, circumstances obviously did not permit warning the Vietnamese civilians before each raid.”²⁹ Of course, there is a limit to exposing the civilian population to danger when compared to measures to enhance the safety of the attacking forces. It may be assumed that given the extensive legal obligation with regard to the protection of the civilian population, their safety must in principle prevail over preventing the destruction of military equipment. Thus, the use of some types of weapons can under no circumstances lead to the invocation of this rationale to refrain from warning. For example, in the case of long-range cruise missiles or unmanned armed drones, only the element of surprise to accomplish the mission can be invoked to justify refraining from warning the civilian population, but not the safety of the attacking forces.

²⁶ See for example the Israel 2014 Gaza War Report, it is maintained that “[o]nce an effective warning has been given, international law does not require additional warnings.” Israel 2014 Gaza War Report, p 170. Accessed 23 December 2016.

²⁷ This follows from the general obligation of Article 57(1) AP I to take constant care, that continues to apply.

²⁸ Dill states that “The law recognizes that sometimes it may not be possible to warn. Crucially the provision does not say ‘warn if possible’, but ‘warn unless impossible’. It is open to interpretation when that is the case and reasonable people may disagree, but the default is to issue a warning and it is a failure to do so that requires explanation. Warnings are not acts of charity.” See Dill <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. Accessed 23 December 2016.

²⁹ Carnahan, 1982, p 866.

The accomplishment of the mission may thus provide a legitimate reason to refrain from issuing a warning. This could be the case for military objectives that are easily relocated, thus making the element of surprise a crucial part of the operation. Furthermore, in the case of an extremely time-sensitive target, no time may be available for the attacker to issue a warning to the civilian population. This may include situations in which the window of opportunity to attack is simply too short, or when the attacking force is under attack itself. In these situations, further protection is provided to the civilian population by the other precautionary measures, and particularly the IHL proportionality rule, which serves as the safety net for situations in which the anticipated civilian damage would be excessive compared to the direct and concrete military advantage anticipated from the planned attack.³⁰ A further exception to the duty to effectively warn is the situation in which warning the civilian populations or their authorities is simply impossible. In cases where no lines of communications are reasonably available, issuing an effective warning may be practically impossible and unrealistic. The inherent balance between humanity and military necessity omnipresent in the rules of IHL recognises this possibility.

Military commanders may generally be expected to be willing to consider the options to warn, because warnings improve a military commanders' options to attack, because with a decreased civilian presence, it become less likely an attack will result in excessive civilian harm and therefore qualify as unlawfully indiscriminate.³¹ Issuing a warning is thus an important factor in the planning and execution of any attack anticipated to place civilians or civilian property at risk. Of course, it may not always be exactly clear where and how the opposing side plans to fight the next battle. Therefore, a certain factor of reasonableness is inherent in the obligation to warn. This is true because the obligation only applies 'unless circumstances do not permit', but can also be derived from practical obstacles. In the example of distributing warnings on air-dropped leaflets, for example, one needs to take into account that it takes a certain period to print and distribute leaflets. The obligation to warn can however only be meaningfully adhered to when military commanders and their planning staff consider different possible warning options in the planning phases of a future military operation.³² One of these options is the knock on the roof practice. The issue of whether the knock on the roof may qualify as a legitimate warning under IHL will be the subject of the next section.

3. Knock on the roof as a warning

So far, the knock on the roof procedure has been used by the IDF and the US, although it seems that the US use of the practice is limited to one instance. Perhaps since in that attack

³⁰ Articles 51, (5) (b) AP I, art 57 (2) (a) (iii) AP I and 57 (2) (b) AP I.

³¹ Baruch and Neuman see a warning therefore as a "useful tool in the hands of commanders for gaining more freedom of action." See Baruch and Neuman 2011, p 373.

³² See also Corn 2014, p 16: "The feasibility for issuing warnings prior to attack, to include when, how, and to whom, should be factored into all courses of action, and not just raised as a consideration after they have been developed."

the knock did not cause the desired effect,³³ it seems that US forces have currently not (yet) adopted the practice as part of the standard targeting procedure. The IDF regards the knock on the roof practice as a method that exceeds its obligations under IHL³⁴ and claims that it is a very effective method to warn the civilian population.³⁵ With regard to the claim that the practice is not legally required, but is done on the basis of policy considerations, it is submitted that this statement fails to acknowledge that the obligation to warn must be judged on the basis of its effectiveness, not on the question whether earlier general or even specific warnings have been issued. Dill points out that if the warned population does not leave after the warning, this does not change their status and protection, nor does it relieve the attacker of the duty to implement other feasible measures to further mitigate the risk of collateral civilian damage. In its 2014 Report, the IDF acknowledges that civilians must not be discounted in the proportionality calculation just because they have been warned.³⁶

3.1 Understanding the knock as a warning

An obvious first issue that needs to be addressed is the question whether it is reasonable to expect that the knock generates the desired effect in the sense that civilians understand the firing of projectiles as a warning. The IDF has been criticised for using the knock on the roof on the basis that civilians have no means to distinguish the knock from an actual attack.³⁷

³³ See www.reuters.com/article/us-mideast-crisis-usa-airstrike-idUSKCN0XN2NK. Accessed 23 December 2016.

³⁴ Major general Dan Efroni, the IDF Military Advocate General, states with regard to the knock on the roof procedure that “our colleagues overseas have criticized [the IDF] for implementing precautionary measures that exceed the requirements of international law, and risk forming opinions that such practices are customary law or accepted practice, thereby raising the threshold of the required precautionary measures by others states.” See Efroni 2014, p 82. See also Israel 2014 Gaza War Report, p 180: “In certain instances where warnings were unheeded or unfeasible, the IDF, as a progressive precaution that went beyond the requirements of international law, fired a low-explosive at the target’s roof.”

³⁵ Dill claims that the practice is consistently ineffective, even counter-productive, referring to Amnesty International, Human Rights Watch and the United Nations. <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. Accessed 23 December 2016. However, according to a former head of the Legal service of the IDF, the knock on the roof method was used more than 200 times during operation Cast Lead in 2008-2009 in Gaza, and he claimed that the method was effective every time it was used. [source removed to keep article anonymous]. In addition, Israel stated in the 2014 Gaza War Report that “the employment of “roof-knocking” was highly effective, preventing many civilian injuries and deaths”. See Israel 2014 Gaza War Report, p 180. See also the Report of the High Level Military Group: “the IDF has further developed a unique tactical innovation aimed at the preservation of innocent life, which to our knowledge is unprecedented in warfare, the “knock on the roof” procedure. Given the extensive nature of the IDF’s warning protocol, the clear evidence that it has saved lives, and the tactical innovation brought to bear in doing so - which exceeds our own armies’ current practices - we are concerned about recent attempts on the basis of incorrect legal interpretations to discredit Israel’s practices in this regard.” See An Assessment of the 2014 Gaza Conflict (2015) High Level Military Group, available online on <http://www.high-level-military-group.org/pdf/hlmg-assessment-2014-gaza-conflict.pdf>. Accessed 23 December 2016.

³⁶ The Israel 2014 Gaza War Report notes that “the IDF did not regard civilians who heeded [warnings] as voluntary human shields and thus legitimate targets for attack. Nor did the IDF discount such civilians for purposes of its proportionality analyses.” See Israel 2014 Gaza War Report, p 177.

³⁷ See for example Mahmoud Abu Rahma of the Gaza based Al Mezan Center for Human Rights: “Imagine you are in Gaza and there are airstrikes everywhere, and many families are in the bottom floor of their home [...] Families miss the sound of the ‘warning’ missile because it sounds like just another explosion.”” Lister T and Abdelaziz S (2014) Israeli military’s ‘knock on roof’ warnings criticized by rights groups <http://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/>. Accessed 23 December 2016.

Assuming that the intention of the attacking side is to avoid or minimise civilian damage, it would be to the benefit of the attacking side that the intention of the knock is clear. Therefore in order to ascertain that the civilian population responds to the knock by leaving the intended target of the main attack effort, additional measures may be required. The effectiveness of such a warning can be enhanced by requiring the knock to be accompanied by other specific modes of warning, such as telephone calls, or publicly explaining the practice of knocking on the roof. Furthermore, when the use of the knock on the roof practice as a warning is announced by the attacking side, and has been used regularly, the civilian population may be expected to better understand the knock as a mode of warning. In cases where there is no additional clarification and announcement of the practice, it may at first be unreasonable to expect the civilian population to respond to the knock by leaving their house, instead of remaining in their houses in order to take cover against hostilities taking place outside.³⁸ It seems therefore necessary for armed forces planning to use the knock on the roof practice, or other innovative ways of warning the civilian population, to put effort into announcing the intended effect of the warning method.

As a result, the unannounced use of a knock used in isolation without further warnings, would in many situations not comply with the requirements of IHL, since the warning would lack effectiveness. However, when the use of the knock is announced and is accompanied by other modes of warning explaining the message, there is no reason why the practice of the knock on the roof would not be understood as an effective warning. In these circumstances, especially for civilians who are aware that they are located in or close to a military objective, the knock will unequivocally be understood as a last warning before the actual attack, and the civilians may be expected to understand that their immediate safety is at stake. In particular, if the authorities of the defending party to the conflict fail to communicate warnings to the civilian population, the use of the knock on the roof may be the best way to unambiguously convey the message that an attack is imminent. States using the knock on the roof as well as States planning to use the technique in the future, thus need to communicate to the civilian population and their authorities in a timely and clear manner that, and how, the knock on the roof will be used as a means to warn civilians of an impending attack.

3.2 The prohibition of acts the primary purpose of which is to spread terror among the civilian population

A second type of criticism regards the claim³⁹ that the practice is in fact an act or threat of violence the primary purpose of which is to spread terror among the civilian population.⁴⁰ Dill

³⁸ ““In some but not all cases, families receive telephone calls from the Israeli military in advance,” said Philip Luther, Middle East and North Africa Director at Amnesty International.” Lister T and Abdelaziz S (2014) Israeli military's 'knock on roof' warnings criticized by rights groups,

<http://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/>. Accessed 23 December 2016.

³⁹ The Goldstone report notes in para 533: “The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.”, see also Dill: <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. Accessed 23 December 2016.

⁴⁰ Article 51(2), second sentence AP I reads: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

voices her concern that in circumstances in which the civilian population has in fact no means to leave, the practice may induce terror in violation of the second sentence of article 51 (2) AP I.⁴¹ Clearly, the knock on the roof practice cannot be dismissed in its totality on this ground, provided the intention of the practice is to warn the civilian population.⁴² First, that intention is in contradiction with the prohibition of attacks the *primary purpose* of which is to spread terror. Second, the level of fear instilled by a terror attack must surpass the level of fear and anxiety that the civilian population may generally be expected to experience during hostilities in populated areas.⁴³ Furthermore, in situations where a warning using the knock on the roof practice is not followed by a major attack, this does not necessarily change the legality of the warning, because there may have been very different reasons not to proceed with the attack.⁴⁴ One obvious motivation to cancel a planned attack is the aspiration of the attacker to limit collateral harm to the civilian population as required by IHL. Other reasons may be that the asset that was tasked with attacking the target was redirected to another, more important target, or the weapon that was employed for the major attack simply malfunctioned. The difficulty is obviously that in hindsight, the exact intention of the attacking forces does not become clear when the knock is not followed by an actual attack. But it seems that this does not qualify as a terror attack under IHL. In addition, there is a difference between a warning and a threat which may amount to inducing terror. The latter may be understood as announcing “an attack directed at the civilian population”,⁴⁵ whereas the former announces an attack on a military objective that may affect the civilian population. Only when an announcement is intentionally vague, in terms of places where the civilians may seek hiding or when an attack may take place, it may in some circumstances be labelled as a threat, instead of a warning.

In sum, it is simply not credible to condemn a knock type warning, the purpose of which is to mitigate risk to civilians, as a violation of the prohibition against launching an attack for the purpose of spreading terror among the civilian population. Ultimately, an incidental consequence is not synonymous with illicit intent.

3.3 Warning or attack on civilians?

⁴¹ See Dill, <http://opiniojuris.org/2014/07/30/guest-post-israels-use-law-warnings-gaza/>. Accessed 23 December 2016.

⁴² See also Baruch and Neuman 2011, p 375-377.

⁴³ As the ICRC Commentary on AP I notes: “there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here.” See para 1940 on p. 618. This is confirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY): see ICTY Trial Chamber, *Prosecution v Dragomir Milosevic*, Judgement, 2007, para 888: “to constitute terror, an intent to instil fear beyond this level is required.”

⁴⁴ Baruch and Neuman 2011, p 377: “there are cases where decisions change for different reasons, including operational, policy and humanitarian considerations.”

⁴⁵ Sassòli and Quintin 2014, p 108.

The third point is the issue of whether the knock is a warning or an attack on civilians, or, as far as objects are concerned, an attack on a civilian object.⁴⁶ The Goldstone Report states that the knock “in essence constitutes a form of attack rather than a warning.”⁴⁷ Furthermore, according to a spokesman of the Gaza based Al Mezan Center for Human Rights: “[t]he sending of a missile cannot be considered a warning. It is the targeting of civilians with a weapon, regardless of how small, and it is a violation of the Geneva conventions,”⁴⁸

Accordingly, a fundamental question related to the legality of using the knock on the roof procedure is whether launching a munition can be considered a warning, or is automatically and always considered an attack. It is submitted that as long as no other IHL obligations are violated, there is no reason to consider it impossible to launch an attack as a warning, as may also be done by firing a warning shot in a safe direction. That kinetic force may be used as a method to warn is confirmed by the Commentary to the HPCR Air and Missile Warfare Manual, which gives the example of the firing of tracer ammunition as a method of warning civilians to take cover for an impending attack.⁴⁹ It is thus submitted that the terms ‘attack’ and ‘warning’ are not necessarily mutually exclusive.⁵⁰ However, when the knock does violate other IHL obligations, its legality must not only be addressed in view of its function as a warning, but also as an attack and thus as a method of warfare.

To further clarify in Section 4 how this must be understood, it needs to be noted first that different scenarios may lead to different outcomes. As mentioned above, the knock on the roof practice has mostly been used in areas with a high civilian presence. It then matters what type of object the attack plans to target: whether the target is a building that in its entirety qualifies as a military objective, or whether the situation is such that military objectives are located in an otherwise civilian object. Obviously, only military objectives may be attacked under IHL.

Two different categories of potential targets may be distinguished: an example of target category A is a weapons cache for medium-large rockets located in a residential building, where a civilian family still lives, and which is surrounded by other civilian residences.⁵¹ It seems that it is highly probable that on the basis of the circumstances ruling at the time, the entire building is a military objective, particularly because the rockets are not easily removed.

⁴⁶ Article 49(1) AP I Defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.” See Section 4 below for a more thorough analysis of the term ‘attack’ within the framework of IHL.

⁴⁷ Goldstone Report, para 541.

⁴⁸ Mahmoud Abu Rahma, Lister T and Abdelaziz S (2014) Israeli military's 'knock on roof' warnings criticized by rights groups <http://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/>. Accessed 23 December 2016.

⁴⁹ HPCR Commentary, p 133. The Commentary however states that this may be done in some situations where this is the only feasible method of warning.

⁵⁰ For a view that “warnings are not attacks”, see Sassòli and Quintin 2014, p 109.

⁵¹ See for example the Allegation Concerning the Deaths of Members of the Abu Itta Family in Tel Al-Za'atar: “a warning strike was executed on the roof of the building in which the weapons cache was located [...] as part of the “knock on the roof” procedure.” IDF MAG Corps, Operation Protective Edge: Examinations and Investigation, Update no. 3, available on <http://www.law.idf.il/1007-en/Patzar.aspx>. Accessed 23 December 2016.

A similar situation may arise when a civilian residence conceals the entrance of a tunnel used for military purposes.⁵² Furthermore, if sufficient information is available on the actual continued military use of a civilian residence,⁵³ the entire object may qualify as a military objective in accordance with article 52 (2) AP I and the civilian house loses its protection against direct attack and becomes a military objective as long as it makes an effective contribution to military action and its total or partial destruction, offers a definite military advantage in the circumstances ruling at the time.⁵⁴ It is submitted that in these examples, the civilians present in the house must be warned unless circumstances do not permit and there is no reason not to use the knock on the roof practice to do this, provided it is established that this will be an effective advance warning.

However, another situation arises when the target (target category B) is principally a civilian object. An example is a residential house that belongs to the family of a commander of the opposing forces. The house itself cannot be attacked because it does not qualify as a military objective, however the commander may be targeted directly. If the commander is the target of a planned attack, a warning would not be required when he is present in the house because it would nullify the chances of a successful attack. Whether the attack may proceed, killing the family members and destroying the civilian structure, depends on the outcome of the assessment required by the IHL proportionality rule, taking into account the circumstances ruling at the time. In situations where the commander uses his residence only on occasion to communicate or meet with other members of the opposing force, it is submitted that this use alone is insufficient to conclude that the residential house is now continuously used as a 'command and control centre' and thus a military objective because of that use. A similar situation exists when the knock on the roof is directed to another civilian house than the actual military objective, for example because the knock cannot be directed to the military objective since civilians have gathered on its roof or because the house is adjacent to the military objective.⁵⁵

In all situations as described for target category B, the knock would possibly violate IHL's fundamental prohibition to launch direct attacks on civilian objects.⁵⁶ As a result, the knock in

⁵² Lister T and Abdelaziz S (2014) Israeli military's 'knock on roof' warnings criticized by rights groups <http://edition.cnn.com/2014/07/15/world/meast/mideast-israel-strike-warnings/>. Accessed 23 December 2016.

⁵³ The Israel 2014 Gaza War Report refers on p 158 to "a residential home regularly being used as an operational planning site" as a military objective, and cites the house of Yehya Sinwar as an example (p 161).

⁵⁴ See possibly the Allegation Concerning the Death of Kaware Family Members in Khan Yunis (8 July 2014). The IDF has identified the Kaware house as a military objective, although it is not clear on which grounds. IDF MAG Corps, Operation Protective Edge: Examinations and Investigation, Update no. 2 & 3, available on <http://www.law.idf.il/1007-en/Patzar.aspx>. Accessed 23 December 2016. See also the discussion by Schmitt and Merriam of the attacks on the homes of Hamas leaders, Schmitt and Merriam 2015, p 212.

⁵⁵ See for example the Allegation Concerning the Deaths of Members of the Abu Itta Family in Tel Al-Za'atar: "a warning strike was executed on the roof of the building in which the weapons cache was located, *as well as on the roof of the adjoining building which was expected to be significantly impacted as a result of the strike*, as part of the "knock on the roof" procedure." IDF MAG Corps, Operation Protective Edge: Examinations and Investigation, Update no. 3, available on <http://www.law.idf.il/1007-en/Patzar.aspx>. Accessed 23 December 2016. (emphasis added).

⁵⁶ Assuming the knock qualifies as an attack as defined under IHL, see below Section 4.

these circumstances cannot be understood as a warning in the sense of article 57 AP I, but as a method of warfare. The IDF admits that the knock on the roof method, “like other kinetic means, may be imperfect”⁵⁷ and it may be telling that in the 2014 Gaza War Report, Israel discusses the knock on the roof method not under the heading of the ‘provision of effective advance warnings’ (Section VI.D.2.b), but under the heading of ‘Means and Methods of Attack’ (Section VI.D.2.c). In situations where there is no military objective to which the knock can be directed, its use seems therefore problematic. Even when it would be established that this situation only occurs in a very limited number of instances, it may still be an impediment to take measures to save civilian lives. Therefore, the issue of whether under these circumstances the knock on the roof may nonetheless qualify as a legitimate method of warfare under IHL needs to be addressed.

4. Knock on the roof as a method of warfare

The precautionary measures obligations require parties to an armed conflict to choose their means and methods of attack with a view to avoiding, and in any event in minimising, incidental loss of civilian life, injury to civilians, and damage to civilian objects, in addition to the provision of warnings and other precautions.⁵⁸ Like any new method of warfare, a legal assessment of the knock on the roof practice is required to establish whether the practice complies with the rules on the conduct of hostilities under IHL, because the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited.⁵⁹ More in particular, when adopting a new method of warfare, parties to an armed conflict need to determine whether its employment would be prohibited by IHL in some or all circumstances.⁶⁰

If the target is a civilian object, such as in the situation of target category B, IHL provides a very clear rule. As long as the structure retains its civilian status, attacking it would violate the prohibition to directly attack civilian objects. As a result, the knock itself is *prima facie* prohibited in this situation as a method of warfare if it qualifies as an attack as defined under IHL, even if this knock would save lives as a precautionary measure. Furthermore, IHL proscribes that no precautionary measure “may be construed as authorizing any attacks

⁵⁷ See the Israel 2014 Gaza War Report, p 180.

⁵⁸ Article 57 (2) (a) (ii) AP I, and Customary IHL Rule 17, Henckaerts and Doswald-Beck 2005, pp 56-58.

⁵⁹ Article 35 (1) AP I.

⁶⁰ Article 36 AP I. Although it is unclear whether this rule constitutes customary IHL, the principle that both new weapons and methods of warfare must adhere to the existing IHL obligations and restrictions of the parties to an armed conflict is undisputed. It results from the “general application of good-faith treaty adherence”. See Parks 2005, p 57. Furthermore, the ICRC is of the opinion that “[p]arties to an armed conflict are limited in their choice of weapons, and in the means and methods of warfare they use, by the rules of international humanitarian law... [and] [a]t the 28th International Conference of the Red Cross and Red Crescent, States party to the Geneva Conventions declared that “in light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons, all new weapons, means and methods of warfare should be subject to rigorous and multidisciplinary review.”” See <https://www.icrc.org/en/document/review-new-weapons>, Accessed 23 December 2016.

against the civilian population, civilians or civilian objects.”⁶¹ This means that the knock is illegal under this article when it is considered a precautionary measure that is aimed at the civilian population, unless it is argued that it is not a precautionary measure, but an attack.⁶²

An important issue to clarify is therefore whether the launch of the inert explosive, or non-explosive knock is an attack as defined in article 49 AP I. If the knock would not qualify as an attack under that definition, one could argue that as a result, the prohibition to attack civilians is inapplicable to launching the knock, as well as the rules on the precautions in attack, including the proportionality rule. Attacks are defined by article 49 AP I as “acts of violence against the adversary, whether offence or in defence.” Since the knock consists of the launch of a projectile against a target, the proposal not to regard the knock as an attack seems counter-intuitive, also because the term ‘attack’ must be understood in a broad sense.⁶³ Furthermore, using a kinetic explosive munition seems emblematic of ‘an act of violence’. Nonetheless, it may be argued that the knock is not aimed ‘against the adversary’ and thus it would fail to meet this particular component of the definition of an attack. This assertion remains problematic, however, because if the knock is not directed to the adversary, as a consequence, it must inevitably be directed to the civilian population.⁶⁴ As a result, the knock violates the ground rule that parties to a conflict “shall direct their operations only against military objectives.”⁶⁵ Also, it seems undesirable and even dangerous to argue that the legal restrictions that protect the civilian population are inapplicable to a military operation that includes the deployment of kinetic weapons. Furthermore, the view that the words ‘directed against the adversary’ are a crucial component of the definition of an attack seems debatable at best. Taking that view to the extreme would even mean that any use of armed force against the own civilian population would not qualify as an attack as defined in article 49 AP I, since also in that case, the attack is not directed against the adversary. It must therefore be concluded that the interpretation that a knock is something else than an attack, must be dismissed. Since the knock consists of the use of a projectile, it clearly qualifies as an attack as defined under IHL within the ordinary meaning to be given to the term. Therefore, all

⁶¹See article 57 (5) AP I. According to the ICRC Commentary to this provision, it is “possibly self-evident [and] a confirmation. The law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things. However, in view of the wording of some of the provisions of this article which take into account military necessity, it is understandable that the Diplomatic Conference wished to stress that these provisions may not be construed so as to justify attacks against the civilian population.” See ICRC Commentary, para 2238, p 689.

⁶² According to Sassòli and Quintin: “as warnings are not attacks, they may be directed at the morale of the civilian population.” See Sassòli and Quintin 2014, p 109.

⁶³ ICRC Commentary on AP I, p 1880.

⁶⁴ One could argue that the knock is directed to a safe direction, but it is submitted that the launch of a projectile on a civilian object, such as the knock on the roof, can under no circumstances be understood as a safe direction. This is confirmed by the finding of a spokesman of Amnesty International that the munitions used for the knock have caused civilian casualties: Amnesty International stated that it has “documented cases of civilians killed or injured by such missiles [used for knocking on the roof] in previous Israeli military operations on the Gaza Strip”. Amnesty International UK: “Israel/Gaza: UN must impose arms embargo as civilian death toll rises”, 11 July 2014 <https://www.amnesty.org.uk/press-releases/israelgaza-un-must-impose-arms-embargo-civilian-death-toll-rises>. Accessed 23 December 2016.

⁶⁵ Article 48 AP I.

targeting rules must be applied to the firing of the knock, including the prohibition to directly attack civilian objects.

In essence, thus, some of the critique on the knock on the roof practice seems justified, because in the situations described as target category B, where the roof of the house that is used for the knock is not a military objective, it seems that launching a projectile on the house would constitute a direct attack on a civilian object. This also applies to the civilian house that is adjacent to a military objective.⁶⁶ Assuming the good-faith effort of the attacker to minimise civilian casualties by employing the knock on the roof technique, this would lead to the undesirable outcome that a legally required effective warning method is available which would prevent killing civilians, but that this method cannot be used as a result of another obligation that also aims to save civilian lives. The result is a situation of two contradicting legal obligations that share a common object and purpose.

When two treaty norms collide, a first response for their interpretation must be to refer to article 31 of the Vienna Convention on the Law of Treaties 1969. The first step is to analyse whether the collision can be solved by interpreting the two norms in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁶⁷

It is submitted that the interpretation in the context and in the light of the object and purpose of the two colliding norms point in the same direction, which is the protection of the civilian population, but that the ordinary meaning of the prohibition of directly attacking civilians in this situation precludes solving the norm collision through a standard interpretation. Therefore, recourse must be sought to other means of conflict of norms resolution. One solution in situations of norm conflict is to assess whether a hierarchy exists between the two conflicting rules of international law.⁶⁸ Although both rules are found in similar treaty provisions and are both similarly accepted as customary IHL, it is generally accepted that the principle of distinction, that prohibits attacking civilians, is a norm of *jus cogens*.⁶⁹ This

⁶⁶ The IDF report notes that knocks would be directed “at the target’s roof”, see Israel 2014 Gaza War Report, p 180. However, knocks have also been launched at civilian houses located next to military objectives. See the Allegation Concerning the Deaths of Members of the Abu Itta Family in Tel Al-Za’atar: “a warning strike was executed on the roof of the building in which the weapons cache was located, *as well as on the roof of the adjoining building which was expected to be significantly impacted as a result of the strike*, as part of the “knock on the roof” procedure.” IDF MAG Corps, Operation Protective Edge: Examinations and Investigation, Update no. 3, available on <http://www.law.idf.il/1007-en/Patzar.aspx>. Accessed 23 December 2016. (emphasis added).

⁶⁷ Article 31 (1) VCLT.

⁶⁸ See generally Shelton 2003, pp 145-172. See also International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (Apr. 13, 2006), (ILC Fragmentation Report) see http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf. Accessed 23 December 2016.

⁶⁹ See for example the Constitutional Court of Columbia in 2007 (Constitutional Case No. C-291/07) as presented by the ICRC in the online ICRC database of State practice of the ICRC customary IHL study: “parties to a conflict are bound to make every effort to distinguish between military objectives and ... civilian property. This rule is found in international treaties applicable in internal armed conflicts and is binding on Colombia. It forms part of customary international humanitarian law and has attained *ius cogens* status” https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_co_rule7. Accessed 23 December 2016 (italics in original).

would solve the norm collision in the sense that the prohibition to attack civilian objects by using the knock on the rule prevails over the obligation of effective warning. However, this solution would also mean that the protection of civilian objects would take priority over the protection of civilian lives, whereas IHL is generally understood to place an emphasis on avoiding human suffering over the preventing the destruction of objects.⁷⁰ This solution is therefore diametrically opposed to the object and purpose of the *jus cogens* rule, which is to save civilian lives rather than to allow them as a result of a strict prohibition on using the knock on the roof on a civilian object in order to save civilian lives. Furthermore, prohibiting the knock on civilian objects is also contrary to other important rules of IHL pertaining to the protection of the civilian population, such as the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.⁷¹ As a result, this solution poses additional legal difficulties.

There are a number of other options to address this conflict of norms, which will be addressed in the following sections. The first is to interpret the two colliding rules in order to circumvent the apparent collision between two legal obligations.⁷² This could be done by broadening the interpretation of the concept of military objectives to include the objects on which the knock may be launched; by re-interpreting the knock as something different than an attack, or by treating the knock as part of the larger operation that does aim to attack a military objective. The second venue to resolve the inherent collision between the two obligations of IHL is to use other suitable legal techniques of resolving norm collisions, such as to prioritise one rule over the other temporarily,⁷³ in light of the underlying principles that may allow one of the two obligations to be set aside.⁷⁴

4.1 Interpreting IHL norms to solve the norm collision.

Interpretation of IHL norms requires taking into account the object and purpose of the field of IHL. As Kleffner notes:

“(…) [IHL] treaties need to be interpreted not in isolation but in the broader context of the actual application and interpretation of the respective treaty and the legal obligations of the parties to it. The reference to the interpretation of a treaty ‘in light of its object and purpose’ also invites us to consider that object and purpose of LOAC treaties. While the specifics may be confined to the individual treaty (…), [IHL] treaties have in common the broader object and purpose of striking a reasonable balance between humanitarian considerations, on the one

⁷⁰ Watkin 2005, p 13: “[IHL] can be interpreted to place a higher premium on life than on the damage or destruction to ‘objects’.”

⁷¹ Article 57 (2) (a) (ii) AP I.

⁷² Milanovic 2009, p 73: “An apparent conflict is one where the content of the two norms is at first glance contradictory, yet the conflict can be avoided, most often by interpretative means.”

⁷³ The ILC Fragmentation Report calls this to attach relative priority to one rule (the duty to warn) over the other (the prohibition to attack civilian objects), allowing the former to be “set aside only temporarily [allowing it] to influence [the latter] ‘from the background’”, see ILC Fragmentation Report, p 16.

⁷⁴ Van Den Boogaard 2013, pp 25-26.

hand, and considerations of military necessity, on the other hand. Accordingly, the interpretation of [IHL] treaties needs to be guided by a balanced and nuanced approach, rather than by the dominance of one of the two considerations.”⁷⁵

One option to dissolve the collision between the two competing IHL norms of warning civilians and the prohibition to attack civilian objects is to allow a more expansive interpretation of the notion of military objectives for the purpose of enabling the knocks on the roof.⁷⁶ Military objectives are defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action *and* whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁷⁷ The intention of the knock on the roof is obviously *not* to destroy the military objective. Therefore, it may be argued that the category of military objectives for the purpose of launching a knock on the roof may be expanded by deleting the second prong from its definition. As a result, the knock on the roof does not have to satisfy the condition that it must be expected to offer a definitive military advantage. In essence, the advantage sought by the knock is primarily of a humanitarian nature, although it is clearly also militarily advantageous when the civilian population has left an area where hostilities take place. This limited definition of military objectives would lead to a larger set of objects that can be attacked, but not destroyed, to include civilian objects containing only a very limited military use or purpose.

Interpreting the concept of a military objective such that *any* military use would qualify the target of the knock as a military objective for the purpose of launching the knock, would thus arguably provide a solution for those objects that serve some limited military purpose. However, the examples of target category B show that the knock on the roof practice has also been used against civilian objects without any military use or purpose. Thus, this expansive interpretation of the concept of military objectives for the purpose of the knock would not lead to an all-encompassing solution, because it would still provide no solution for launching knocks on civilian objects adjacent to military objectives. Furthermore, any overly broad interpretation of the concept of military objectives seems unadvisable in more general terms, because it would certainly result in an embarkation on a slippery slope. It seems difficult, if not impossible, to justify that an entire structure may qualify as a military objective for the purpose of launching a knock on the roof, but as a civilian object when the complete destruction of the military objective contained therein is assessed (such as the example in which only a small portion of a larger residential building is used for military purposes in situations where the capability to attack only the military objective is available). Therefore, it is submitted that the interpretation of a military objective through the two-pronged test contained in article 52 (1) AP I must be left untouched also for the purpose of dissolving the collision between the two competing IHL norms of warning civilians and the prohibition to attack civilian objects.

⁷⁵ Kleffner 2016, p 75.

⁷⁶ For a discussion of the notion of military objectives, see generally Jachec-Neale 2015.

⁷⁷ Article 52 (2) AP I (emphasis added).

A second possible solution is to interpret the knock as a ‘warning shot’, and thus as a ‘signal’ instead of an attack.⁷⁸ In the context of the law of naval warfare, warning shots are a long and established practice.⁷⁹ By analogy, under US national regulations, warning shots used in order to board a vessel in a law enforcement situation, are “considered a ‘signal’ to a vessel to stop, not a use of force”⁸⁰ and may be used if all other measures to signal a ship to stop have failed.⁸¹ However, it seems that with regard to the use of warning shots, the situation on land is incomparable to the situation at sea, because there is no danger of hitting civilians or civilian objects at sea when a shot is fired across the bows. Naval warning shots and the knock on the roof method are therefore incomparable.

Of course, the IHL rules on the conduct of hostilities on land do not require to first fire a warning shot to the opponent before an actual attack is launched, although there is neither a prohibition to do so. It is imaginable that during armed conflict, military forces use warning shots, for example to warn civilians that they are approaching a military roadblock and they need to slow down in order to allow the forces at the roadblock to check civilian vehicles. These are routine operations during armed conflict that in most cases are closer to law enforcement than to combat. Baruch and Neuman argue that “the widespread use of warning shots in law enforcement situations reinforces the lawfulness of using warning shots from the air (...) as a method of warning civilians prior to attack.”⁸² It is submitted that although it is possible that the practice of warning shots during law enforcement operations may increase the awareness of the purpose of the knock on the roof method, this does not impact the question of its legality as an attack. At best it may be said that it may increase its effectiveness. The knock on the roof however differs from such warning shots in the sense that it is meant as a signal during combat and that it is directed to the civilian population, not to the opponent. The question therefore remains whether the knock during armed conflict is equivalent to a warning shot as it is used in law enforcement practice. It must be noted that warning shots fired in law enforcement operations on land, like naval warning shots, must be aimed at a safe direction. The knock on the roof is however not aimed at a safe direction, but at the construction from which the civilians are meant to be distance themselves. Thus, even if warning shots are meant only as a signal to the civilian population, warning shots still qualify as attacks under article 49 AP I when they are launched in the direction of civilians or civilian objects. It is thus concluded that interpreting the knock as a warning shot, or signal, does not solve the collision of the two norms.

⁷⁸ See Baruch and Neuman 2011, p 387.

⁷⁹ For example, already the 1907 IV Hague Convention concerning Bombardment by Naval Forces in Time of War obliged the commander of a warship to “take all due measures in order that the town may suffer as little harm as possible”. Schindler and Toman 2004, p 1079. See also article 34 (1) of GCII: “The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given (...)”

⁸⁰ Allen 2005, p 133.

⁸¹ Ibid.

⁸² See Baruch and Neuman 2011, p 387.

A third alternative interpretation to effectively solve the conflict between the legal obligation to spare civilian lives as much as possible over the prohibition to aim the knock on a civilian object, is to understand the knock as part of the larger attack on the military objective. This is an analogy to the declaration of a number of States that in the assessment of the expected military advantage in the context of the proportionality calculation, the military advantage expected from that attack must be viewed ‘as a whole’. In this interpretation, it is acknowledged that the knock is in fact also an attack, and that it must be directed to a military objective, but its objective is to scare the civilian population away, before the subsequent attack destroys the military objective. If the totality of the collateral damage of the total attack (thus of both the knock and the actual attack) is not excessive in relation to the military objective of the attack as a whole, the knock is not illegal, provided it has as its objective that it minimises the collateral damage resulting from the total attack.⁸³ Therefore, this interpretation may be of use when the knock is used against a civilian object adjacent to a military objective, in the knowledge that the main attack effort will likely lead to severe damage to that civilian object as permitted collateral damage of the main attack. Nonetheless, this approach does not change the fact that the knock still violates the prohibition to attack civilian objects and does as such thus not solve the conflict of norms. After all, it is unacceptable under any interpretation of IHL to directly attack the civilian population or civilian objects as part of a larger military operation that aims to achieve a certain military advantage, unless the civilian objects and civilians may be regarded as legitimate incidental damage under the IHL proportionality rule.

To sum up, interpreting the existing legal obligations fails to dissolve the norm collision that exists when the knock on the roof technique is used against a civilian object. Therefore, the next Section will search for a different approach to solve the conflict of norms.

4.2 Prioritising the protection of civilian life

Since interpretation of the norm conflict seems insufficient to solve the conflict between the two colliding norms of IHL, other avenues need to be sought in order to solve the collision.⁸⁴ Hence, other suitable legal techniques of resolving the conflict of norms must be employed to prioritise one rule over the other temporarily.⁸⁵ The priority of different norms may be concluded from using techniques such as *lex specialis derogat lex generali*⁸⁶, in light of the underlying principles that reinforce setting one of the two obligations aside temporarily.

⁸³ Conducting a *prima facie* illegal, minor initial attack like the knock may however not be used with a different purpose, such as a ruse of war. See for example Baruch and Neuman 2011, pp 376-377.

⁸⁴ Milanovic 2009, p 73: “resolution requires one conflicting norm to prevail or have priority over another”.

⁸⁵ ILC Fragmentation Report, p 16.

⁸⁶ Pouw 2013, p 130: “The maxim *lex specialis derogat lex generali* is a historically deeply rooted and nowadays commonly accepted mechanism to regulate normative relationships of two norms being simultaneously valid and applicable to the same subject matter. In its traditional meaning, the *lex specialis* principle entails that in situations of simultaneous applicability of two norms to a similar factual situation, the more specific norm is awarded priority over the norm that is more general.” See Pouw 2013 (diss.) available online: https://pure.uva.nl/ws/files/2243203/129363_08.pdf

The International Law Commission has defined the *lex specialis* rule as follows:

“Sometimes *lex specialis* is... understood more narrowly to cover the case where two legal provisions that are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts. In such case, *lex specialis* appears as a conflict-solution technique. It suggests that instead of the (general) rule, one should apply the (specific) exception. In both cases, however, priority falls on the provision which is “special”, that is, the rule with a more precisely delimited scope of application.”⁸⁷

In the current situation, the prohibition to attack civilians and civilian objects in all circumstances, including through the knock on the roof, is a general rule, applying to all situations. The obligation to issue an effective advance warning to save civilian lives is a much more specific rule, applying only to the specific situation where circumstances permit. As such, arguably, it should be the more specific rule on effective warning that should be prioritised temporarily in order to enable the use of the knock on the roof technique as a warning on civilian objects. Nonetheless, when a norm of IHL is prioritised over another, it needs to be ensured that the reasonable balance between considerations of humanity and military necessity remains intact.⁸⁸

It is submitted therefore that the priority of the obligations to provide effective advance warning and to take all feasible precautions in the choice of means and methods of warfare over the prohibition to use the knock on a civilian objective must be supported by assessing the underlying principles of IHL. The most important of these principles are those of humanity and military necessity.⁸⁹ These principles of IHL, “guide and bind armed members of the parties to the conflict”⁹⁰ and represent the object and purpose of the specific conventional and customary rules of IHL. Of course, the result of solving the current norm collision must preserve the ‘delicate’ balance between the IHL principles of military necessity and humanity.⁹¹ Setting aside a legal rule by reference to the underlying principles of the applicable legal framework can only be done in exceptional cases⁹² and never to such an extent that it allows considerations of military necessity to evade the restrictions posed by IHL on the conduct of hostilities.⁹³ It is submitted that prioritising the obligation to warn over the strict prohibition for the purpose of launching a knock on a civil object is in accordance with both the principle of military necessity as with that of humanity. Although much more

⁸⁷ ILC Fragmentation Report, p 35.

⁸⁸ Kleffner 2016, p 75.

⁸⁹ According to Schmitt: “Although *carte blanche* deviation from established legal norms based on military necessity is impermissible, the balancing of necessity and humanity pervades contemporary international law in both a general and a specific sense. See Schmitt 2010, p 798.

⁹⁰ Van den Boogaard 2013, p 26.

⁹¹ Schmitt 2010.

⁹² Van Den Boogaard 2013, pp 25-26.

⁹³ Schmitt 2010, p 798. See Hayashi 2016, p 105, who notes that based on the character of the underlying notion of humanity, that “affirmative aspects of humanity and chivalry may survive the process of [IHL] norm-creation and operate as additional layers of lawfulness determination over positive [IHL rules].” And that this is not the case for military necessity.

could be said about the exact content and effect of these principles, a short check suffices for the current discussion. With regard to the principle of military necessity, launching the knock is an enabler for military forces using the technique to attack military objectives “in the knowledge that less civilian collateral damage is expected”.⁹⁴ Simultaneously, protecting those not taking part in hostilities by minimizing collateral civilian casualties is in accordance with the IHL principle of humanity. The balance between these principles thus seems preserved, and thus the core principles are no obstacle to allowing the knock on the roof to be used on civilian objects with the intention to save civilian lives.

It seems that prioritising the obligation to warn the civilian population, supported by a balance of IHLs two core principles, as suggested in this section, may be the only possible way to harmonise the two conflicting norms. Even when the intention and purpose of the knock is to save civilian lives, launching the knock on a civilian object will usually lead to some minor material damage to that object. However, this minor material damage is generally more acceptable than attacking a military objective that is expected to cause civilian casualties without a warning, where such warning would have been possible. This is in line with the generally accepted notion that more value needs to be attached to loss of civilian life than damage to civilian objects in IHL proportionality assessments.⁹⁵ Great caution however needs to be exercised, for allowing a civilian object to be affected by a knock on the roof can arguably only be excused in cases where the intention of the knock is to save civilian lives in accordance with the object and purpose of IHL in general and as a last resort to achieve that objective. In the end, if it is not accepted that the argument that the knock on the roof is a legitimate method of warfare on the basis of the application of the *lex specialis* method in order to prioritise the rules on precautions over the general prohibition to attack civilian objects, this would open up the door for criminal prosecutions of military personnel. It deserves mentioning however that in the enforcement phase of the rules of IHL, the intention to warn the civilian population in order to minimise possible civilian casualties may absolve criminal responsibility for the violation of the prohibition to attack civilian objects⁹⁶ during a prosecution under (international) criminal law.⁹⁷

5. Conclusion

IHL provides a legal framework that provides attackers with a certain margin of appreciation, but its application is complicated if the opponent operates contrary to its obligations with regard to precautionary measures against the effects of hostilities.⁹⁸ The knock on the roof is a legitimate method to warn the civilian population against an impending attack against a

⁹⁴ Baruch and Neuman 2011, p 395: “successful warnings that lead to most civilians leaving a combat area do allow military forces more freedom of action in the knowledge that less civilian collateral damage is expected.”

⁹⁵ Watkin 2005, p 13.

⁹⁶ See Rome Statute of the International Criminal Court: the relevant crimes are codified in articles 8 (2)(b)(ii) for IACs and 8(2)(e)(ii) for NIACs.

⁹⁷ See Rome Statute of the International Criminal Court, articles 30 and 32.

⁹⁸ See for example Goldstone Report, para 439-498, pp 111-124. Furthermore, Jensen points to the possibilities modern technologies provide to defenders in order to comply with their part of the ‘shared’ responsibility to protect civilians during armed conflict. See Jensen, p. 174.

military objective. It rather effectively warns civilians to evacuate urgently from the location where an airstrike is imminent. The practice of the knock on the roof thus complies with the objective of warnings, which is to give civilians the chance to protect themselves.⁹⁹ The critique that the civilian population cannot reasonably be expected to understand the knock as a warning, as well as the critique that the knock constitutes a terror attack, must be dismissed. There are many scenarios in which the knock may be used without the result occurring that civilians or civilian objects are directly attacked.

The knock on the roof practice may however pose legal difficulties in situations where there is no military objective to which the knock can be directed. The knock is thus not only a warning, but it may also be an attack as defined under IHL. A strict reading of the IHL rules on the conduct of hostilities would give priority to the absolute prohibition to attack civilian objects and prohibit, as a method of warfare, the launch of the knock at a civilian object. However, in a very limited number of cases, and under strict conditions, the illegality of the use of the knock on the roof against a civilian object may arguably temporarily be set aside by the obligation to provide effective warning. Of course, any conduct that may amount to setting aside the prohibition to attack civilians, must be treated with suspicion. It is submitted that the practice, that complies with the basic principle of precautions in attack, may be reconciled under strict conditions with the other rules of IHL, more in particular the prohibition to attack civilian objects. These conditions are, first, that the warning must be expected to be effective because it is accompanied by other modes of warning and second, that the knock on the civilian object reasonably must be expected to save civilian lives and be in accordance with the core principles of IHL. When these conditions are met, the knock on the roof practice may be regarded as a legitimate method of warfare.

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⁹⁹ The only armed forces that have used the knock on the roof procedure in a substantial number of occasions, the IDF, has reported that a large number of different precautions were taken during the armed conflicts in Gaza and that the knock on the roof procedure was effective in saving civilian lives. See Israel 2014 Gaza War Report, p 178.

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