LAWS
and
accountability for IHL violations

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IHL is distinguished from other legal frameworks applicable to the use of force due to its RECIPROCAL NATURE.

IHL is enforced primarily through command-responsibility and a chain of accountability.
• LAWS lack the ability to comply with IHL
  Manufactured or programmed in a way that cause effects that are unlawful under IHL.
  API article 36

• Intentional or deliberate violation of IHL using LAWS
  “you can violate IHL by using a chair”
  Ordinary rules of accountability apply, API article 85(3)

• Accidental or incidental violation of IHL by LAWS
1. LAWS meets civilians & civilian objects

Effects:

- LAWS accidentally directly targets civilians or civilian objects
- LAWS causes disproportionate civilian casualties

PARTIES to the conflict must:

- select target which is lawful (rule of \textit{distinction}, API 51(2))
- not cause incidental harm to civilians that is excessive in relation to the direct and concrete military advantage anticipated (rule of \textit{proportionality}, API 51(5)b)
- take precautions during the entire targeting cycle (\textit{precautions} in attack API 57)
1. LAWS meets civilians & civilian objects

THE ACCOUNTABILITY CHAIN OF THE PARTY

Combatant: individual accountability
Military commander: command responsibility

1) LAWS cannot be held “individually accountable”. Who is accountable in its place? Pulverizes individual accountability

2) Where lies the command responsibility? Manufacturer, programmer, civilian infrastructure Moves beyond the chain of command

What is the effect for accountability in a given case? COMPLEX

In IHL, accountability is supposed to be “INTUITIVE”

What is the effect of these changes for accountability within the chain of command on a more general basis? DETRIMENTAL
II. Accidental /incidental violation of IHL

B. LAWS meets combatant

LAWS continues to target a combatant who has been placed *hors de combat* by injury or a clearly expressed indication of intention to surrender. **CA3, API article 41.**

1) Must LAWS be able to identify a combatant *hors de combat*?

2) Is there an obligation on the combatant not to feign target immunity in the encounter with LAWS?

RUSE: the combatant can fool the machine, **API 37(2)**

PERFIDY: the combatant abuses IHL immunity to gain a military advantage, **API 37(1)**

Perfidy is part of a delicate system of enforcement of IHL that distributes accountability **between the two parties** for the purpose of STRENGTHENING RESPECT AND ENFORCEMENT OF THE RULES
II. Accidental /incidental violation of IHL

B. LAWS meets combatant

Provided that the combatant cannot commit perfidy (ORDINARY RULES APPLY)
A range of difficult questions consequently arise:

1) should the rules apply AS IF LAWS were a combatant?

2) does this mean that LAWS takes the place of the combatant also in terms of rights and privileges under IHL in the field?

3) can it be expected that combatants treat LAWS “as if it were an enemy combatant”?

➔ can this internal enforcement mechanism of distributing accountability BETWEEN THE PARTIES actually work as long as LAWS cannot be held “individually accountable”? 
Accountability for IHL violations

- LAWS meets civilian
  AFFECTS DISTRIBUTION OF ACCOUNTABILITY FOR VIOLATIONS OF IHL WITHIN ONE PARTY TO THE CONFLICT

- LAWS meets combatant
  AFFECTS DISTRIBUTION OF ACCOUNTABILITY FOR VIOLATIONS OF IHL BETWEEN THE TWO PARTIES
SUM UP OF CORE CHALLENGES for accountability for IHL violations:

• LAWS cannot assume the individual accountability for IHL violations on which the system of IHL is premised

• Who is to be held accountable for the evaluations and actions of LAWS in its place?
  – Does accountability pulverize or is it moved outside the chain of command
  – How does this affect accountability within the chain of command more broadly?

• As LAWS cannot assume individual accountability, can LAWS still take the place of a combatant with regard to rights and privileges on the field within the SYSTEM of IHL?
  – Can it be expected that combatants will respect this (treat the machine fairly)?
  – Does this affect distribution of accountability between the parties? (will the combatant party end up as the violator of IHL?)
  – If no, does this mean the introduction of a sub-set of norms for LAWS?